

OXFORD

A painting of a small sailboat with a single white sail on a river. A person is sitting in the boat, looking towards the right. The background shows a riverbank with trees and buildings under a pale sky. The water is calm with some ripples.

ON HUMAN RIGHTS

James Griffin

4.3 THE INFERENCE FROM MORAL WEIGHT TO HUMAN RIGHTS

How should we now proceed? Should we first determine the moral significance of infants, late foetuses, early foetuses, and so on, and then decide, on that basis, whether the significance of any of them is such as to justify their having human rights? Fortunately, it is not necessary.

As I remarked a moment ago, there is no inference from something's being morally significant to its bearing human rights. There are grounds for something's being morally significant, even for being highly so, that are not grounds for its bearing human rights—grounds such as being persons requiring justice, or being animals capable of great suffering.⁹

Nor is there an inference from an infant's being a 'person', if that is what we should in the end decide it is, to an infant's bearing human rights. There are several senses in which 'person' may be used, and not all of them allow the inference. We should still have to decide whether the sense in which a being is a person would figure centrally in the best account of the ground of a human right. For instance, there is the following argument that an infant is a person.¹⁰ A normal fully developed human being is of considerable moral weight, perhaps for several reasons, but one of them is simply that the human being is a *person*. What sort of being are we persons essentially? We are embodied minds—that is, something with the capacity to support consciousness. So when did I, a being of this sort, begin to exist? It must be that I began to exist when my brain first acquired the capacity to support consciousness. So I am the *same* person as only entities that are also persons. I may say that I am the same person as the new-born baby in that photograph over there, because a new-born baby has in fact acquired the capacity in question and so is a person. I am not, however, the same person as the early foetus or embryo that was a previous biological stage of that baby, because embryos and early foetuses lack the capacity. I may, however, be the same person as the late foetus that preceded that baby, some say,¹¹ because the brain of late foetuses may already have developed the capacity. In any case, this account of personal identity provides a stop to the temporally backward proliferation that I spoke of earlier—from baby to foetus to embryo to sperm and egg on course for fertilization.

But we now have two quite different contexts in which we are employing the word 'person': we are employing it in an account of what constitutes

personal identity, and we are employing it in characterizing an especially valued status, the dignity of the human person, or, as it was captured in an earlier period, the worth that comes of being made in God's image. It is doubtful that we may infer from the fact that a particular person is morally significant that anything identical to it is also morally significant. But we certainly may not infer from the fact that a particular person is morally significant that anything identical to it, on this criterion of identity, is just *as* morally significant. For example, it would be the plainest of non sequiturs to argue that because a normal adult person has human rights, anything that is the same person as it has human rights.

There is a response to this last claim. One might reply that the idea of a person that appears in the criteria of personal identity is the idea of something with moral weight. We value a being that has risen to the level of a capacity to support consciousness. It thereby becomes an entity of *our* kind, with the same essence as us. It is *one of us*, and that is an important status. Well, it is 'one of us' at least in this sense: we share characteristics with it. Not human consciousness, however. An infant has highly limited consciousness; it responds to hunger, pain, light, and noise, but the new-born baby of many other species is far more conscious of the world than the human baby. That, no doubt, is why the proposal about identity, as I formulated it, claimed only that human babies have the *capacity to support* consciousness, and, one may add, to strengthen the importance of the status, to support the peculiarly *human* form of consciousness. But the human infant does not have that consciousness yet. It has no sense of 'self' and 'other', of 'future', of 'objects'. It is not just that the infant has not yet had time to learn these things; its brain has to go on developing physically before it can begin to acquire them. The sense in which the infant's brain has the capacity to support consciousness is that all the parts of the brain that bring about consciousness are present, though in a stage of physical development that will not yet actually yield typical human consciousness. So the infant and, still more, the late foetus have only a *potential* for such consciousness, in a sense similar to that in which an early foetus has a potential for typical human consciousness: with favourable conditions it will in time acquire such consciousness. If that is all that it means to be 'one of us', then it is hard to see what value to attach to that status.

To sum up: we want to decide whether or not infants have human rights. Knowing the moral significance of infants will not tell us whether they do; we need also to know the kind of moral significance required to be a bearer

of human rights. Also, and more to our point, knowing whether an infant is a person will not tell us; we need to know what kind of personhood supports human rights, and nothing in these views about personal identity settles it.¹²

On my personhood account, the decision about infant rights could go either way. It could be elaborated so as to include infants or to exclude them. Which way it goes is, in some measure, a matter of stipulation. I shall come to that shortly.

4.4 NEED ACCOUNTS OF HUMAN RIGHTS

This is the place to pause and reflect upon another major alternative to the personhood account.¹³ If one believes that infants have human rights, then one might well wish to explore the idea that these rights are based, not on personhood, but on some especially fundamental needs. Infants (and human beings in an irreversible coma and so on) certainly have needs.

Statements of need are always of the form: x needs a in order to ϕ . An element needs a free electron to conduct electricity; a terrorist needs cool nerves to plant a bomb.¹⁴ The first task for a need account of human rights is to specify the kind of need that will serve as a ground for them. The plausible proposal is that human rights are grounded in ‘basic’ human needs. The idea of a ‘basic’ human need is generally explained like this. One can distinguish adventitious needs that persons acquire in virtue of their choosing one particular goal rather than another (if I were to decide to plant a bomb, I should need cool nerves) from needs that arise from goals that, in a sense, are not chosen but are characteristic of human life generally. As human beings, we need food simply in order to survive. Although in special circumstances survival can become subject to choice, in normal circumstances it is not; survival is, rather, what human life characteristically aims at. Human beings, as such, need air, food, water, shelter, rest, health, companionship, and so on. A basic human need, we might say as a first attempt at definition, is what human beings need in order to avoid ailment, harm, or malfunction—or, to put it positively, what they need to function normally.¹⁵

We should obviously have to go well beyond this initial definition to make the notion of a basic need determinate enough to provide a satisfactory explanation of human rights. Is interesting work a basic need? Well, without it, alienation, a kind of social pathology, results. Is education? Well, without it, one’s intellect will atrophy. And how much education is a basic need?

