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The Concept of Human Rights

Human rights—*droits de l'homme, derechos humanos, Menschenrechte,* "the rights of man"—are literally the rights that one has because one is human. What does it mean to have a right? How are being human and having rights related? The first four sections of this chapter consider these questions, examining how human rights work and how they both rest on and help to shape our moral nature as human beings. The final three sections consider the problem of philosophical foundations of substantive theories of human rights.

1. How Rights Work

What is involved in having a right to something? How do rights, of whatever type, work?

A. Being Right and Having a Right

"Right" in English, like equivalent words in several other languages, has two central moral and political senses: rectitude and entitlement. In the sense of rectitude, we speak of "the right thing to do," of some*thing* being right (or wrong). In the narrower sense of entitlement we typically speak of some*one* having a right. To have a right to x is to be entitled to x. It is owed to you, belongs to you in particular. And if x is threatened or denied, right-holders are authorized to make special claims that ordinarily trump utility, social policy, and other moral or political grounds for action (Dworkin 1977: xi, 90).

More precisely, rights are prima facie trumps. All things considered, rights may themselves be trumped by weighty other considerations. Claiming a right, however, in effect stops the conversation and both increases and shifts

the burden of proof to those who would argue that this right in this particular case is itself appropriately trumped.[1]

Both rectitude and entitlement link right and obligation but in systematically different ways. Claims of rectitude (righteousness)—"That's wrong," "That's not right," "You really ought to do that"—focus on a standard of conduct and draw attention to the duty-bearer's obligation under that standard. Rights claims, by contrast, focus on the right-holder and draw the duty-bearer's attention to the right-holder's special title to enjoy her right. Rights in this sense thus are sometimes called "subjective rights"; they focus on the subject (who holds them) rather than an "objective" standard to be followed or state of affairs to be realized.

Rights create—in an important sense are—a field of rule-governed interactions centered on, and under the control of, the right-holder. "A has a right to x (with respect to B)" specifies a right-holder (A), an object of the right (x), and a duty-bearer (B). It also outlines the relationships in which they stand. A is entitled to x (with respect to B), B stands under correlative obligations to A (with respect to x), and, should it be necessary, A may make special claims upon B to discharge those obligations.

Rights are not reducible to the correlative duties of those against whom they are held. If Anne has a right to x with respect to Bob, it is more than simply desirable, good, or even right that Anne enjoy x. She is entitled to it. Should Bob fail to discharge his obligations, besides acting improperly (i.e., violating standards of rectitude) and harming Anne, he violates her rights, making him subject to special remedial claims and sanctions.

Neither is having a right reducible to enjoying a benefit. Anne is not a passive beneficiary of Bob's obligation. She is actively in charge of the relationship, as suggested by the language of "exercising" rights. She may assert her right to x. If he fails to discharge his obligation, Anne may press further claims against Bob, choose not to pursue the matter, or even excuse him, largely at her own discretion. Rights empower, not just benefit, those who hold them. Violations of rights are a particular kind of injustice with a distinctive force and remedial logic.

B. Exercising, Respecting, Enjoying, and Enforcing Rights

"Claiming a right makes things happen" (Feinberg 1980: 150). When Anne exercises her right, she activates Bob's obligations, with the aim of enjoying the object of her right (which in some cases may require coercive enforcement). Exercise, respect, enjoyment, and enforcement are four principal dimensions of the practice of rights.

1. For a good discussion of the attractions and limitations of the trump metaphor, see Zivi (2012: 24–42).

When we consider how rights work, though, one of the more striking facts is that we talk about rights only when they are at issue. If I walk into the supermarket and buy a loaf of bread, it would be odd to say that I had a right to my money, which I exchanged for a right to the bread. Only in unusual circumstances would we say that those who refrained from stealing my money or bread were respecting my rights. Rights are actually put to use, and thus important enough to talk about, only when they are at issue, when their enjoyment is questioned, threatened, or denied.

Three major forms of social interaction involving rights can be usefully distinguished.

1. "*Assertive exercise*": the right is exercised (asserted, claimed, pressed), activating the obligations of the duty-bearer, who then either respects the right or violates it (in which case he is liable to enforcement action).
2. "*Active respect*"[2]: the duty-bearer takes the right into account in determining how to behave, without the right-holder ever claiming it. The right has been respected and enjoyed, even though it has not been actively exercised. Enforcement may have been considered by the duty-bearer but is otherwise out of the picture.
3. "*Objective enjoyment*": rights apparently never enter the transaction, as in the example of buying a loaf of bread; neither right-holder nor duty-bearer gives them any thought. The right—or at least the object of the right—has been enjoyed. Ordinarily, though, we would not say that it has been respected, and neither exercise nor enforcement is in any way involved.

Objective enjoyment must be the norm. For society, the costs associated with even active respect of a right must be the exception rather than the rule. Right-holders too would prefer not to have to exercise their rights. In an ideal world, rights would remain both out of sight and out of mind.

Nonetheless, the ability to claim rights, if necessary, distinguishes having a right from simply being the (rights-less) beneficiary of someone else's obligation. Paradoxically, then, "having" a right is of most value precisely when one does not "have" (the object of) the right—that is, when active respect or objective enjoyment is not forthcoming. I call this the "possession paradox": "having" and "not having" a right at the same time—possessing it but not enjoying it—with the "having" being particularly important precisely when one does not "have" it.

2. In the first edition, I used the label "direct enjoyment," which now seems to me misleading in drawing attention to the right-holder's enjoyment rather than the duty-bearer's respect for the right.

We thus should be careful not to confuse having a right with the respect it receives or the ease or frequency with which it is enforced. In a world of saints, rights would be widely respected, rarely asserted, and almost never enforced. In a Hobbesian state of nature, rights would never be respected. At best, disinterest or self-interest would lead duty-bearers to not deny the right-holder the object of her right. Only the accidental coincidence of interests (or self-help enforcement) would allow a right-holder to enjoy (the substance of) her right.

Differing circumstances of respect and enforcement tell us nothing about who *has* what rights. To have a right to x is to be specially entitled to x, whether the law that gave you a legal right is violated or not, whether the promise that gave rise to the contractual right is kept or not, whether others comply with the principles of righteousness that establish your moral right or not. I have a right to my car whether it sits in my driveway, is borrowed without my permission (for good reason or bad), is stolen but later recovered, or is stolen, never to be seen again by me (whether or not the thief is ever sought, apprehended, charged, tried, or convicted). Even if the violation ultimately goes unremedied and unpunished, the nature of the offense has been changed by my right.

2. Special Features of Human Rights

Human rights are literally the rights that one has simply because one is a human being. In section 3 we will consider the relationship between being human and having (human) rights. Here I focus on the special characteristics of human rights.[3]

Human rights are *equal* rights: one either is or is not a human being, and therefore has the same human rights as everyone else (or none at all). Human rights also are *inalienable* rights: one cannot stop being human, no matter how badly one behaves or how barbarously one is treated. And they are *universal* rights, in the sense that today we consider all members of the species *Homo sapiens* "human beings" and thus holders of human rights.

Much of this book explores the political implications of human rights being equal, inalienable, and universal. In this section I stress the implications of their being rights (in the sense discussed above) and their special role in enabling progressive political change.

A. Human Rights as Rights

The substance of human rights—what is on a defensible list of human rights—will be addressed in chapters 2 and 4. Here I focus on the fact that human rights

3. I emphasize the differences between (human) rights and other social practices and grounds for action. The similarities are perceptively discussed and emphasized in Nickel (2006).

are not just abstract values. They are rights, particular social practices to realize those values. A human right thus should not be confused either with the values or aspirations underlying it or with enjoyment of the object of the right.

For example, protection against arbitrary execution is an internationally recognized human right. The fact that people are not executed arbitrarily, however, may reflect nothing more than a government's lack of desire. Even active protection may have nothing to do with a right (title) not to be executed. For example, rulers may act out of their sense of justice or follow a divine injunction that does not endow subjects with any rights. And even a right not to be arbitrarily executed may be a customary or statutory (rather than a human) right.

