Towards a Philosophy of Human Rights

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Abstract: Two important trends are discernible in the contemporary philosophy of human rights. According to foundationalism, human rights have importantly distinctive normative grounds as compared with other moral norms. An extreme version of foundationalism claims that human interests do not figure among the grounds of human rights; a more moderate version restricts the human interests that can ground human rights to a sub-set of that general class, e.g. basic needs or our interest in freedom. According to functionalism, it belongs to the essence of human rights that they play a certain political role or combination of such roles, e.g. operating as benchmarks for the legitimacy of states or triggers for intervention against states that violate them. This article presents a view of human rights that opposes both the foundationalist and the functionalist trends. Against foundationalism, it is argued that a plurality of normative values ground human rights; these values include not only the equal moral status of all human beings but also potentially all universal human interests. Against functionalism, it is argued that human rights are moral standards—moral rights possessed by all human beings simply in virtue of their humanity—that may perform a plurality of political functions, but that none of these functions is definitive of their nature as human rights. The ensuing, doubly pluralistic, account of human rights is one that, it is claimed, both makes best sense of the contemporary human rights culture and reveals the strong continuities between that culture and the natural rights tradition.

Distorted Projections

The propensity of human beings to depict the gods, in both their appearance and manner of life, after their own image was a phenomenon well known to the philosophers of ancient Greece. One of them, Xenophanes of Colophon, jokingly observed that horses and cattle, given hands and the ability to draw, would no doubt portray the gods as horses and cattle

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like themselves. On a rhetorical level at least, the idea of human rights has emerged as a ruling idea of our age, one that is often invested with a quasi-religious significance by its devotees. It should not surprise us that it too has not escaped distortion through a similar process of projection.

And so one finds lawyers who unapologetically declare that a human right is nothing more than any norm denominated as such in a formally valid legal source, such as an international treaty. But this superficial view lacks both breadth and depth. It lacks breadth because many of the human rights laid down in law are not universally binding or are subject to eviscerating qualifications and reservations. More importantly, it lacks depth, because it passes over in silence the justification for including any item in human rights law in the first place. A supposed right does not automatically become a genuine demand of human rights morality merely by being set down in an official instrument, however impressive or widely adhered to, any more than a judicial decision constitutes a requirement of justice simply because it is issued by a body designated as a Court of Justice. This crude, legalistic reduction of human rights fails on its own terms, since the human rights laws it invokes typically presuppose an extra-legal conception of human rights, one that is a benchmark against which the laws themselves are to be assessed.

It is no sufficient improvement on this uncritical legalism to construe human rights as embryonic legal rights of a certain kind, as defeasible grounds for legislation or legal rights-in-waiting, as it were. As Amartya Sen has argued, incarcerating human rights within a legal framework obscures the tremendous diversity of ways in which they are given shape and force in everyday life. These include non-legal channels through which ordinary citizens and non-governmental organizations, such as Amnesty International and Human Rights Watch, exert pressure on governments, transnational corporations, and international institutions. It also jars with the realization that some apparent human rights, such as the right to have a say in important family decisions, are only dubiously bases for the enactment of legal rights with matching content. Later I shall return to the limitations of conceptually tethering human rights to some institutional structure or role, whether specifically legal or not. But let me first introduce another tribe that has displayed unmistakable projectivist tendencies in relation to human rights.

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Philosophers are relative latecomers to the contemporary human rights scene; and, perhaps because they lack the institutional clout of lawyers, they have not so much asserted ownership of human rights as the authority to preside in judgment over uses of the concept. Too often, however, the source of this authority has been the claim to possess what philosophers, exhibiting an uncharacteristic forbearance, are prone to calling a ‘theory’. Normally, this is a theory of morality in general, one that presents all moral thought as grounded in a single master principle, or a small number of principles systematically ordered in advance of any specific practical decision. But it might be, instead, a general theory of the nature of rights, one extracted through hard labour in the Hohfeldian salt mines and invoked as a template to which human rights discourse must conform. For those, like myself, who are generally sceptical of the prospects of ‘theory’ of this sort in morality—an attitude which is by no means equivalent to scepticism about the claims of morality itself—this is an unpromising basis for asserting intellectual authority over any domain of practical thought.