This is not to make an objection to the need account, but merely to point out work that still has to be done. But there are reasons to doubt that this further work can be carried out. The need account seems to be pointed in the wrong direction. Its central notion is that of normal functioning. The paradigm case would be the normal functioning of the human body and mind. To that idea of normal functioning we could add a description of characteristic human roles or tasks in order to give content to the notion of 'function'. Now, as an account of basic needs, this is an attractive, if still fairly primitive, proposal. But basic needs, so understood, do not make a promising ground for human rights. My human rights would be violated if on some occasion I were to be denied freedom of religious observance. But is it at all plausible to think that I should then be ailing, that my body or mind would be malfunctioning? That puts the malfunction in the wrong place. What is functioning badly is my society. The idea of health, mental and physical, may be central to a useful notion of basic needs, but it is the wrong place to be looking for an explanation of human rights. It is too narrow. One could stretch it, but, as I think the example of freedom of religion shows, we should have in the end effectively to abandon the central idea of health or normal functioning and replace it with a quite different one.

There is a closely related point. If we were to have a human right to anything needed to avoid ailment and malfunction, then human rights would be in danger of becoming implausibly lavish. I could then demand by right that society devote resources, if it had them, to curing any ailment I had, however slight, and to correcting any malfunction I experienced, however unimportant. But nearly everyone accepts that, on the contrary, there comes a point where ailments and malfunctions become minor enough that they do not create, by right, a demand upon others to remedy them. When we have a cold, we ail. We all have minor psychological hang-ups that sometimes cause us to malfunction, such as the hang-up that causes some of us to be irritatingly late for appointments. But it is deeply counter-intuitive that ailments such as those give us a right, even an easily overrideable one, to a cure. Perhaps, if a society were well off and a cold or these minor hang-ups could be cured by a cheap pill, then the National Health Service ought to provide it. It is hard to find in the need account resources to draw the line we want here.¹⁶

So far I have mentioned ailment and malfunction, which are only two of the three terms that I used earlier to define 'basic' human need. The third term is 'harm', which has more breadth, so perhaps more promise, than the first two terms. A basic human need, one could say, is what is needed to

avoid harm.¹⁷ But that, too, is not enough. Foetuses, embryos *in vitro*, and so on can also be harmed. And harm specifically to human beings extends far beyond any plausible ground for human rights. One can harm someone by being continually nasty to them; in fact, one can often do more harm that way, which is no violation of their rights, than one can by denying them some minor liberty, which would be. What a need account has to explain is what kinds of harms violate rights. The explanation cannot simply be that they are great harms, as the last example shows. It is a quality of harm that we are after, not a quantity.¹⁸

All of that said, I must not exaggerate the difference between the need account and my personhood account. The personhood account generates a positive right to the minimum provision necessary to support life as a normative agent, which is substantially more than just subsistence. So my personhood account too faces the difficulties of compiling and justifying a list of basic needs. My account can therefore be seen as a kind of need account: what is needed to function as a normative agent. What is needed will be air, food, water, shelter, rest, health, companionship, education, and so on. There will clearly be great overlap between the lists that emerge from these two accounts. And if the need account spells out the notion of ‘normal functioning’ by appeal to the especially basic roles in a characteristic human life—say, parent, householder, worker, and citizen¹⁹—then the convergence of the two lists will be still greater. But the lists will not be the same. The personhood account is more focused and exclusive in the role it specifies: what is needed to function as a normative agent.

4.5 A CLASS OF RIGHTS ON THEIR OWN?

Perhaps it is wrong to treat children’s rights, if they have them, as a species of human rights. I mentioned at the start that they might instead form a class of rights on their own, general moral rights that children have simply in virtue of being children—only analogous to human rights, but perhaps none the worse for that.

If a child had these rights simply in virtue of being a child, then we should need some grasp of what it is about children that attracts this strong protection. That is, we should need to know the existence conditions of this class of general moral rights. The United Nations, as we know, cites children’s vulnerability. But zygotes, embryos, foetuses, and indeed many

forms of animal life are vulnerable; yet we do not regard that feature as sufficient for their having rights.

A better proposal is that the existence condition is their being potential persons. That they have such potentiality and such vulnerability fully justifies the especially strong obligations we feel to them. But for the reasons I gave earlier, they do not seem to be the existence conditions for a narrow enough class of moral rights.

4.6 A ROLE FOR STIPULATION

I said earlier that the grounds for infants' having stringent moral protections are not necessarily also grounds for their having human rights. For instance, reasons for bringing, or not bringing, infants under protection of the prohibition of murder are not identical with reasons for regarding, or not regarding, them as bearers of human rights. What shows this is that there is something more at issue in the second matter than the first. There is an element of stipulation in the second matter, and even if there is also some stipulation in the first, it is a different one, needing its own justification.

If any conclusion about infants' rights is even partly stipulative, why not make a different stipulation from the one I favour? Stipulation gives one freedom. Why not stipulate that infants, though only potential agents, be deemed 'persons' in the sense relevant to grounding human rights? Why not also, in order to exclude foetuses, further stipulate, as we do for murder, that a person in the relevant sense must already be born? If this proposed stipulation were to catch on, the word 'person' in the relevant sense might eventually have a settled use, and the stipulation might eventually produce a satisfactorily determinate sense.

As the personhood account can accommodate either the stipulation that infants be regarded as holders of human rights or the stipulation that they not be, the personhood account is not at stake here. But the first stipulation would, I think, be the wrong one to make. My argument for that is empirical, and the relevant facts, I admit, are not easy to determine. One criterion for a successful stipulation is that it improves our ethical vocabulary overall—makes it fuller, more perspicuous, or more user-friendly. Another criterion is feasibility; there is no point in making a stipulation that will be almost entirely ignored. Of course, a stipulation might commend itself to a small coterie of theorists; they may find that it helps clarify their ethical

thought or makes discussion between them less confused. But they might also be willing to trade off that improvement in their small circle for a stipulation that would be accepted by the much wider circle of, say, all educated persons who want to take human rights seriously. In any case, at present, educated opinion on whether infants have human rights is divided, with many on both sides. There is therefore some point in asking which the better stipulation here would be.