Such distinctions are more than scholastic niceties. Whether citizens have a right (title) shapes the nature of the injury they suffer and the forms of protection and remedy available to them. Denying someone something that it would *be* right for her to enjoy in a just world is very different from denying her something (even the same thing) that she is entitled (*has* a right) to enjoy. Furthermore, whether she has a human right or a legal right that has been contingently granted by the state dramatically alters both her relationship to the state and the character of her injury.

B. Human Rights, Legal Change, and Political Legitimacy

Human rights traditionally have been thought of as moral rights of the highest order. They have also become, as we will see in more detail below, international (and in some cases national and regional) legal rights. The object of many human rights can be claimed as "ordinary" legal rights in most national legal systems. Many local jurisdictions also have human rights statutes.

Armed with multiple claims, right-holders typically use the "lowest" right available. For example, in the United States, as in most countries, protection against racial discrimination in employment is available on several grounds. Depending on one's employment agreement, a grievance may be all that is required, or a legal action based on the contract. If that fails (or is unavailable), one may be able to bring suit under a local ordinance or a state nondiscrimination statute. Federal statutes and the Constitution may offer remedies at still higher levels. In unusual cases, one may (be forced to) resort to international human rights claims. (In Europe, the European Court of Human Rights provides an intermediate stage between national and international law. See section 11.3.A.) In addition, a victim of discrimination may claim moral (rather than legal) rights—as well as appeal to non-rights-based considerations of justice or righteousness.

One can—and usually does—go very far before explicit appeals to human rights become necessary. The "higher" claims are always available; one still

has those rights. In practice, though, they rarely are appealed to until lower-level remedies have been tried (if not exhausted). An appeal to human rights usually testifies to the absence of enforceable positive (legal) rights and suggests that everything else has been tried and failed, leaving one with nothing else (except perhaps violence).[4] For example, homosexuals in the United States often claim a human right against discrimination because US courts have held that constitutional prohibitions of discrimination do not apply to sexual orientation. If rights are a sort of last resort, claimed only when things are not going well, human rights are a last resort in the realm of rights; no higher rights appeal is available.

Claims of human rights thus ultimately aim to be self-liquidating, giving the possession paradox a distinctive twist. Human rights claims characteristically seek to challenge or change existing institutions, practices, or norms—especially legal practices. Most often they seek to establish (or bring about more effective enforcement of) a parallel "lower" right. For example, claims of a human right to health care in the United States typically aim to create a legal right to health care. To the extent that such claims are politically effective, the need to make them in the future will be reduced or eliminated; the human rights claim will be replaced by a claim of ordinary legal rights.

A set of human rights thus can be seen as a standard of political legitimacy. The Universal Declaration of Human Rights, for example, presents itself as a "standard of achievement for all peoples and all nations." To the extent that governments protect human rights, they are legitimate.

No less importantly, though, human rights authorize and empower citizens to act to vindicate their rights, to insist that these standards be realized, and to struggle to create a world in which they enjoy (the objects of) their rights. Human rights claims express not merely aspirations, suggestions, requests, or laudable ideas, but rights-based demands for change.

We must therefore not fall into the trap of speaking of human rights as demands for rights; as what Joel Feinberg calls rights in a "manifesto sense" (1980: 153). Human rights do imply a manifesto for political change. That does not, however, make them any less truly rights. Claiming a human right, even when it also involves a demand to create or better enforce a parallel legal right, involves exercising a (human) right that one already has. And in contrast to other grounds on which legal rights might be demanded—for example, justice, utility, self-interest, or beneficence—human rights claims rest on a prior moral (and international legal) entitlement.

4. In some places, especially Europe, human rights have been incorporated into national law with the label "human rights." In such cases, we need to distinguish what we might call nationally legalized human rights from "human rights" as I am using the term here. The point I am making is the tendency for human rights to function as "above" ordinary national law.

Legal rights ground legal claims to protect already established legal entitlements. Human rights ground "higher," supra-legal claims (which often seek to strengthen or add to existing legal entitlements).[5] This makes human rights neither stronger nor weaker than other kinds of rights, just different. They are human (rather than legal) rights. If they did not function differently from legal rights there would be no need for them.[6]

3. Human Nature and Human Rights

Let us now turn from the "rights" to the "human" side of "human rights." This involves charting the complex relationship between human rights and "human nature."

Legal rights have the law as their source. Contracts create contractual rights. Human rights would appear to have humanity—"human nature"—as their source. With legal rights, though, we can point to statute or custom as the mechanism by which the right is created. With contractual rights we have the act of contracting. How does being human give one rights?

A. Needs and Capabilities

Human needs are a common candidate: "needs establish human rights" (Bay 1982); "a basic human need logically gives rise to a right" (Green 1981: 55); "it is legitimate and fruitful to regard instinctoid basic needs . . . as *rights*" (Maslow 1970: xiii).[7] Unfortunately, "human needs" is almost as obscure and controversial a notion as "human nature."

Science reveals a list of empirically validated needs that will not generate anything even approaching an adequate list of human rights. Even Christian Bay, probably the best-known advocate of a needs theory of human rights, admits that "it is premature to speak of any empirically established needs beyond sustenance and safety" (1977: 17). Conversely, Abraham Maslow, whose expansive conception of needs comes closest to being an adequate basis

5. Viewing human rights as international legal (rather than moral) rights requires adding "municipal" or "national" before "legal" in this and the preceding sentence.

6. This discussion, along with the earlier discussion of the possession paradox, implicitly criticizes the "legal positivist" claim that there are no rights without remedies and no remedies except those provided by law or the sovereign. The classic locus of this argument, which goes back at least to Hobbes, is Austin (1954 [1832]). Whatever the grounds for stipulating such a definition, it is inconsistent with ordinary usage and understandings. We have no difficulty understanding, and regularly make claims of, moral and unenforced (even unenforceable) rights. That a right is not legally enforceable often is an important fact about that right. It is a fact, though, about a right, not about some other kind of claim.

7. Compare Benn (1967), Pogge (2001 [1995]: 193), Gordon (1998: 728), Felice (2003: 45), Osiatynski (2007), London (2008: 68), and Miller (2011: 169).

for a plausible set of human rights, admits that "man's instinctoid tendencies, such as they are, are far weaker than cultural forces" (1970: 129; cf. 1971: 382–88).

Without grounding in hard empirical science, "needs" takes on a metaphorical or moral sense that quickly brings us back to philosophical wrangles over human nature.[8] There is nothing wrong with philosophical theory—as long as it does not masquerade as science. In fact, to understand the source of human rights we *must* turn to philosophy. The pseudoscientific dodge of needs will not do. In fact, it is positively dangerous to insist that rights are rooted in needs but then be unable to provide a list of needs adequate to produce an attractive set of human rights.

The idea of "human capabilities" has become increasingly popular in recent discussions of human rights.[9] There certainly are important links between rights and capabilities. "Human capabilities" may be somewhat less contentious than "human nature" (if only because somewhat narrower), but appeals to capabilities largely restate, rather than resolve, the problem of providing a source for human rights.

Leading proponents simply do not present capabilities as a ground for human rights. For example, Amartya Sen, who has done more than anyone to advance the idea of human capabilities, notes that "human rights and human capabilities have something of a common motivation, but they differ in many distinct ways" and argues that they "go well with each other, so long as we do not try to subsume either entirely within the other" (Sen 2005: 152, 163). Martha Nussbaum, the most prominent advocate of capabilities after Sen, argues for "defining the securing of rights in terms of capabilities" (Nussbaum 2003: 38; cf. Nussbaum 1997: 294). Capabilities, in other words, are a way to operationalize the enjoyment of human rights, not ground their substance. Polly Vizard (2007) even argues for defining capabilities in terms of human rights.

Many internationally recognized human rights simply are not fundamentally matters of capabilities. As Sen notes, many political rights "cannot be adequately analysed within the capability approach" (2005: 163). Human rights are fundamentally about human dignity not human capabilities—although it is plausible to see human capabilities as also rooted in human dignity, although derived from it by different means (Cf. Nussbaum 2000: 124, Vizard 2007: 247).

8. Needs have even been defined in terms of rights: "We can initially define human needs, in a *minimal* sense, as that amount of food, clean water, adequate shelter, access to health services, and educational opportunities to which every person is entitled by virtue of being born" (McHale and McHale 1979: 16).