Because much philosophical work on human rights exhibits this fixation on abstract theoretical structures, it often results in a disappointing non-engagement: a failure to bring into focus human rights as that notion is understood in the wider culture in which it has its home. In consequence, this mode of philosophizing forfeits the opportunity to exert any meaningful critical leverage on that culture. Symptomatic of this failure is the commonplace spectacle of philosophers acknowledging as authentic human rights only very few of the rights in the Universal Declaration of Human Rights. So, when the most influential political philosopher of the last century, John Rawls, endorses a severely truncated list of human rights—a list that makes no room for human rights to non-discrimination on the grounds of sex, race, and religion; no room for human rights to freedom of opinion, speech, movement, and political participation; no room for human rights to education, work, and an adequate standard of living; and, instead, classifies all these excluded rights as ‘liberal aspirations’—it is hard to shake off the suspicion that Rawls means by ‘human rights’ something very different from what, on any half-way charitable construal, most people, including the Declaration’s framers, mean by that phrase.2

2 Rawls’ approved list of human rights comprises only the following: ‘[the] right to life (to the means of subsistence and security); to liberty (to freedom from slavery, serfdom, and forced occupation, and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought); to property (personal property); and to formal equality as expressed by the rules of natural justice (that is, that similar cases be treated similarly).’ J Rawls,
Although both lawyers and philosophers, as portrayed in my admittedly cartoon-like sketch, have engaged in different forms of projection, their images of human rights have an important feature in common. In both cases, human rights are understood rationalistically: as consisting, first and foremost, in a set of principles, a code of conduct. For lawyers, these principles possess, or are to be presumptively given, a legal-institutional embodiment; for philosophers, the principles form part of the broader web of propositions that comprises a theory of morality or some segment of it. Of course, the source of rationalism’s allure typically differs in each case. In the case of lawyers, a large role is played by the bureaucratic imperative favouring standards that can be applied without extensive reliance on the exercise of moral judgment, thereby facilitating predictable social relations. In contrast, for philosophers, a significant, if often unacknowledged, motivation is the ambition to mimic the explanatory achievements of the natural sciences, albeit by adhering to a model of rational inquiry that is very probably an inaccurate interpretation of a defunct scientific paradigm, that of Newtonian physics.

In any case, one reason why the idea of human rights belongs to neither the lawyers nor the philosophers is that it does not ultimately consist in a system of principles, but in a distinctive ethical sensibility. It is characterized by a number of hallmarks: the idea of each and every individual human being as an ultimate focus of moral concern; that the concern in question should, along at least on one dimension, take the form of recognizing moral duties that are directly ‘owed to’ these individual human beings, who have corresponding rights to their performance; that in virtue of our standing as human beings, equipped with the capacity to realize certain values in our lives, we each possess certain rights, independently of whether or not they are actually enforced or even recognized socially. And intimately bound up with these ideas are sentiments, such as those of blame, guilt, and resentment, that give form and content to notions such as that of a duty or its wrongful violation, and also some

*The Law of Peoples* (Harvard University Press 1999) 65. As Rawls makes clear at 80, n 23, only Arts 3–18 of the Universal Declaration of Human Rights constitute human rights proper, on this view. Of course, Rawls believes that a ‘fully reasonable’ society—one with a liberal democratic conception of justice—will uphold a much richer schedule of individual rights than the minimalist set of human rights proper.

In taking human rights morality to consist in a kind of sensibility, I do not mean to suggest that considerations of objective truth are out of place in it, rather the contrary (see ‘History and Truth’, below). For the idea that a given subject-matter can be ‘subjective’, in having a constitutive connection to certain modes of thought and feeling, yet also ‘objective’, in that its deliverances can be assessed as straightforwardly true, see J McDowell, *Mind, Value, and Reality* (Harvard University Press 1998) Part II and D Wiggins, *Needs, Values, Truth: Essays in the Philosophy of Value* (3rd edn, OUP 1998) chs III–V.
sense of the elements that conduce to a good human life and the threats to their realization. This sensibility, of course, is embodied in a wider culture of thought and practice, one that both lawyers and philosophers must presuppose and draw upon in pursuing their practical-institutional and explanatory-theoretical projects.