Our ultimate aim is to make the sense of the term 'human right' satisfactorily determinate. There are strong inflationary pressures on the term that have brought about its debasement (as I called it earlier), and they are still at work. The belief is widespread that human rights mark what is most important in morality; so whatever any group in society regards as most important, it will be strongly tempted to declare to be a human right. The group will be out to annexe the force of the term for its own keenest concerns. It is now also a common, and not unjustified, belief that getting something widely accepted as a human right is a good first step to getting it made a legal right; so there is a great temptation to assert that anything to which one wants to have a legal guarantee is a human right. And getting something accepted as a human right transforms one's case. One is transformed from beggar ('you ought to help me') to chooser ('it is mine by right'). If one can claim by right, one is not dependent upon the grace or kindness or charity of others. These features of the discourse of human rights are responsible both for great good and great bad, the bad being the ballooning of the discourse itself.

My belief is that we have a better chance of improving the discourse of human rights if we stipulate that only normative agents bear human rights—*no exceptions*: not infants, not the seriously mentally disabled, not those in a permanent vegetative state, and so on. For the discourse to be improved, the criteria for correct and incorrect use of the term must be fairly widely agreed. They would not have to be anything like universally agreed, but there would have to be fairly wide agreement among those who take human rights seriously: moral and political philosophers, jurists, international lawyers, drafters of relevant legislation and documents generally, human rights activists, and journalists. If a good number of the members of those groups came to agree on the criteria, the rest of the members would be likely in time to follow, and the general public would themselves to some extent eventually fall in line.

That sequence of events is what we should need for an appreciable improvement in the discourse. What, then, should we need to set off that

favourable sequence of events? The start would be the appearance of a substantive account of human rights—some not too complicated, fairly sharp-edged normative intension for the term—which commended itself to a growing number of those who take human rights seriously. There is no mechanism available that would be likely to lead us to agree a very few, but not more, exceptions to the proposed new intension. Even if there were, the inflationary pressures are all still with us and all still very strong; there would soon be too many exceptions for the criteria for correct and incorrect use to remain sharp-edged enough to produce the needed improvement.

I should stress again that what moves me is not the wish to reverse the proliferation of rights. I have no views about how many human rights there are. Nor, given the different levels of abstraction in their formulation, do I know how to enumerate them. We speak of ‘proliferation’, in a pejorative sense, only because we suspect that some of the declared rights are not true rights. What moves me is the wish to end the damaging indeterminateness of sense of the term ‘human right’.

Once one thus admits elements of stipulation into the grounds of human rights, does one not abandon a central claim of the natural rights/human rights tradition: that human rights are grounded in human nature? I think not. On the contrary, the decision embodied in the stipulation is the decision to derive human rights solely from certain values constitutive of human nature. That element of stipulation does not make the constituent values of normative agency, autonomy and liberty, any less able to be considered ‘objective’ or ‘natural’ or even in a sense ‘real’. I shall come to the metaphysics of human rights shortly.²⁰ Still, one cannot deny that there are several feasible alternatives to adopting the restriction to normative agency that I recommend. For example, there is the personhood account expanded to include certain potential persons such as infants; there is the basic need account; there is, as I mentioned earlier,²¹ a more pluralist account than mine that includes other elements of well-being besides the goods of normative agency; and so on. Any of these further accounts could be adopted, though, I am claiming, with less benefit. I may not simply insist that human rights *are* derived solely from normative agency; that belief would need a great deal in the way of justification. Although some of the alternative accounts (e.g. the need account) can be faulted for not adequately explaining human rights, others of them (the account that includes certain potential persons or the more pluralist account) cannot be. The objection to them is practical: they

do not give us the beneficial determinateness of sense available to us. That is why the sort of stipulation I am making is not arbitrary. It has to be justified.

There are different kinds of stipulation. Many, of course, *are* arbitrary: for instance, announcing at the start of a book, ‘By “rich” I shall mean “having more than 2.5 million pounds in personal assets”.’ With that common sort of stipulation, one can pretty much do as one pleases. But some stipulations are part of a disciplined project—for example, looking for the best language in which to think and on which to base one’s action. Indeed, the whole language of human rights itself is such a project. We saw earlier that the idea of a human right grew out of a transmutation of the discourse of *what is* actually right into the discourse of *having* a natural right.²² Ethics, I maintained, could do without the discourse of natural rights and still say all that is necessary to it.²³ Still, the discourse has distinct merits. It focuses and gives prominence to obligations that arise, not from social status or special talents or skills, but from the dignity of human status itself. The dignity of human status itself is not the only, or the most, important moral status that human beings have. The case for singling it out is largely practical. Ring-fencing this particular status gives it prominence, ease of transmission, enhanced effectiveness in our social life, and indeed in our moral life, and so on. My stipulation here is of this kind.

4.7 COMING INTO RIGHTS IN STAGES

For these reasons, it seems to me best to reserve the term ‘human rights’ for normative agents. That then leaves us the large problem of settling the boundary disputes about when a human being is a normative agent. In the natural development of a child, the capacity for autonomy and liberty appears in stages, and therefore respect for the child’s personhood should (ideally) increase in parallel stages. But parents and schools and governments face all of these difficult definitional problems already—for instance, in deciding when, and to what degree, paternalism is justified (say, in determining how much weight to put on a child’s wishes in a custody decision in a divorce).

What seems to me clear is that many children, as opposed to infants, are capable of normative agency. So my scepticism about infants’ rights does not extend in any wholesale way to children’s rights. I should certainly have no doubts about many children’s having rights on the definition of a ‘child’ employed in the United Nations’ Convention on the Rights of the Child: namely, anyone under legal majority (so in most countries anyone under

18). Indeed, children are capable of some degree of agency much younger than that. The autonomy of children of only a few years has sometimes to be respected, and they rightly think that their dignity is affronted if it is not. We should see children as acquiring rights in stages—the stages in which they acquire agency.²⁴

So I am inclined to conclude that human rights should not be extended to infants, to patients in an irreversible coma or with advanced dementia, or to the severely mentally defective. And if they do not extend to them, it is hard to find a case for extending them to foetuses.