9. See, for example, Nussbaum (1997, 2011), Sen (2004, 2005), Alexander (2004), Vizard (2007), Vizard, Fukuda-Parr, and Elson (2011), and Yao (2011: chap. 5).

The source of human rights is man's *moral* nature, which is only loosely linked to scientifically ascertainable needs and not adequately captured by the idea of human capabilities. The "human nature" that grounds human rights is a *prescriptive* moral account of human possibility. (Needs and capabilities are typically understood as descriptive.) The scientist's human nature says that beyond this we cannot go. The moral nature that grounds human rights says that beneath this we must not permit ourselves to fall.

Human rights are "needed" not for life but for a life of dignity, a life worthy of a human being. "There is a human right to x" implies that people who enjoy a right to x will live richer and more fully human lives—a notion that goes well beyond developing or realizing their "capabilities." Conversely, those unable to enjoy human rights will to that extent not merely see their capabilities diminished, they will be estranged from their moral nature.

B. Human Rights and the Social Construction of Human Nature

The scientist's human nature sets the "natural" outer limits of human possibility. Human potential, however, is widely variable: the world seems to be populated by at least as many potential rapists and murderers as potential saints. Society plays a central role in selecting which potentials—capabilities—will be realized.

Today this selection is significantly shaped by the practice of human rights, which are rooted in a substantive vision of man's moral nature. Human rights set the limits and requirements of social (especially state) action, but that action, guided by human rights, plays a major role in realizing that "nature." When human rights claims bring legal and political practice into line with their demands, they *create* the type of person posited in the underlying moral vision.

Just as an individual's "nature" or "character" arises from the interaction of natural endowment, social and environmental influences, and individual action, human beings create their "essential" nature through social action on themselves. Human rights provide both a substantive model and a set of practices to realize this work of self-creation.

"Human nature" is a social project rather than a pre-social given. Marx and Burke provide important examples of such a theory of human nature (see Donnelly 1985a: 37–44), clearly indicating that such a conception is not tied to any particular political perspective. Human rights theories and documents point beyond actual conditions of existence—beyond the "real" in the sense of what has already been realized—to the possible, which is viewed as a deeper human moral reality. Human rights are less about the way people are than about what they might become. They are about moral rather than natural or juridical persons.

The Universal Declaration of Human Rights, for example, tells us little about life in many countries. And where it does, that is in large measure because the rights enumerated in the Universal Declaration have shaped society in their image. Where theory and practice converge, it is largely because the posited rights have helped to construct society, and human beings, in their image. Where they diverge, claims of human rights point to the need to bring (legal and political) practice into line with (moral) theory.

The Universal Declaration, like any list of human rights, specifies minimum conditions for a dignified life, a life worthy of a human being. Even wealthy and powerful countries regularly fall far short of these requirements. As we have seen, though, his is precisely when, and perhaps even why, having human rights is so important: they demand, as a matter of entitlement (rights), the social changes required to realize the underlying moral vision of human nature.

Human rights are at once a utopian ideal and a realistic practice for implementing that ideal. They say, in effect, "Treat a person like a human being and you'll get a human being." They also, by enumerating a list of human rights, say, in effect, "Here's how you treat someone as a human being."

Human rights thus can be seen as a self-fulfilling moral prophecy: "Treat people like human beings—see attached list—and you will get truly human beings." The forward-looking moral vision of human nature provides the basis for the social changes implicit in claims of human rights. If the underlying vision of human nature is within the limits of "natural" possibility, and if the derivation of a list of rights is sound, then implementing those rights will make "real" that previously "ideal" nature.

Human rights seek to fuse moral vision and political practice. The relationship between human nature, human rights, and political society is "dialectical." Human rights shape political society, so as to shape human beings, so as to realize the possibilities of human nature, which provided the basis for these rights in the first place.

Human rights thus are constitutive no less than regulative rules and practices.[10] We are most immediately familiar with their regulative aspects: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"; "Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment." No less importantly, however, human rights *constitute* individuals as a particular kind of political subject: free and equal rights-bearing citizens. And by defining the requirements and limits of legitimate government they constitute states of a particular kind.

In an earlier work (1985a: 31–43) I described this as a "constructivist" theory of human rights. One might also use the language of reflexivity. The essential point is that "human nature" is seen as a moral posit rather than a fact of "nature" and as a social project rooted in the implementation of human rights. It is a combination of "natural," social, historical, and moral elements, conditioned, but not simply determined, by objective historical processes that it simultaneously helps to shape.

10. The classic formulation of this distinction is Rawls (1955), reprinted in Rawls (1999).

4. Human Rights and Related Practices

Human rights, as we have seen, are a particular type of social practice, founded on a particular conception of "being human," implemented by particular kinds of mechanisms. They must not be confused with other values and practices such as social justice, natural law, or moral duty.

We do not have human rights to all things that are good, or even to all important good things—and this is not only or even primarily because of the need to keep the Universal Declaration short. There are many good things that we not only *do* not but *should* not enjoy as matters of human rights. For example, we are not entitled—do not have (human) rights—to love, charity, or compassion. Parents who abuse the trust of children wreak havoc with millions of lives every day. We do not, however, have a human right to loving, supportive parents. In fact, to recognize such a right would transform family relations in ways that most people would find deeply unappealing, even destructive. Most good things simply are not the object of human rights.

The emphasis on human rights in contemporary international society thus implies selecting certain values for special emphasis. It also involves selecting a particular mechanism—rights—to advance those values.

As we saw above, human rights are not just abstract values such as liberty, equality, and security. They are rights, particular social practices to realize those values. A human right thus should not be confused with the values or aspirations underlying it or with enjoyment of the object of the right.

Human rights do not even provide a comprehensive account of social justice. Justice is particular as well as universal, and it is not entirely a matter of rights. Furthermore, as we will see in some detail below, human rights are but one historically very distinct way to conceptualize and attempt to realize social justice.

Human rights are a) the minimum set of goods, services, opportunities, and protections that are widely recognized today as essential prerequisites for a life of dignity, and b) a particular set of practices to realize those goods, services, opportunities, and protections. No more. But no less.

5. Analytic and Substantive Theories

The theory I have sketched so far is substantively empty—or, as I would prefer to say, conceptual, analytic, or formal. I have tried to describe the character

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of any human right, whatever its substance, and some of the basic features of the practice as a whole. I have yet to argue for the existence of even a single particular human right.

The obvious "solution" is to present and defend a theory of human nature linked to a particular set of human rights. Few issues in moral or political philosophy, however, are more contentious or intractable than theories of human nature. There are many well-developed and widely accepted philosophical anthropologies: for example, Aristotle's *zoon politikon*; Marx's "human natural being" who distinguishes himself by producing his own material life; Mill's pleasure-seeking, progressive being; Kant's rational being governed by an objective moral law; and feminist theories that begin by questioning the gendered conceptions of "man" in these and most other accounts. Each of us probably has a favorite that, up to a certain point, we would defend. There are few moral issues, though, where discussion typically proves less conclusive.

Philosophical anthropologies are much more like axioms than theorems. They are more assumed (or at best indirectly defended) starting points than the results of philosophical argument. This does not make substantive theories of human rights pointless or uninteresting. They are, however, contentious in ways, or at least to a degree, that a good analytic theory is not.

If we were faced with an array of competing and contradictory lists of human rights clamoring for either philosophical or political attention, failure to defend a particular theory of human nature might be a serious shortcoming. Fortunately, there is a remarkable international normative consensus on the list of rights contained in the Universal Declaration and the 1966 International Human Rights Covenants (the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights). Furthermore, in the philosophical literature on lists of human rights there are really only two major issues of controversy (other than whether there are such things as human rights): the status of economic and social rights (which is addressed in section 3.1) and the issue of group human rights (addressed in section 3.2).

Finally, although it may sound perverse, let me suggest that the "emptiness" of a conceptual theory is one of its great attractions. Given that philosophical anthropologies are so controversial, there are great dangers in tying one's analysis of human rights to any particular theory of human nature. The account of human rights I have sketched above is compatible with many (but not all) theories of human nature. It is thus available to provide (relatively) "neutral" theoretical insight and guidance across (or within) a considerable range of positions.