In fairness to the philosophers, many of them have recently emphasized the desirability of adopting what is often called a bottom-up approach to human rights, one that starts from an effort to make sense of established practices and modes of thought, in contrast to a top-down approach driven by the potentially alien preoccupations of philosophical theory. But even these philosophers often frame their engagement with human rights in terms of an overarching concern with what is said to be an out-of-control ‘proliferation’ of human rights claims, one that threatens to debase the currency of human rights. In response, they present themselves as injecting a vital measure of intellectual quality control. There are many reasons for entertaining misgivings about this proliferating talk of human rights ‘proliferation’, even if we can get past the faintly comical image of a solitary philosopher seeking to roll back an onrushing political tide of global proportions. These misgivings persist even when we also put aside the fact that those who vociferously complain about ‘proliferation’ often fail to make clear whether they have in mind human rights understood as moral standards or as legal norms. After all, although human rights law characteristically seeks to embody and implement human rights morality, something’s being a human right in morality is neither a necessary nor a sufficient condition for enacting a legal human right with matching content.4

But even supposing we confine ourselves to human rights as morally conceived, it is not as if we possess a firm independent grasp of how many human rights we should acknowledge, or even how to go about counting them. In line with our initial religious analogy, some philosophers appeal to a trinity of fundamental human rights from which the others derive, while others of a monotheistic bent invoke a single master-right.5 In this numbers game, we should be careful not to confuse parsimony

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4 My contention is not that philosophers should be uncritical towards the (often conflicting) claims about human rights found in the wider human rights culture, including its leading instruments (see ‘The Threshold: An Interlude’, below), but rather that any worthwhile criticism must be formulated in the light of a prior attempt to interpret that culture in a charitable way.

5 For respective illustrations, see J Griffin, On Human Rights (OUP 2008) 149 (affirming three highest level human rights to autonomy, liberty and minimum material provision) and RM Dworkin, Justice for Hedgehogs (Harvard University Press 2011) ch15 (affirming a basic human right to be treated with respect for one’s dignity).
with intellectual rigour, so that fewer is even presumptively equated with better. Another thing worth noticing is that philosophers’ talk of proliferation often reflects an unappealing mixture of intellectual condescension and lack of interpretative charity. So, for example, the philosophers who lament the proliferation of human rights claims predictably reserve their most scathing remarks for Article 24 of the Universal Declaration, which notoriously states: ‘Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.’ But, at most, the specific reference to ‘periodic holidays with pay’ can be faulted for conflating a particular mechanism of implementation with the human right itself. Yet this is hardly a fatal error given the wider aims of the Universal Declaration, which go beyond enumerating human rights to proposing effective means for their social realization.\(^6\)

Even assuming that the phenomenon of proliferation is a misplaced focus of ultimate concern about the contemporary human rights culture, a critic might insist on a deeper, two-headed problem: that it is far from clear, within that culture, first, what it means to assert that something is a human right, and second, on what grounds anything is properly judged to be a right of that sort. Proliferation, to the extent that it is a problem, is symptomatic of this underlying lack of clarity about the nature and grounds of human rights. Although there is merit to this line of thought, no compelling reason has been given for supposing that talk about human rights is in notably worse shape than talk about justice, fairness, or equality. There is, perhaps, simply more of it around. Moreover, the demand for clarity cannot be limited to supposedly marginal or novel human rights claims. If we need to get clearer about the nature and grounds of human rights in general, then this must apply just as much to the human right not to be tortured as to the right to rest and leisure.

In this article, I will address two broad ways in which philosophers in recent years have sought to instil greater clarity and rigour into the discourse of human rights. The first way, which I shall call foundationalism, imposes significant restrictions on the values that can ground the existence of a human right. It constrains the ‘input’ into arguments for human rights claims. The second way, which I shall call functionalism, characterizes the very nature of human rights in terms of certain institutional functions. It constrains the practical ‘output’ of human rights. My contention is that the constraints sponsored by the foundationalist and

functionalist moves backfire, distorting the true significance of human rights. Contrary to foundationalism, the grounding values of human rights are not importantly distinctive; instead, they incorporate both the notion of human dignity—the equal intrinsic objective worth of all human beings—and the diverse elements of a flourishing human life, or universal human interests. Contrary to functionalism, we should not abandon the characterization of human rights as moral rights possessed by all human beings simply in virtue of their humanity. Not only are foundationalism and functionalism defective, the misguided preoccupations they foster serve to distract attention from the crucial but difficult question of how to advance from the values underlying human rights (dignity and interests) to the conclusion, in any given case, that a human right exists. By making progress with this problem, which we may call the problem of the threshold, I believe we will be better placed to see the foundationalist and functionalist gambits for what they are: strait-jackets that constrict, rather than clarify and facilitate, our thinking about human rights.