This conclusion is compatible with our none the less having the weightiest obligations to members of all these classes. We have constantly to remind ourselves of the destructive modern tendency to turn all important moral matters into matters of rights, especially of human rights. We have to recover our sense of the power of the rest of our moral vocabulary—for example, the language of justice and fairness. We have to feel again the power of the term ‘murder’. We should be better off if we reserved talk about ‘human rights’ to a more restricted sense—and in that way gave it tolerably clear criteria for correct and incorrect use. It is, or should be, quite enough to say that wantonly to take an infant’s life is murder, and one of the most grievous kinds of murder. To deny an infant the chance to reach and exercise and enjoy maturity is a far more horrendous wrong than most infringements of human rights. Once we recover a sense of the full range of our moral vocabulary, we shall no longer feel the need to turn all important moral claims into claims of rights. My personhood account is deflationary in three related ways. It supplies a ground for rejecting certain actual declarations of human rights. It tends to narrow the content of individual human rights. And it reduces the importance of human rights. None of these deflationary effects seems to me regrettable. Human rights cover only one special part of morality; there are very many highly important moral domains outside the domain of human rights: for example, certain considerations of justice and fairness, some forms of equality, and many cases of one person’s cruelty to another. In addition, human rights can be at stake in ways that are not especially important: a pretty minor liberty might be at stake, or a minor exercise of autonomy. If so much of such very great moral importance falls outside the domain of human rights, can infants, the severely mentally handicapped, and sufferers from advanced dementia not find the protection they deserve there?

5

My Rights: But Whose Duties?

5.1 INTRODUCTION

Who bears the duty correlative to a human right? Many Kantians have a ready answer. There are, they say, three kinds of obligations. Some are universal (owed by all agents to all others, so doubly universal) and perfect (those who owe and those who are owed are perfectly—i.e. fully—specified). Some obligations are perfect but not universal, because the classes of those who owe and those who are owed are less than universal; a promise is a clear example. The two kinds of perfect obligations just described have correlative rights—universal (human) rights in the first case, special rights in the second. Finally, some obligations are imperfect and non-universal: for example, obligations to be kind, helpful, or charitable to others. They are deficient not as obligations but, rather, in their specification of the persons owed the duty. There is no specification; the duty-bearer may use discretion in choosing upon whom to discharge the obligation. Imperfect obligations, therefore, cannot have correlative rights. Who could come forward as a rights-bearer? This Kantian schema¹ is, I suspect, largely responsible for the belief that the identification of the duty-bearer correlative to human rights is not the problem that it seems to me to be.

This Kantian trichotomy is undermined if human rights are not entirely negative: that is, if either some positive rights, such as a right to basic welfare, are also human rights, or if the apparently negative rights, such as a right to liberty, are not purely negative but, upon closer examination, are found to contain positive elements, such as provision of courts, competent judges, and police to prevent intimidation. Human rights fail to be entirely negative in both of these ways.²

5.2 WHAT DUTIES?

Let us start with the question, What duties? Here the answer is indeed straightforward. The content of a human right is also the content of the corresponding duty. What one party may demand, as of human right, another party has some sort of obligation to supply. We have only to know the content of human rights. But deciding that, of course, is not always easy.

Take, for example, the right to life. On the personhood ground, the intuitive case for it would go roughly like this. We attach a high value to our living as normative agents. Then it is not surprising that we should include among human rights, as the tradition has long done, not only rights to autonomy and liberty (which the tradition has generally lumped together under the word ‘freedom’ or ‘liberty’), but also a right to life. Can we value living in a characteristically human way without valuing the living as well as the autonomy and liberty that make it characteristically human? If human rights are protections of that form of life, they should protect the life as well as that form of it. The case for the existence of a right to life is, as these things go, fairly clear.

One can thus be satisfied that a certain human right exists without being clear what it is a right to. In the seventeenth century most of the proponents of a right to life seem to have conceived of it negatively—as a right not to be deprived of life without due process. But since then, the supposed content of the right has broadened, and lately has positively ballooned: from a right against the arbitrary termination of life, to a right to rescue, to a right to protection of anything deemed to be covered by the term ‘sanctity of life’, including a right against the prevention of life (so against euthanasia, abortion, sterilization, etc.—a use of the right made by many ‘pro-life’ campaigners), to a right to a fairly modest basic welfare provision, all the way up to a right to a fully flourishing life.³ And that last extension clearly goes too far.

What is the content of the right to life? To my mind, the personhood ground supports a right to life with positive as well as negative elements. For present purposes I shall give just a quick intuitive case for these positive elements and leave the argument for later.⁴ The rationale for human rights, on the personhood account, is centred on the high value attaching to certain features that we sum up under the heading ‘personhood’. One attacks the value of life if one wantonly discards it. And it would seem to be possible

to discard it wantonly by more than just murder—for instance, by my not bothering to throw a life-belt to you when you are drowning, or, in general, by failure to save life when one can do so at little cost to oneself.

If we accept that the right to life implies positive as well as negative duties, then we face the great problem of precisely how far the positive duties go. One plausible limit is this. The right is only to life as a normative agent—that is, to characteristic human existence. It is not a right to that ultimate human goal: a good, fulfilled, flourishing life. The ultimate goal—a fully flourishing life—would make enormous demands upon others, and it is not the subject of *any* human right. The right to life is merely to survival as an agent.

Still, that leaves the right quite demanding enough. You have a right to rescue and to aid in mortal distress. So does everyone else—the millions starving in the Third World, potential victims of genocide, anyone with a fatal illness that might yield to a crash research programme.