A conceptual theory delimits a field of inquiry and provides a *relatively* uncontroversial (because substantively thin) starting point for analysis.[11] It also helps to clarify what is (and is not) at stake between competing substantive theories. Ultimately, however—in fact, rather quickly—we must move on to a substantive theory. And as soon as we do we must confront the notorious problem of philosophical "foundations."

6. The Failure of Foundational Appeals

In a weak, largely methodological sense of the term, every theory or social practice has a "foundation," a point beyond which there can be no answer to questions of "Why?" ("Because I'm the mom!") Usually, though, we talk about foundations in a strong, substantive sense as something "beyond" or "beneath" social convention or reasoned choice. A (strong) foundation can compel assent, not just ask for or induce agreement. In this sense, human rights have no foundation.

Historically, though, most human rights advocates and declarations have made foundational appeals. For example, both Locke and the American Declaration of Independence appealed to divine donation. The Universal Declaration of Human Rights makes an apparently foundational appeal to "the inherent dignity . . . of all members of the human family." Needs and capabilities, as we saw above, are often advanced today as an "objective" foundation.

Such grounds have often been accepted as persuasive. None, however, can through logic alone compel the agreement of a skeptic. Beyond the inevitable internal or "epistemological" challenges, foundational arguments are vulnerable to external or "ontological" critique.

Consider the claim that God gives us human rights. Questions such as "Are you sure?" or "How do you know that?" ask for evidence or logical argument. They pose (more or less difficult) challenges from within an accepted theoretical or ontological framework. The external question "What God?" raises a skeptical ontological challenge from outside that framework. To such questions there can be no decisive response.

"Foundational" arguments operate within (social, political, moral, and religious) communities that are defined in part by their acceptance of, or at least openness to, particular foundational arguments.[12] For example, all the major parties in the English Civil War took it for granted that God was a

11. A conceptual theory cannot be *entirely* empty. For example, "human" and "rights" are substantive moral concepts. They can, however, be effectively neutral notions in discussions across a considerable range of substantive theories.

12. The examples in this section are Western in part to emphasize that the issue has nothing to do with difference between cultures or civilizations (which are the subject of part 2).

central source of rights and that the Bible provided authoritative evidence for resolving political disputes. Their disagreements, violent as they ultimately became, were "internal" disputes over who spoke for God, when, and how, and what He desired. To English and Scottish Christians in the 1640s, asking whether God had granted political rights to kings, to men (and if so, which men), or both—and if both, how He wanted their competing claims to be resolved—was "natural," "obvious," even "unavoidable." But through argument alone they would have been unable to compel the assent of a skeptical atheist (had one dared raise a head).

Natural law theories today face much the same problem. For example, John Finnis's *Natural Law and Natural Rights* (1980) is a brilliant account of the implications of neo-Thomist natural law for questions of natural (human) rights. To those of us outside of that tradition, the "foundational" appeals to nature and reason are more or less attractive, interesting, or persuasive. But for Finnis, operating within that tradition, they are definitively compelling. Having accepted Finnis's starting point, we may be rationally compelled to accept his conclusions about natural rights.[13] But a skeptic cannot be compelled by reason alone to start there.

Consider Arthur Dyck's appeal to "the natural human relationships and responsibilities on which human rights are based" (1994: 13). His effort to ground human rights on "what is logically and functionally necessary, and universally so, for the existence and sustenance of communities" (1994: 123) fails because there is very little that is empirically universal about human communities, and almost nothing that is truly logically necessary for their existence. Dyck is really arguing about human communities *of a particular type*, specified in contentious normative—not empirical/descriptive—terms.[14]

Hadley Arkes, another contemporary natural law theorist, correctly identifies the situation when he writes of "The Axioms of Public Policy" (1998). Without accepting certain axiomatic propositions *that we are rationally free to reject*, no moral or political argument can go very far. Unfortunately, Arkes goes on to treat his axioms as if they were indisputable facts about the world.

Consider a very different example. The 1966 International Human Rights Covenants make a vague but clearly foundational appeal to "the inherent dignity of the human person." The very category "human being" or "human person," however, is contentious. Those who do not draw a sharp categorical distinction between *Homo sapiens* and other creatures (as, for example, in

13. More precisely, the debate shifts to internal ("epistemological") questions. For example, Maritain (1943) provides a somewhat different neo-Thomist derivation of human rights. Fortin (1982) offers a critique from within the Thomist camp that stresses the difference between natural rights and natural law. See also Fortin (1996).

14. Very similar problems are faced by efforts (e.g., Gewirth 1982; Griffin 2008) to root human rights in the capacity for agency, understood as an allegedly universal feature of human beings and human life.

classical Hindu cosmology and social theory) are not irrational, however substantively misguided we may today take them to be. Neither are those who draw categorical moral distinctions between groups of human beings—as in fact most societies throughout most of history have done. Many societies have denied the moral centrality of our common humanity on grounds no less thoughtful or carefully justified than contemporary theories of universal human rights. Even granting the moral category "human person," we face almost equally difficult problems specifying the nature and source of a person's putative "inherent dignity."

Moral and political arguments require a firm place to stand. That place appears firm, though, largely because we have agreed to treat it as such. "Foundations" ground a theory only through an inescapably contentious decision to *define* or *accept* such "foundations" as firm ground.[15]

"Foundational" arguments reflect contingent and contentious agreements to cut off certain kinds of questions. What counts as a "legitimate" question is itself unavoidably subject to legitimate (external) questioning. There is no strong foundation for human rights—or, what amounts to the same thing, there are multiple, often inconsistent "foundations," as we will see in more detail in section 4.2.

I will argue below that this is less of a practical problem than one might imagine. Nonetheless, it does counsel a certain degree of caution about the claims we make for human rights. Even if we consider ourselves morally compelled to recognize and respect human rights, we must remember that the simple fact that someone else (or another society) rejects human rights is not necessarily evidence of moral defect or even error.

7. Coping with Contentious Foundations

The common complaint that non-foundational theories leave human rights "vulnerable" is probably true but certainly irrelevant.[16] The "invulnerability" of a strong foundation is, if not entirely illusory, then conventional, a matter of agreement rather than proof. Foundations do provide reasoned assurance for moral beliefs and practices by allowing us to root particular arguments, rules, or practices in deeper principles. This reassurance, however, is a matter of internal consistency, not objective external validation.[17]

15. A useful analogy might be drawn with the "hard core" of a Lakatosian research program (1970, 1978).

16. See, for example, Freeman (1994), which gives considerable critical attention to my "relativist" position. I should perhaps note, though, that in conversation Freeman has indicated that he no longer holds these views in the strong form he presents them in this essay.

17. Even Alasdair MacIntyre, who remains committed to the idea of the rational superiority of particular systems of thought (1988: chaps. 17–19), in his Gifford Lectures (1990) speaks of Thomism as a tradition, and even titles one chapter of the book based on the lectures "Aquinas and the Rationality of Tradition." I take this to be very close to an admission that "foundations" operate only within discursive communities.

Chris Brown correctly notes that "virtually everything encompassed by the notion of 'human rights' is the subject of controversy. . . . the idea that individuals have, or should have, 'rights' is itself contentious, and the idea that rights could be attached to individuals by virtue solely of their common humanity is particularly subject to penetrating criticism" (1999: 103). But we can say precisely the same thing about all other moral and political ideas and practices. While recognizing that human rights are at their root conventional and controversial, we should not place more weight on this fact than it deserves. Problems of "circularity" or "vulnerability" are common to all moral concepts and practices. They are neither specific to human rights nor unusually severe in their case.

Human rights ultimately rest on a social decision to act as if such "things" existed—and then, through social action directed by these rights, to make real the world that they envision. This does not make human rights "arbitrary," in the sense that they rest on choices that might just as well have been random. Nor are they "*merely* conventional," in roughly the way that driving on the left is required in Britain. Like all social practices, human rights come with, and in an important sense require, justifications. Those justifications, however, appeal to "foundations" that ultimately are a matter of agreement or assumption rather than proof.