Against Foundationalism

Perhaps the most egregious manifestation of the foundationalist tendency consists in the rejection of an apparently irresistible inference. The inference begins from the observation that almost any plausible candidate to be a human right serves some interests of the putative right-holder, interests that are universal in the sense that all humans have them simply as human beings, or at least as human beings inhabiting a defined historical context. The human right to a fair trial serves one’s interest in liberty, the human right to health serves one’s interest in health, and so on. From this observation, it is inferred that human rights not only systematically serve human interests, but also at least partly owe their existence to the fact that they do so. To this extent, human interests will be among the grounds of human rights, even if they are not exhaustive of those grounds. To this extent, also, any sound account of human rights is interest-based.

According to some philosophers, this seemingly natural inference to an interest-based view of human rights is radically misconceived. The primary grounding of human rights cannot be in interests, they claim, because there is a radical discrepancy between the logic obeyed by interests as compared with that obeyed by human rights. The moral significance of human interests, on this view, is exhausted by moral reasons to maximize impartially their aggregate fulfilment across persons. In the process of maximizing interest-fulfilment, it will often be necessary to sacrifice one person’s interests in favour of another’s. In other words, some form of utilitarianism captures the moral significance of human interests. But the distinguishing feature of human rights is to erect powerful, if not absolutely insurmountable, barriers against trade-offs of this kind. From a purely interest-based perspective, it is argued, there is a reason to kill one innocent person in order to prevent three other innocent persons being killed by someone else. But this is precisely what the logic of rights forbids: the recognition of a human right to life is the recognition of a barrier against any such trade-offs. These philosophers conclude that the primary grounding of human rights is in the ‘status’ of their holders as inviolable members of the moral community, not in their ‘interests’.

One problem with this view is that the elusive notion of moral status seems to be over-inclusive, for it plausibly lies at the root of inter-personal morality generally, informing even departments of morality not centred on rights, such as charity and mercy. It therefore cannot, by itself, serve to isolate that segment of morality which consists in human rights. Thomas Nagel, a prominent defender of the status-based view, implicitly responds to this challenge by arguing that the relevant notion of status is to be elaborated by reference to the possession of certain moral rights. To the inevitable complaint that this is a circular argument, grounding basic moral rights in a moral status that consists in the possession of those self-same rights, his reply is that we should bite the bullet: the anti-utilitarian logic of human rights demands that they be acknowledged as fundamental in our moral thinking, and it follows from this that there is no other independently graspable moral idea from which they can be derived. Any attempt to articulate their grounds, therefore, will inevitably appear question-begging.8

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8 ‘Any attempt to render more intelligible a fundamental moral ideal will inevitably consist in looking at the same thing in a different way, rather than in deriving it from another idea that seems at the outset completely independent.’ T Nagel, ‘Personal Right and Public Space’, in his *Concealment and Exposure and Other Essays* (OUP 2002) 39.
Acquiescing in this circularity, however, comes at a steep price. One measure of the cost is the consequent obscurity involved in telling just when a proposed human right really is integral to our status as moral persons and when it is not. Into this logical vacuum something is bound to rush, and sceptics will plausibly suggest that what rushes in are cultural prejudices. Hence, perhaps, the alacrity with which Nagel, an American philosopher, endorses the uniquely expansive American doctrine of freedom of speech, which protects both hate speech and the use of pornography. My point is not that these activities are obviously beyond the pale of human rights protection, but that it is exceedingly difficult to see how, on a status-based view, one can even begin to argue the case either way. We should pay this price only if we are convinced that the moral significance of interests is exhausted by their role in a consequentialist calculation that maximizes their aggregate fulfilment. But there is no compelling reason for supposing that this is the whole moral truth about interests, or—I would go further—even necessarily part of the truth.9