Rescue or aid at what cost to oneself? Locke attaches the obvious proviso that one does not have to save another person's life at the cost of one's own. But that is a weak proviso; surely the cost can be somewhat lower, and one still not have to pay it. I have mentioned another conventional proviso: provided that the cost to oneself is slight. But that is doubtless too weak in the opposite direction; surely the cost can be somewhat more than slight, and one would still have to pay it. In any case, these provisos need a rationale.

I think that there is a rationale for them—extremely rough and ready, I admit, but a rationale all the same. And it goes a long way towards meeting the objection that many positive duties are too demanding to be plausible. I discussed this earlier;⁵ the principle '*ought*' implies '*can*' enters here. There are limits both to human understanding and to human motivation. Sometimes we are able to calculate fairly reliably the good and bad consequences of large-scale, long-term social arrangements, but sometimes we are not. And our failures in understanding are often not peripheral to morality but at its centre and great enough to leave us with no belief upon which we should be willing to base our lives. Moreover, not all action is within human motivational capacity. We are by nature partial, and cannot enter into and exit from all our particular commitments at will. Both of these limitations help shape the content of our obligations.⁶

There are limits, therefore, to what one may demand of the sort of persons we are and have no sufficient reason not to be. Such persons will sacrifice themselves and their families for others, perhaps more than common-sense ethics now demands, but still only up to a point. That point will be difficult

to place exactly, and anyone who tries to place it will have to put up with roughness and arbitrariness. But these are, or at any rate should be, familiar features of ethical life. This implies that there are limits to what any redistributive welfare programme may require. Its demands must stay within the capacities of the sort of people that society seeks to regulate. We should do what, with present resources, we can to raise the destitute to the minimum acceptable level. But do so at what cost to ourselves? The answer to that question is inevitably rough, but it is along these lines: at a cost within the capacities of the sort of persons we are. There are other restrictions as well, but this is a major one. It still leaves open the possibility of hefty claims on governments and, through taxation and charities, on individual citizens to help the needy. And it by no means implies that our current common-sense ethics has drawn the line in the right place.

Let me now make my example more concrete. If the right to life includes the positive elements I have mentioned, then it includes a right to health, at least to the degree of health needed for life as a normative agent. And, indeed, the United Nations includes on its list of human rights a right to health. How much is that a right to? I shall respond more fully later on,⁷ but for now let me quickly sketch an answer.

A human right to health cannot be a right, literally, to health. We have only limited control over health. If I am struck down by an unpreventable and incurable cancer, my rights are not violated. 'Ought' implies 'can': in many cases we cannot do anything to preserve health. Nor is the right to health, instead, a right just to health care. Health is often best promoted by action well outside the bounds of health care, as normally understood. For example, in many countries the best way to reduce infant mortality is to raise female literacy. The right to health is a welfare right: it is a right to the sorts of welfare provision that support health: antibiotics and other medicines, of course, but also sewers, education of women, or advice to change one's diet.

But a right to how much health support? The International Covenant on Economic, Social and Cultural Rights of the United Nations, followed by many other international documents, announces that we have a human right to 'the highest attainable standard of physical and mental health'.⁸ But that cannot be so. The highest attainable standard of physical and mental health is not even a reasonable social aim, let alone a right. Rich societies could mount crash programmes, on the model of the Manhattan Project, in the case of illnesses for which cures are attainable, but they often do not. They

regard themselves as free to decide when they have spent enough on health, even if they fall short of the highest attainable standards, and may instead devote their inevitably limited resources to education, preservation of the environment, and other major social goods.

The United Nations Committee on Economic, Social and Cultural Rights, in a session in 2000,⁹ spelt out what a violation of the right to health would be. The 'highest attainable' level of health, it said, requires each state party merely to attain the level it can 'to the maximum of its available resources'. But no current state, no matter how rich, spends 'the maximum of its available resources' on health. Nor should it.

Of course, the phrase 'available resources' was meant to be concessive: a state need not spend more than is available to it. That concessive spirit suggests a rather different interpretation from the one I have just adopted. Perhaps when the drafters wrote of 'the highest attainable standard' and 'the maximum of its available resources', they meant to take account of just the realities I have pointed out in criticism. Perhaps they meant 'highest attainable standard, given the other standards that a state should also meet'; and perhaps by 'maximum available resources' they meant 'available after proper allocation to other important social goals'. If they did mean this, one would be justified to ask why they did not say so. In any case, this interpretation is no better. A right to health must specify, at least roughly, the level of health we have a right to; otherwise the right is too indeterminate to be a useful social claim. To say that one has a right to the level of health support possible given expenditure on other worthy social goals, with no account of which other social goals are worthy, or of their worthiness relative to health, is to say far too little. The first interpretation makes the right ridiculously lavish; the second makes it next to empty.

On the personhood account, we have a right to life, because life is a necessary condition of normative agency. And on the personhood account we also have a right to the health support necessary for our functioning as normative agents. These statements of the right to life and the right to health are still very loose, and much work has to be put into making them determinate enough for political life. But I should say that there is nothing in the personhood account that implies that life must be extended as long as possible or that health must be as rude as possible. And that seems intuitively right.

So, to repeat, what is the right to health a right to? There are many forms of ill health that do not jeopardize normative agency. We all get sniffles from

time to time. The sniffles are pathological; they are illnesses. But they do not stop us from being agents. According to the United Nations, we have a human right to have these sniffles treated; according to the personhood account, we do not. All the same, it is compatible with the personhood account that, if there were cheap pills that would cure these sniffles, and if our society were sufficiently well off, then we should have them. There would be a perfectly good reason for that, only not a human right: namely, that it would increase the quality of our lives. But 'health' is not equivalent to 'well-being', although the World Health Organization, in the Preamble to its Constitution, in effect declares that it is.

On the personhood account, our main project in the case of the right to health is to specify what is needed—some sort of basic kit of capacities and opportunities—for life as an agent. The sketch would inevitably be very rough and, at points, arbitrary. But roughness and arbitrariness run through nearly all moral principles.