Moral arguments can be both uncertain in their foundations and powerful in their conclusions and implications. We can reasonably ask for good grounds for accepting, for example, the rights in the Universal Declaration of Human Rights. But such grounds—for example, their desirable consequences, their coherence with other moral ideas or practices, or the supporting authority of a revealed religious text—are not unassailable, and we must recognize that there are other good grounds not only for these principles and practices but also for different, even "competing," practices.

Faced with inescapably contending and contentious first principles, we not only can but should interrogate, evaluate, and judge our own. Working both "up" from "foundational" premises to particular conclusions and back "down" from particular practices, we can both explore the implications of foundational assumptions that have previously remained obscure and attempt to ascertain whether particular judgments and practices are "reasonable" or "well justified."[18] Through such work, moral progress, in a very real sense of that term, may be possible—consider the rethinking of slavery and colonialism in the Western world in the nineteenth and twentieth centuries—even if it is progress only within an ultimately conventional set of foundational assumptions.

The contentious nature of the foundations of substantive theories of human rights, however, does not make such theories any less necessary or

18. Compare John Rawls's notion of reflective equilibrium (Rawls 1971: 20–21, 48–51).

possible. Chapters 2 and 4 represent my effort to sketch the outlines of a substantive theory of human rights, thus providing substantive content to the analytic theory offered above. I do so by arguing that we have a variety of good (although not unassailable) moral and political reasons for accepting the system of human rights outlined in the Universal Declaration of Human Rights.

2
The Universal Declaration Model

This chapter begins to sketch a particular substantive theory of human rights that I call "the Universal Declaration model," in recognition of the central role of the 1948 Universal Declaration of Human Rights in establishing the contours of the contemporary consensus on internationally recognized human rights.[1] For the purposes of international action, "human rights" means roughly "what is in the Universal Declaration." I do not, for reasons outlined in the preceding chapter, attempt to give a philosophical account of human rights—let alone the "best" philosophical account. Rather, I treat the body of international human rights law as providing largely authoritative standards for all states in the contemporary world (compare sections 4.1 and 6.2.A). In this chapter I try to explicate the conceptual logic that underlies the Universal Declaration and the body of international human rights law to which it has given rise.

1. The Universal Declaration

Most of us today take human rights to be a normal and "obvious" part of international relations. In fact, however, such an understanding goes back only to the end of World War II.

The recognition of certain limited religious rights for some Christian minorities in the Peace of Westphalia (1648)—which brought the Thirty Years' War to an end and is usually seen as inaugurating modern international relations—can be seen, with the benefit of hindsight, as an early precursor of the idea of international human rights. In the nineteenth century, international campaigns against the slave trade and slavery had clear

1. The best study of the development and substance of the Universal Declaration is Morsink (1999). See also Samnoy (1993, 1999) and Eide et al. (1992).

overtones of what today we would call human rights advocacy. After World War I, workers' rights and minority rights were addressed by the newly created International Labor Organization and the League of Nations. Nonetheless, prior to World War II the very term "human rights" was largely absent from international discourse. For example, it is not mentioned in the Covenant of the League of Nations, which is usually seen as an expression of the "idealism" of the immediate post–World War I era. Even those who believed that all human beings had an extensive set of equal and inalienable rights—a distinctly minority idea in an era that had little trouble justifying colonialism—did not suggest that other states had rights or obligations with respect to those rights.

This changed decisively with the creation in 1945 of the United Nations, which took place in the shadow of not only an unusually vicious global war but also of the Holocaust. The preamble of the UN Charter lists as two of the four principal objectives of the organization "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small" and "to promote social progress and better standards of life in larger freedom."[2] Likewise, Article 1 lists as one of the four purposes of the United Nations "to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." In 1946 the newly created United Nations Commission on Human Rights quickly began to give definition to these abstract statements of postwar optimism and goodwill.

The original commission was composed of eighteen elected members, generally representative of the then fifty-one members of the United Nations. Its first task was to draft an authoritative statement of international human rights norms, a task it undertook with both skill and speed. The initial drafts were written by John Humphrey, a young Canadian member of the commission's staff, and René Cassin, the French member of the commission. There was widespread participation, though, by non-Western representatives. The eight-member drafting committee included P. C. Chang of China (the vice chair of the commission), Charles Malik of Lebanon (the rapporteur of the commission), and Hernan Santa Cruz of Chile. Each, along with the commission chair, Eleanor Roosevelt of the United States, played a major role in shaping the Declaration.[3]

2. The other objectives are "to save succeeding generations from the scourge of war" and to establish conditions for the respect of international law.
3. See Morsink (1999: 28–34) and Samnoy (1990: chap. 7). On the important role of small and non-Western states, see Waltz (2001, 2002, 2004) and Glendon (2003).

After barely a year and a half of work, the commission had completed a short statement of principles, adopted as the Universal Declaration of Human Rights by the UN General Assembly on December 10, 1948. (December 10 is thus celebrated globally as Human Rights Day.) The vote was forty-eight in favor, none opposed, and eight abstentions.[4] Although most of Africa, much of Asia, and parts of the Americas were still under colonial rule, the Universal Declaration from the beginning had global endorsement. It received the votes of fourteen European and other Western states, nineteen states from Latin America, and fifteen from Africa and Asia. In other words, both African and Asian states and Western states provided just less than a third of the votes for the Universal Declaration. Furthermore, the countries that later achieved their independence were at least as enthusiastic in their embrace of the Declaration as those who voted for it in 1948.

There was no North-South split in 1948. Ashlid Samnoy (1990: 210) correctly notes that the debate in the United Nations in 1948 "gives an impression of a massive appreciation of the Declaration. The events were characterised as 'the most important document of the century' (Ecuador), 'a world milestone in the long struggle for human rights' (France), 'a decisive stage in the process of uniting a divided world' (Haiti), 'an epoch-making event' (Pakistan) and 'a justification of the very existence of the United Nations' (the Philippines)."

The 1966 International Human Rights Covenants—the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR)—give the force of treaty law to the Universal Declaration (which as a resolution of the UN General Assembly is not in itself directly binding in international law). A number of single-issue treaties have expanded considerably on particular rights (see section 11.4). The Universal Declaration, however, is unquestionably the foundational document of international human rights law. It establishes the basic parameters of the meaning of "human rights" in contemporary international relations—and (as I will argue in part 2) in national discussions as well.

2. The Universal Declaration Model

The Universal Declaration and the Covenants—together sometimes known as the International Bill of Human Rights—proclaim a short but substantial list of human rights. Table 2.1 identifies the rights recognized in these documents.

4. Saudi Arabia abstained principally because of provisions that allowed Muslims to change their religion. South Africa abstained because of the provisions on racial equality. The abstention of the six Soviet bloc states (USSR, Byelorussian SSR, Czechoslovakia, Poland, Ukrainian SSR, and Yugoslavia) was ostensibly because the document was insufficiently detailed and far-reaching.

In addition to the substance of these internationally recognized human rights, to which we will return in chapter 3, five structural features of the Universal Declaration model merit emphasis.

TABLE 2.1 INTERNATIONALLY RECOGNIZED HUMAN RIGHTS

The International Bill of Human Rights recognizes the rights to:
Equality of rights without discrimination (Dl, D2, E2, E3, C2, C3)
Life (D3, C6)
Liberty and security of person (D3, C9)
Protection against slavery (D4, C8)
Protection against torture and cruel and inhuman punishment (D5, C7)
Recognition as a person before the law (D6, C16)
Equal protection of the law (D7, C14, C26)
Access to legal remedies for rights violations (D8, C2)
Protection against arbitrary arrest or detention (D9, C9)
Hearing before an independent and impartial judiciary (D10, C14)
Presumption of innocence (D11, C14)
Protection against ex post facto laws (D11, C15)
Protection of privacy, family, and home (D12, C17)
Freedom of movement and residence (D13, C12)
Seek asylum from persecution (D14) Nationality (D15)
Marry and found a family (D16, E10, C23)
Own property (D17)
Freedom of thought, conscience, and religion (D18, C18)
Freedom of opinion, expression, and the press (D19, C19)
Freedom of assembly and association (D20, C21, C22)
Political participation (D21, C25)
Social security (D22, E9)
Work, under favorable conditions (D23, E6, E7)
Free trade unions (D23, E8, C22)
Rest and leisure (D24, E7)
Food, clothing, and housing (D25, E11)
Health care and social services (D25, E12)
Special protections for children (D25, E10, C24)
Education (D26, E13, E14)
Participation in cultural life (D27, E15)
A social and international order needed to realize rights (D28)
Self-determination (E11, C1)
Humane treatment when detained or imprisoned (C10)
Protection against debtor's prison (C11)
Protection against arbitrary expulsion of aliens (C13)
Protection against advocacy of racial or religious hatred (C20)
Protection of minority culture (C27)

Note: This list includes all rights that are enumerated in two of the three documents of the International Bill of Human Rights or have a full article in one document. The source of each right is indicated in parentheses, by document and article number. D = Universal Declaration of Human Rights. E = International Covenant on Economic, Social, and Cultural Rights. C = International Covenant on Civil and Political Rights.