Here is a start on describing the basic kit. Protecting normative agency requires protecting certain human capacities: namely, those without which one's options in life shrink so drastically that life as a normative agent is undermined. Life as a normative agent requires a reasonable span of life and level of health. Children become agents only with time, and one requires a good run of adult years to form mature aims and to have time to realize some of the most major ones. And many people in old age naturally lose some of the powers of agency, and often the major achievements in their lives are already behind them. This hardly means that there is no longer a moral case for caring for the elderly, but agency may play a smaller part in it. So a right to health requires high priority being given to a fair span of life, but its demands in old age can decline in strength—for example, in determining allocation of scarce medical resources.

5.3 WHOSE DUTIES?

With those preliminaries over, we may now turn to our main question: Whose duties?

As I mentioned at the start, a human right is widely thought to be doubly universal. But welfare rights in general, and a right to health in particular, seem to be doubly particular. We think that only members of a particular group—say, citizens of a certain country—can claim welfare, and can claim

it, say, from only their own government. If human rights have to be doubly universal, then welfare rights are not human rights.

But I am just assuming—what I think is correct and shall come to later—that rights to certain forms of welfare are indeed *human* rights.¹⁰ In any case, classical liberty rights are not entirely negative; they too sometimes give rise to duties of implementation, often costly implementation (think of the cost of an effective system of justice), and with them too there can be the problem of identifying the correlative duty-ower. And I think that there is a solution to the problem of identifying a less than universal duty-ower in the case of welfare rights generally, and the right to health in particular, without thereby undermining their status as human rights.

In ethics, we accept a general obligation to help those in distress, at least if the benefit we can confer is great and the cost to us is small. That is almost universally agreed upon. If I see a child fall into a pond, and I can save it just by wading in, and no one else is about, why must *I* do it? The right to rescue is doubly universal; it is a claim that all of us make upon all the rest of us. Why, then, should it fall upon *me* in particular? Well, obviously because I happen to be the only one on the scene. Accidental facts such as being in a position to help can impose moral responsibilities—and nothing more special to the situation than that may bring the responsibility. Of course, in many cases of need, it is one's own family, or local community, or central government that has the ability to help. At different periods in history, different agencies have had that ability. And, of course, the families of the needy have additional reasons to help them. Central governments may too, but simple ability, apart from any of the reasons arising from special relations, itself remains at least one reason-generating consideration. And ability provides a ground in the world as it is to distribute the burden to help along membership lines: a family to its members, a central government to its citizens.

Ability also explains why, over time, the burden has shifted from one group to another.¹¹ In the late Middle Ages and early modern period in England the Church had the resources and the highly developed organization, the central government playing a much smaller role in society than it does now, and it fell to the clergy to provide almshouses and the like. With the dissolution of the monasteries and religious confraternities, a new source of welfare had to be found. The Poor Law of 1572 secularized support for the indigent: the burden shifted from the Church to local civil entities ('every city, borough, town, village, hamlet'), and money was raised through a local tax. By the eighteenth century, after both agricultural and industrial revolutions, local

welfare provision no longer met the problem. The Poor Law assumed a static workforce, and the new economy needed a mobile one. The shift to national welfare provision fitfully began. In 1834, the Benthamite Chief Commissioner for the Poor Law, Edwin Chadwick, promoted the Poor Law Amendment Act, which left funding as a local responsibility but introduced central control through a board of Poor Law commissioners. Chadwick also designed beneficial schemes to improve water supplies, sewers, and housing. The Liberal government of 1906 introduced a wide range of centrally funded welfare benefits; the Labour government of 1945 created a 'welfare state'. There are perfectly good reasons for assigning the responsibility for welfare to one agency rather than another. And recently, as we shall come to shortly, there have been signs of a globalization of the burden of aid.

I said a moment ago that simple ability is one reason-generating consideration in cases of aid. But moral life is more complicated than that. Many other considerations also shape moral norms, for instance, the one I glanced at earlier: that a good life is a life of deep commitments to particular persons, causes, careers, and institutions; that deep commitments limit our wills in major ways; and that our powers of large-scale calculation about what maximizes good outcomes are also limited. Unless one stresses these other reason-generating considerations, my proposal that ability can fix who should give aid might look odd. A Bill Gates or a John Paul Getty has a great ability to help the needy. That ability, no doubt, means that they have above-average obligations to help. But the obligation upon them does not go on until their marginal loss equals the marginal gain of the needy; nor does it with us. The ethical story is far more complicated than that. The Gateses and the Gettys—and we—are allowed substantially to honour our own commitments and follow our own interests, and these permissions limit our obligations. All that I wish to claim is that mere ability is *one* consideration in fixing where to place the duty to help.

As with identifying the content of a human right, so also with identifying the related duty-owner: my remarks are only a start. It is characteristic of the work involved in identifying duty-owners that it, too, can be long, hard, and contentious. I think that sometimes it will prove impossible to make a clearly successful case for holding anyone in particular the appropriate duty-owner. Sometimes the identification will have elements of arbitrariness and convention in it. Sometimes it will be subject to negotiation in a particular place or time. We can know that there is a moral burden, without yet knowing who should shoulder it.

Still, in the case of the human right to welfare it seems to me justified, in these times of concentration of wealth and power in central governments, to place the burden to a large extent on them. And if poor central governments are unable to shoulder the burden, then perhaps the time has come for us to consider whether the burden should not also be placed on a group of rich nations—although a lot of work would have to go into deciding which nations count as ‘rich’ for this purpose, how great a demand can be made on them, and what a fair distribution of the burden between them would be. To test whether the right to welfare, at a deep moral level, is doubly universal, one should look at what happens when the duty-bearers specified at a particular time cannot discharge the duty. That the right to welfare is a human right is compatible with there also being other sorts of rights to welfare—say, a special right to welfare in circumstances of social contract, settled expectations, or agreed definition of the functions of government.

5.4 PRIMARY AND SECONDARY DUTIES

So far I have been talking about the primary duties correlative to a human right, defined as the duties with the same content as the related rights. But there are also duties more loosely connected to human rights—call them ‘secondary’ duties.