First, human rights are rooted in a conception of human dignity. Section 3 looks briefly at this relationship, to which we will return in some historical detail in chapter 8.

Second, (universal) rights—entitlements—are the mechanism for implementing such values as nondiscrimination and an adequate standard of living. The implications of this choice have been discussed in chapter 1.

Third, all the rights in the Universal Declaration and the Covenants, with the exception of the right of peoples to self-determination, are rights of individuals, not corporate entities. Section 4 examines the logic behind this restriction and addresses some common misconceptions about individual human rights. The question of group (human) rights is taken up in section 3.2.

Fourth, internationally recognized human rights are treated as an interdependent and indivisible whole, rather than a menu from which one may freely select (or choose not to select). I discuss this idea briefly in section 5 and return to the most controversial aspect of this claim—namely, the equal status of economic, social, and cultural rights—in section 3.1.

Fifth, although these are universal rights, held equally by all human beings everywhere, states have near-exclusive responsibility to implement them for their own nationals. Sections 6 and 7 explore the special place of the state in the contemporary practice of human rights.

3. Human Dignity and Human Rights

Human dignity is the foundational concept of international human rights law, "the 'ultimate value' that gives coherence to human rights" (Hasson 2003: 83). The 1996 International Human Rights Covenants, in the second paragraphs of their preambles, proclaim that "these rights derive from the inherent dignity of the human person." The Vienna Declaration of the 1993 World Conference on Human Rights likewise affirms, also in its preamble's second paragraph, that "all human rights derive from the dignity and worth inherent in the human person." Such claims build on the opening words of the Universal Declaration: "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." All of this can be traced back to the aim of the United Nations, as stated in the second paragraph of the preamble of the Charter, "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."

As one would expect from legal instruments, though, these documents are unclear as to the exact meaning of human dignity and how it gives rise to or grounds human rights. "We do not find an explicit definition of the expression 'dignity of the human person.' . . . Its intrinsic meaning has been left to intuitive understanding. . . . When it has been invoked in concrete situations, it has been generally assumed that a violation of human dignity can be recognized even if the abstract term cannot be defined" (Schachter 1983: 849; cf. Henkin 1992: 211; Beyleveld and Brownsword 2001: 11, 21). Although there are immense philosophical problems in grounding a conception of human dignity and deriving a list of human rights from it, for our purposes here—namely, understanding the logic of the Universal Declaration model—little more is required than noting this vague quasi-foundational appeal and explicating its basic terms.

Dignity indicates worth that demands respect. The first definition of "dignity" in the *Oxford English Dictionary* is "The quality of being worthy or honourable; worthiness, worth, nobleness, excellence." Other ethically and politically relevant senses include "honourable or high estate, position, or estimation; honour; degree of estimation, rank"; "*collect.* Persons of high estate or rank"; "an honourable office, rank, or title; a high official or titular position"; "*transf.* A person holding a high office or position; a dignitary"; and "nobility or befitting elevation of aspect, manner, or style; . . . stateliness, gravity."

As these definitions suggest—and as we will see in detail in chapter 8—dignity historically has usually been ascribed to an elite group. *Human* dignity—when linked with the idea that all members of the species *Homo sapiens* are human in the relevant sense—represents, in effect, the democratization of dignity. The claim of human dignity is that simply being human makes one worthy or deserving of respect; that there is an inherent worth that demands respect in all of us.

Human rights can thus be understood to specify certain forms of social respect—goods, services, opportunities, and protections owed to each person as a matter of rights—implied by this dignity. The practice of human rights provides a powerful mechanism to realize the dignity of the person. More precisely, as we will see below, human rights are one particular mechanism for realizing a certain class of conceptions of human dignity.

4. Individual Rights

With the exception of the right to self-determination, which I will ignore for the rest of this section, all the rights in the Universal Declaration and the Covenants are the rights of individuals. Enumerations typically begin "Every human being," "Everyone has the right," "No one shall be," and "Everyone is entitled." Even where we might expect groups to appear as right-holders, they do not. For example, Article 27 of the ICCPR reads, "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other

members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." Individuals belonging to minorities, not minorities (collective entities), have these rights. More generally, even where group membership is essential to the definition of a human right, the rights are held by individual members of protected groups—not the group as a collective entity. For example, individual workers (not workers as a group) hold workers' rights and individual women (not women as a group) are protected against gender discrimination.[5]

Society does have legitimate claims against individuals. Individuals do have important duties to society.[6] Many of those duties correspond to rights of society. From none of this, though, does it logically follow that society, or any social group, has *human* rights.

If human rights are the rights that one has simply as a human being, then only human beings have human rights. Because only individual persons are human beings, it would seem that only individuals can have human rights. Collectivities of all sorts have many and varied rights, but these are not human rights—unless we substantially recast the concept. It is worth taking seriously claims for radical revisions of the Universal Declaration model. This chapter, however, is restricted to explicating that model and beginning to lay out some of its attractions. (In the next chapter, I defend a strong general prejudice against group human rights.)

In addition to being separate persons, though, individuals are members of multiple communities and participants in many associations. Any plausible account of human dignity must include membership in society. To paraphrase Aristotle, outside of society, one would be either a god or a beast. As Hobbes put it, life would be solitary, poor, nasty, brutish, and short. Individual human rights no more require atomistic individualism than communitarianism requires reducing individuals to ciphers or cells that have no value apart from the organic whole of society. Quite the contrary, atomistic individuals cannot make for themselves a life worthy of human beings.

Rights-based societies can be, have been, and are societies, not aggregates of possessive, egoistic atoms.[7] Furthermore, the very ideas of respecting and

5. The partial exception (in addition to self-determination) is families, which are protected by a number of internationally recognized human rights. The human rights of families, however, apply only against the broader society. Furthermore, families may not exercise their rights in ways that infringe the human rights of their members (or any other persons). Families may not, for example, deny their adult members freedom of religion or the right to participate in politics.
6. These duties, however, are not a condition for the possession or even the enjoyment of human rights (except in some very limited instances, such as restrictions on the enjoyment of personal liberty of those convicted of serious crimes). One has the same human rights whether or not one discharges one's duties to society. One is a human being, and thus has the same human rights as any other human being, whether or not one is a good citizen or even a contributing member of society.
7. Howard (1995) emphasizes the compatibility of human rights and strong communities.

violating human rights rest on the idea of the individual as part of a larger social enterprise. Individual rights are a *social* practice that creates systems of obligations between individuals and groups of various sorts. A's right to *x* with respect to B establishes itself and operates through social relationships. Individual and group rights differ in who holds the right—individuals or corporate actors—not in their sociality.

The Universal Declaration envisions individuals deeply enmeshed in "natural" and voluntary groups ranging from families through the state. Furthermore, many individual human rights are characteristically exercised, and can only be enjoyed, through collective action. Political participation, social insurance, and free and compulsory primary education, for example, are incomprehensible in the absence of community. Freedom of association, obviously, is a right of collective action. Workers' rights, family rights, and minority rights are enjoyed by individuals as members of social groups or occupants of social roles.[8]

5. Interdependence and Indivisibility

The Universal Declaration model treats internationally recognized human rights holistically, as an indivisible structure of rights in which the value of each right is significantly augmented by the presence of many others. As Article 5 of the 1993 Vienna Declaration puts it, "All human rights are universal, indivisible and interdependent and interrelated."[9]

"Interdependence" suggests a functional relation between rights: they interact with one another to produce a whole that is more than the sum of its parts. For example, the right to life and the right to food are together worth far more than the sum of the two rights enjoyed separately. "Indivisibility" suggests that a life of dignity is not possible without something close to the full range of internationally recognized human rights. For example, having, say, 80 percent of your rights respected does not mean that you have pretty much a life of dignity but only that your dignity is being denied in a *relatively* narrow set of ways.

During the Cold War, this doctrine was regularly challenged. In particular, the relationship between civil and political and economic, social, and cultural rights was a matter of intense and lively, although not particularly productive or illuminating, controversy. Commentators and leaders in all Soviet bloc and most Third World countries regularly disparaged most civil

8. These rights, however, are universal in the sense that they refer to anyone who should happen to be in that class, the membership of which is in principle open to all (in the sense that it is not defined by achievement or ascription).
9. Whelan (2010) provides a thorough historical-theoretical survey of this idea. See also Nickel (2008).

and political rights. Conversely, many Anglo-American conservatives and philosophers—but, among states, significantly, only the government of the United States—disparaged most economic and social rights. Although such debates have largely receded from international discussions, in the United States a lingering suspicion of economic and social rights persists. For example, few mainstream politicians or commentators have addressed the ongoing crisis of health care in the United States in terms of a human right to health. Political discussions of "entitlements"—which are usually addressed to limiting, reducing, or eliminating them—usually treat social security, medical care, food, housing, and income assistance as matters contingently granted by the government rather than fundamental and overriding obligations imposed by universal human rights. I will thus address arguments against economic and social rights directly in section 3.1 and indirectly in chapter 14.

6. The State and International Human Rights

If human rights are held universally—that is, equally by all—one might imagine that they apply universally against all other individuals and groups. Such a conception is inherently plausible and in many ways morally attractive. It is not, however, the dominant contemporary understanding.

A. National Implementation of International Human Rights

Internationally recognized human rights impose obligations on, and are exercised against, sovereign territorial states. "Everyone has a right to *x*" in contemporary practice means that each state has the authority and responsibility to implement and protect the right to *x* within its territory. The Universal Declaration presents itself as "a common standard of achievement for all peoples and nations"—and the states that represent them. The Covenants create obligations only for states. And states have international human rights obligations only to *their own* nationals (and foreign nationals in their territory or otherwise subject to their jurisdiction or control).

Although human rights norms have been largely internationalized, their implementation remains almost exclusively national. As we will see in chapter 11, contemporary international (and regional) human rights regimes are supervisory mechanisms that monitor relations between states and citizens. They are not alternatives to a fundamentally statist conception of human rights. Even in the strong European regional human rights régime, the European Court of Human Rights regulates relations between states and their nationals or residents.

The centrality of states in the contemporary construction of international human rights is also clear in the substance of recognized rights. Some, most

notably rights of political participation, are typically (although not universally) restricted to citizens. Many obligations—for example, to provide education and social insurance—apply only to residents. Virtually all apply to foreign nationals only while they are subject to the jurisdiction of that state.

Foreign states have no internationally recognized human rights obligation—or even a right—to protect foreign nationals abroad. They are not even at liberty to use more than persuasive means on behalf of foreign victims. Current norms of state sovereignty prohibit states from acting coercively abroad against virtually all violations of human rights—genocide being the exception that proves the rule (compare chapter 15).

This focus on state-citizen relations is also embedded in our ordinary language. A person beaten by the police has her human rights violated but we usually call it an ordinary crime, not a human rights violation, if she receives an otherwise identical beating at the hands of a thief or an irascible neighbor. Similarly, we draw a sharp categorical distinction when comparable suffering is inflicted on innocent civilians based on whether the perpetrator is (an agent of) one's own government or a foreign state—which produce, respectively, human rights violations and war crimes.

Although neither necessary nor inevitable, this state-centric conception of human rights has deep historical roots and reflects the central role of the sovereign state in modern politics. Since at least the sixteenth century, dynastic states, and later territorial nation-states, have struggled, with considerable success, to consolidate their internal authority over competing local powers. Simultaneously, early modern states struggled, with even greater success, to free themselves from imperial and papal authority. Their late modern successors have jealously, zealously, and (for all the talk of globalization) largely successfully fought attempts to reinstitute supranational authority.

With power and authority thus doubly concentrated, the modern state has emerged as both the principal threat to the enjoyment of human rights and the essential institution for their effective implementation and enforcement. Although human rights advocates have generally had an adversarial relationship with states, both sides of this relationship between the state and human rights require emphasis.

B. Principal Violator and Essential Protector

Early advocates of natural (human) rights emphasized keeping the state out of the private lives and property of its citizens. In later eras, workers, racial and religious minorities, women, and the colonized, among other dispossessed groups, asserted their human rights against states that appeared to them principally as instruments of repression and domination. In recent decades, most human rights advocates, as symbolized by the work of groups

like Amnesty International, have focused on preventing state abuses of individual rights. Given the immense power and reach of the modern state, this emphasis on controlling state power has been (and remains) both prudent and productive.

The human rights strategy of control over the state has had two principal dimensions. Negatively, it prohibits a wide range of state interferences in the personal, social, and political lives of citizens, acting both individually and collectively. But in addition to carving out zones of state exclusion, human rights place the people above and in positive control of their government. Political authority is vested in a free citizenry endowed with extensive rights of political participation (rights to vote, freedom of association, free speech, etc.).

The state, though, precisely because of its political dominance in the contemporary world, is the central institution available for effectively implementing internationally recognized human rights. "Failed states" such as Somalia show that one of the few things as frightening as an efficiently repressive state is no state at all. Therefore, beyond preventing state-based wrongs, human rights require the state to provide certain (civil, political, economic, social, and cultural) goods, services, opportunities, and protections.

This more positive human rights vision of the state also goes back to seventeenth- and eighteenth-century social contract theories. Locke, for example, emphasizes that natural rights cannot be effectively enjoyed in a state of nature. In fact, society and government are not only essential to the enjoyment of natural or human rights, the legitimacy of a state, within the contractarian tradition, can largely be measured by the extent to which it implements and protects natural rights.

The essential role of the state in securing the enjoyment of human rights is, if anything, even clearer when we turn from theory to practice. The struggle of dispossessed groups has typically been a struggle for full legal and political recognition by the state, and thus equal inclusion among those whose rights the state protects. Opponents of racial, religious, ethnic, and gender discrimination, political persecution, torture, disappearances, and massacre typically have sought not simply to end abuses but to transform the state from a predator into a protector of rights.

The need for an active state has always been especially clear for economic and social human rights. Even early bourgeois arguments emphasizing the natural right to property stressed the importance of active state protection. In fact, the "classic" liberalism of the eighteenth and nineteenth centuries saw the state as in large measure a mechanism to give legal form and protection to private property rights. Since the late nineteenth century, as our conceptions of the proper range of economic and social rights have expanded, the politics of economic and social rights has emphasized state

provision where market and family mechanisms fail to assure enjoyment of these rights.

A positive role for the state, however, is no less central to civil and political rights. For example, implementing the right to nondiscrimination often requires extensive positive actions to realize the underlying value of equality. Even procedural rights such as due process entail substantial positive endeavors with respect to police, courts, and administrative procedures. Free, fair, and open elections do not happen through state restraint and inaction.

Because human rights first emerged in an era of personal, and thus often arbitrary, rule, an initial emphasis on individual liberty and state restraint was understandable. As the intrusive and coercive powers of the state have grown—steadily, and to now frightening dimensions—an emphasis on controlling the state continues to make immense political sense. The language of human rights abuses and violations continues, quite properly, to focus our attention on combating active state threats to human rights.

Nonetheless, a state that does no active harm itself is not enough. The state must also protect individuals against abuses by other individuals and private groups. The right to personal security, for example, is about safety against physical assaults by private actors, not just attacks by agents of the state. The state, although needing to be tamed, is today the principal institution we rely on to discipline social forces no less dangerous to the rights, interests, and dignity of individuals, families, and communities.