For example, who is to *promote* human rights? Rights will be largely ineffectual unless someone declares and publicizes them, and educates people in them, and gives them weight in society. One might give them weight by turning them into domestic or international law: one might give them further weight by entrenching a bill of rights into a constitution—though whether bills of rights are, all things considered, good for a society is properly a subject of active debate. All of these promotional attempts are meant to give human rights their proper place in our action. During the twentieth century the duty of promotion was accepted by organizations whose object was to bring about respect for human rights: mainly the United Nations but also non-governmental organizations such as Amnesty International.

Then, who is to *monitor* the observance of human rights? Even when human rights have been incorporated into international law, there has been as yet only limited prosecution and punishment of offending nations. In this situation it is important to monitor compliance. If, for whatever reason, legal sanction is not available, the sanction of shame should take its place.

Most importantly, who is to *ensure compliance*, when that is indeed feasible? For instance, who is to protect our liberty from its enemies, domestic and foreign? Who is to detect, prosecute, and punish violators of human rights? Here we need legislators, judges, lawyers, police, army, and so on—complex and costly institutions. Now, a small group of people on a remote seventeenth-century frontier who have to dispense justice to one of their number might do so faultlessly; they might act justly by nature, even down to the finest points of procedure. But such a society, while not impossible, is highly unusual. In our actual societies we need institutions to make laws, to keep track of and publicize them, to lay down procedures for dealing with the accused, to defend participants in these procedures from intimidation, and so on. Although this duty to create and sustain a legal system is not strictly identical to the primary duty, as the frontier example shows, in our actual social conditions the two duties are so close as to be treatable, for all practical purposes, as one.

Some secondary duties are at a considerable remove from their related primary duties. But it would be artificial to regard a right to procedural justice and a right to the social institutions needed for any realistic chance of procedural justice as other than the same human right. Similarly, the primary duty to respect people's liberty is, in our circumstances, indistinguishable from the secondary duty effectively to protect people's liberty—with institutions such as police or army. Not all secondary duties merge in this way with their primary duty, but some do.

5.5 AIDS IN AFRICA

Let me take an example, if only to acknowledge further how hard it can sometimes be to identify the duty-ower. With the right to health, the duty in an emergency now falls, in the first instance, on the right-holder's government. But the present AIDS epidemic in the developing world is so extensive, and the really effective treatment (the anti-retroviral 'cocktail' of drugs introduced in 1996) so costly, that some governments cannot afford it. For example, recently the adult rate of infection was 35.8 per cent in Botswana and 19.94 per cent in South Africa, and the cost in the West for the anti-retroviral treatment was US\$10,000 to \$15,000 per person per year.¹² To use the word I put stress on earlier, these governments lack the *ability*. But other agencies are able: to mention two, some rich countries and

some pharmaceutical firms. Should we conclude that the duty now shifts to another agency? And how do we decide which agency? And as there are fatal diseases other than AIDS in countries unable to buy the effective medicines or technology, how far must these other agencies go? Or, to step back for a moment, do these questions show that I must be wrong about where the duty lies?

One problem is that, on my account, the duties threaten to become exceedingly burdensome. I have already given part of a solution to that threat: there are limits to the moral obligation; there are, for example, permitted areas of partiality. The problem of the excessive demandingness of ethics is one that we in the First World already face as individuals, given the present poverty in the Third World. The place where we fix the limits on these demands is not easy either to decide or to defend. But, again, this is not a problem special to human rights.

Now, if in the circumstances I described a moment ago the duty to help many of the AIDS victims in Africa shifts away from their governments, where does it go? To the extent that ability to help is our guide, it is natural to think of rich First World governments. If we were to follow this line of thought, then we should have to put a lot of work into deciding what a fair distribution of the burden between the 'rich' nations would be. Even without that, there have been moves towards the globalization of help. In May 2004 President Bush promised 15 billion US dollars to treat HIV in developing countries over five years.¹³ Of course, there was self-interest in the decision. Poor nations are poor trading partners; poverty can produce political instability, hostility, and in the worst case terrorism. The motive behind charity has always been so. The Poor Law of 1572 in England, in making aid local, aimed at preventing the formation of large bands of the poor roaming the countryside menacing the better-off. But the motives behind aid are often not solely self-interested.

But it has already occurred to some that the demand might also appropriately be addressed to pharmaceutical firms. The anti-retroviral drugs are still under patent, but the firms that produce them have already made huge profits from them. As pharmaceutical firms can now decide between life and death, and as there is a human right to life, these firms are in a special moral position. If the present death rate from AIDS in southern Africa continues in the most productive age group, then several future generations seem destined for deep poverty. These firms are the ones who have already profited greatly from the near-monopoly position that patents give them, and it is

the international community that has granted them this privileged position by establishing the laws of patent. It is true that nations could change the patent laws—say, change the present twenty-year duration of patents on the anti-retroviral medicines—but there is a limit to the fine-tuning possible in legislation. And perhaps the remedy for some crises, such as AIDS in Africa, should not be delayed until new laws of patent can be put in place. The scene is changing: national emergency is now seen as justifying special commercial arrangements, and some governments are now allowed, under special license, to use cheaper generic versions of the drugs.¹⁴

If we were to follow this second line of thought, then we should have to decide how much profit from the development of a new drug is ‘sufficient’, for present purposes. And we might speed up the decision if we were to develop institutions to decide when First World governments and when pharmaceutical firms had to shoulder the burden. We should also have to decide which other businesses might be subject to a similar obligation. And, of course, we should have to decide whether this complicated scheme is either feasible or fair. If it is not, that would suggest that we think again about First World governments, or some combination of the two agencies.

I shall leave the matter here. If my example of the AIDS crisis has done no more than to highlight how hard it can sometimes be to identify the duty-ower, then, in the present state of our understanding of human rights, that is some advance.

5.6 CAN THERE BE RIGHTS WITHOUT IDENTIFIABLE DUTY-BEARERS?

Would we not have a right unless the correlative duty-bearers were identifiable? Must rights be, in this sense, claimable? Some writers think so.¹⁵

Some of them use this requirement of claimability to argue that welfare rights cannot be human rights. The duties correlative to a right to welfare, they say, fall upon what we can describe no more specifically than ‘*some agents*’, thus failing to identify any actual agents against whom to make the claim. A right to welfare therefore will not meet the requirement of claimability until certain social institutions, such as governments, are on the scene to decide on both the content and the bearers of such duties.¹⁶ Rights of this sort, accordingly, can be civil but not human rights.¹⁷ It is not that *all* rights with correlative positive duties depend upon the existence of certain

social institutions. When a baby falls into a pond, we can often identify the bearer of the duty of rescue without the help of institutions. Perhaps the strongest claim that should be made is that for the great majority of rights with positive duties, institutions are necessary for claimability.¹⁸

But that is not so. My example of the AIDS epidemic is a typical case of a right to help, and the deliberation necessary to identify the extent of the duty and its bearer, as we have just seen, does not require any special institution. What instead is needed is deliberation about ability, responsibility, fairness of burden, speed with which help can be delivered, and so on. In any case, there are as yet no international institutions with the role of settling these questions. Yet we can manage all the same. We can get together a new *ad hoc* group, perhaps composed of representatives of rich nations, of pharmaceutical firms, and of the countries badly stricken with AIDS, and there is no impossibility to their reaching agreement on who should do what—especially if there is an ex-President of the United States around (Bill Clinton), anxious to redeem his reputation by helping to broker a deal. But their reaching agreement is no more evidence of the existence of an institution than would be the bystanders' agreeing on who should do what when a baby falls into a pond.

It is doubtful, too, that claimability is anything as strong as an existence condition of a right, though the requirement treats it as such. If one knows the content of a right, one thereby knows the content of the correlative duties, even if one does not know against whom to make the claim. One has all that is needed to settle the existence of a human right without knowing the duty-bearers. One will also have all that one needs to determine the content of a human right, and thereby the content of the correlative primary duties. This is because such a substantive account gives human rights a rich evaluative content in terms of human interests. The mode of reasoning then proceeds from interests to rights to duties. Of course, anyone who believes that the relevant duties can be prior to considerations of the human good will resist this mode of reasoning, and will wish to make duty independently, normatively rich. But why must that greater normative richness have to include the identity of the duty-bearers? Why could the duty-bearers not be specified, as in the case of the bystanders when the child falls into the pond, with the not fully identifying formula 'one or more of us must save the child'?

We saw earlier how the statement of a human right can vary in abstraction, from a universal form (e.g. a right to life) to a more particular form relevant to certain circumstances (e.g. a right of AIDS sufferers to anti-retroviral drugs).¹⁹ Given that the content of a human right tells us the content of

the correlative duty, the latter can also vary in degree of abstraction. And the more particular the content of the duty becomes, the more will specific potential duty-bearers come into focus. If the right in question is stated as the right of AIDS sufferers, then First World governments, pharmaceutical firms, the capitalist system, patent law, and so on enter the frame, and we can at last start the difficult process of identifying specific duty-bearers. According to the claimability requirement, though, it is only at this level of particularity, or some roughly similar one, that a right exists. The more common view is that the right of AIDS sufferers arises from the application to their situation of more abstract rights, such as the right to life or the right to health. According to this common view, the same right, with perfectly coherent criteria of identity, appears at many different levels of abstraction and in many different situations of application. To the extent that the common model is plausible, the requirement of claimability is not.²⁰

It ought to be acknowledged that the intention behind the claimability requirement (and also behind the stronger, less plausible, enforceability requirement)²¹ is a sympathetic one: namely, to curb the recent uncontrolled multiplication of rights. There must be much stiffer existence conditions for a human right than that it would be beneficial, even very beneficial, even important, for us to have it. But the best way to get these stiffer conditions is to remedy the great indeterminateness of sense of the term 'human right'; stiffer conditions will come with an adequate understanding of what a human right is.

All the same, there is a form of claimability requirement on human rights, weaker than the earlier ones, that it seems to me we must accept. There cannot be a right with *no* specifiable duty-bearers. A right is most commonly a claim, and one cannot have a claim that is a claim on no one identifiable in thought. We should not have created a legal claim, for instance, if the law stated merely that we all had the right to live in peace but made no one responsible for achieving it (compare the United Nations' human right to peace). No moral claim at all emerges from the mere fact that such-and-such would increase someone's well-being. What would arise would be, at best, an admirable aspiration. The strongest defensible requirement is that a claim generated by a human right must be a claim on someone specifiable in words, though not necessarily confrontable in flesh and blood.

How weak can the requirements on the duty side get? Is it possible for the correlative duties not even, in aggregate, to meet the claims? That there are duties correlative to claim rights does not imply that whatever rights demand,

there will be duties sufficient to supply it. I see no reason why there cannot be a shortfall on the supply side. Suppose the rich nations of the world were not so rich that they could eliminate all starvation without a heavy cost to themselves. Everyone has a right to life, including a right to rescue when in dire enough straits. But are there not also limits to what may be morally demanded of us? Are we not permitted certain sorts of partiality—partiality in the pursuit of our own central ends in life and partiality in promoting the well-being of those close to us? There is a sound line of thought leading us to an acceptance of human rights to life and to minimum provision. But there is also a sound line of thought leading us to acceptance of a domain of permitted partiality. Might not the former line of thought lead to a level of demand that the latter line of thought does not require that we supply? Whether that is possible depends partly upon what kind of system, if any, ethics can aspire to. Can ethics have the kind of system that will ensure that the conclusion of one correct line of thought will always be in harmony with the conclusion of another? Or might it be that the most plausible ethics is not like that?

The acceptable requirement of claimability is that the duty-bearers be specifiable, not that they exist. It is possible, in certain states of the world, for the duty to fall on specifiable bearers but for no one actually to meet the specification. Even then, there would still be a point in publicly announcing and justifying the description of the duty-bearers, if there might eventually be some. I can find no case for a stronger claimability requirement than that.