Other strategies have been tried or proposed to control the destructive capacities of the state and harness its capabilities to realize important human goods and values. The virtue or wisdom of leaders, party members, or clerics, the expertise of technocrats, and the special skills and social position of the military have seemed to many to be attractive alternatives to human rights as bases of political order and legitimacy. But the human rights approach of individual rights and popular empowerment has proved far more effective than any alternative yet tried—or at least that is how I read the remarkably consistent collapse of dictatorships of the left and right alike over the past three decades in Latin America, Central and Eastern Europe, Africa, Asia, and (it now seems finally) the Middle East.

Most of the alternatives to human rights treat people, if not as objects (rather than as agents), then at best as beneficiaries (rather than right-holders). They rest on an inegalitarian and paternalistic view of the average person as someone to be provided for; a passive recipient of benefits, rather than a creative agent with rights to shape his or her life. Thus even if we overlook their naively benign view of power and the state, they grossly undervalue both autonomy and participation. To use the language that I develop in chapter 4, they fail to treat citizens with equal concern and respect. That requirement is the substantive core of the Universal Declaration model.

7. Respecting, Protecting, and Providing Human Rights

A different way to look at the special role of the state is in terms of the differential social allocation of the duties correlative to human rights. Slightly modifying Henry Shue's classic analysis (1980: 52–60, 1984), we can identify duties (1) to respect the right (or not to deprive the right-holder of the enjoyment of her right), (2) to protect against deprivation, (3) to provide what is necessary to ensure that right-holders are able to enjoy their rights, and (4) to aid the deprived.[10] Duties to respect (to not deprive) are held by all social actors. In the contemporary world, however, duties to protect, to provide, and to aid are assigned almost exclusively to states, creating the system of national implementation of internationally recognized human rights noted above.

The language of entitlement and claims draws our attention conceptually toward the duty to respect (to not deprive) and practically toward the duty to protect against deprivation. To the extent that duties to provide are contemplated, emphasis tends to be placed on adversarial processes that culminate in "legal remedy"—that is, a system of authoritative and effective adjudication. Even the most superficial reflection, however, reveals that most of the work of protection, and virtually all the work of provision, takes place far from courts. A social provision focus shifts our attention to the duty to provide (and where necessary to aid the deprived).

I do not mean to belittle the role of courts and legal remedy.[11] Rights are indeed likely to be well guaranteed where right-holders can challenge deprivations of their rights through fair and impartial courts whose judgments are reliably implemented. This, however, is only the tip of the iceberg. Even where law is arguably the single most important institution assuring the effective enjoyment of human rights, this is largely because "the law" is embedded in or built on top of a complex system of social provision of rights.

A social provision perspective also remains open to multiple mechanisms of provision. The state is required only to guarantee internationally

10. In international legal discussions of economic, social, and cultural rights, it has become conventional to talk of duties to protect, to respect, and to fulfill. See, for example, Guideline 6 of the 1997 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (University of Minnesota Human Rights Library, http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html).

11. For a variety of perspectives on the "legalization" of human rights, see Meckled-Garcia and Cali (2005). The title of my essay in that volume, "The Virtues of Legalization" (Donnelly 2005), makes it clear that I am no critic of law as a mechanism to realize human rights. But law alone is never enough. And legal mechanisms have been given inordinate overrepresentation—or, perhaps more accurately, nonlegal mechanisms have not been given sufficient attention.

recognized human rights; that is, to create a system of social provision. It is not required—and in no society does it—directly perform all the work of protection and provision. Much the same is true of duties to aid the deprived (although in practice such duties tend to be discharged directly by the state).

Consider "the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control" (Universal Declaration, Article 25[1]). Duties to not deprive will rarely be of much significance; active deprivation of social security is likely to occur only through violations of other rights (e.g., assault or theft). Even duties to protect from deprivation are of secondary significance. The right to social security is fundamentally about assuring that one has available—if necessary, is provided with—the financial and other resources needed to lead a minimally dignified life when confronted with unemployment, old age, etc.

How, though, is this to be accomplished? Different societies and states have had "social security systems" that have relied to varying degrees on family, society, state, and self-provisioning. Historically, the family has been the principal social security mechanism. "Society" often has an obligation—for example, through religious organizations or through a redistributive social norm obliging the wealthy to assist those in need. Patron-client relations are another common "societal" mechanism. Over the past half century, the state in many countries has played a central role. But even in countries with developed market economies, family provision is an essential element of the system of social guarantees. In many countries, self-provisioning, through savings and private insurance and investment schemes, is an important part of the picture. Employers, through "private" pension schemes, also sometimes play an important role.

The practical heart of the human right to social security is the obligation of the state to assure that some system of provision is in place that gives everyone a reasonable guarantee of social security. Whoever actually provides the necessary goods and services, the state is obliged to assure that citizens are provided with social security. The state, though, has a considerable margin of appreciation in allocating particular elements of the general duties to protect and to provide to different social actors.

Social provision is no less important for civil and political rights, many of which involve primarily duties to provide. Consider the right to a government chosen by "periodic and genuine elections" carried out with "universal and equal suffrage" (Universal Declaration, Article 21[3]). The principal duty correlative to this right is the obligation of the state to stage and to administer elections that are free, fair, and open (to all candidates and all voters). Other

actors—e.g., poll watchers or international election monitors—may be incorporated into the process to strengthen its integrity. The state must vigilantly protect all citizens from private efforts to coercively discourage or prevent them from participating. For the most part, though, the state's basic obligation is to run—that is, to provide—clean elections.

Other civil and political rights emphasize protection. For example, Article 5 of the Universal Declaration declares, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Citizens have not merely a right not to be tortured (correlative to the duty to not deprive) but also a right to be protected against deprivation. The practicalities of assuring such protection point also to the duty to provide—in this case, through institutions and practices that protect detained suspects against abuse.

Consider also the right to security of person (Article 3). In the contemporary world of states, duties to protect personal security are largely carried out by the police and courts. Nonstate societies, however, rely (by definition) on other social institutions, usually including a substantial element of "self-help." In all societies, families, neighbors, and friends play a supporting role and individual right-holders are expected to exercise a certain degree of prudence.

In the contemporary United States, for example, private security services and neighborhood watch organizations have become an important part of the system for those able to afford or to organize them. Urban gangs, in addition to their criminal activities and other social functions, often provide some elements of neighborhood security. Individuals have been forced to take a variety of personal measures—installing better locks and alarms, exercising more caution when walking in certain areas, choosing where one lives on the basis of neighborhood and building security—to "supplement" state efforts. Many large Third World cities reveal a similar dynamic. Rio de Janeiro is an often-cited example.

Such self-help or self-provisioning mechanisms sometimes operate effectively. Often—more often, I suspect—they do not. In thinking about the social provision of human rights, we need to be open to considering the full range, and various mixtures, of "private" and state provision. The results produced by the system of provision as a whole are the measure of whether a state is adequately discharging its human rights obligations.

Assuring effective enjoyment of one's rights is the bottom line for civil and political rights and economic and social rights alike. In most instances, this will require multiple social actors discharging a variety of duties. The state need not be, and often is not, the only or even the principal provider. Nonetheless, the state has primary and ultimate responsibility for implementing an effective system of universal (national) provision.

8. Realizing Human Rights and Human Dignity

The practice of human rights is about realizing the dignity that is inherent in us as human beings. Although none of this is independent of resources, every state, no matter how poor, can and must respect all internationally recognized human rights. What counts as, for example, "the guarantees necessary for [a criminal defendant's] defense" or "necessary social services" will vary with national resources, but each and every country—from Sweden to Somalia—can and must implement each and every human right.

The demands of human rights thus are constantly escalating. A quantity and quality of, say, health care or legal services appropriate for a country at one point in its history will not be adequate to meet the same human rights obligations of that same country when its government has access to substantially greater resources. Viewed from a more psychological perspective, what satisfied the demands for human rights of our great grandparents would in many ways be considered inadequate for us today, and what we accept today will probably appear to our great grandchildren as in many ways far too restricted.

Every state can make substantial progress at realizing human rights with its existing resources. But every state also always has more to do to realize human rights—and the underlying vision of a life of dignity.