Status-based theorists often overlook or downplay the possibility of an interest-based, but non-utilitarian or non-consequentialist, account of human rights. Such an account does not identify human rights with the interests that underlie them, an identification that would have the result that whatever impairs the fulfilment of the interest is in virtue of that fact also a violation of the right. On the contrary, there remains the vitally important question of the content of the duties generated by the interest. Moreover, the interests in question are not simply free-floating entities whose fulfilment is to be maximized within some aggregate calculus. Instead, they are the interests of individual people, beings who in virtue of possessing various rational and other characteristically human capacities equally enjoy a certain moral status. And one implication of that status—the status sometimes referred to as ‘human dignity’—is that their interests cannot be traded-off against each other in the way mandated by a simple aggregative utilitarianism. Human interests and moral status operate here in intimate union; the status of individuals is to be honoured primarily by respecting, protecting and advancing their interests in certain distinctive ways. This conception of the grounding of human rights is a moral-political theory sufficiently coherent to yield results which need to be, and can be, trumped by considerations of individual rights’.

9 I echo here John Finnis’ rejection of the ‘unwarranted assumption that utilitarianism is a moral-political theory sufficiently coherent to yield results which need to be, and can be, trumped by considerations of individual rights’, in JM Finnis, ‘Human Rights and their Enforcement’, in his Human Rights and the Common Good (OUP 2011) 19–46, 31. The rejection of utilitarianism is, obviously, something I cannot make good on in this article; for instructive criticism, see D Wiggins, Ethics: Twelve Lectures on the Philosophy of Morality (Penguin Books 2006) chs 6–8.
human rights, as interest-based but not utilitarian or consequentialist, fits as a general schema what I take to be the most promising accounts of the foundations of human rights currently in circulation. These regard morality as bound up with the advancement and protection of important human interests and this leads them to reject standard forms of deontology. But they also reject consequentialism, according to which the over-arching point of morality is to maximize the realization of good states of affairs.10

More than 30 years ago, HLA Hart presciently observed that a satisfactory foundation for a theory of rights will remain elusive ‘as long as the search is conducted in the shadow of utilitarianism’.11 As is well known, Jeremy Bentham was profoundly sceptical about natural rights. Hardly any philosopher today takes seriously his most frontal argument for scepticism, which is a version of the crude legalism I dismissed at the outset of this article, according to which a right is always, in Bentham’s striking formulation, ‘the child of law’.12 But many of those who congratulate themselves on having no truck with Bentham’s legalism remain firmly in the grip of his more fundamental, moral-philosophical tenet: namely, that utilitarianism exhaustively captures the moral significance of human interests. They over-react to utilitarianism’s inability to make sense of fundamental moral rights by embracing a non-interest-based explanation of the grounds of such rights, one that is vulnerable to accusations of dogmatism and obscurantism. In my view, we will not put the ghost of Benthamite scepticism back in its display cabinet, where it belongs, until we have abandoned that deeper assumption about interests, along with the more superficial one about rights.

Of course, not all of the philosophers who adopt foundationalism do so out of fear of utilitarianism or consequentialism. Amartya Sen, for example, defends human rights within a recognizably consequentialist ethical outlook. But he also rejects the idea that human rights are

10 Interest-based, but non-consequentialist, accounts of moral rights or human rights have been prominently defended in JM Finnis, Natural Law and Natural Right (2nd edn, OUP 2011) ch 8; J Raz, The Morality of Freedom (OUP 1986) ch 7; J Nickel, Making Sense of Human Rights (2nd ed, Blackwell 2006); and A Buchanan, Human Rights, Legitimacy, and the Use of Force (OUP 2010) Pt I. My fullest explication of this approach is in Tasioulas (n 7).


grounded in interests; instead, he takes them to be grounded in the value of freedom—in particular, in human capabilities to realize certain valuable states of being and doing (‘functionings’) together with considerations of fair process that bear on decisions affecting people’s ability to achieve those functionings. Rather counter-intuitively, Sen denies that freedom is a human interest, something the fulfilment of which makes a person’s life go better for the person living that life. Yet surely, if we compare two people, both highly successful surgeons who are equally happy in their careers, it makes a significant difference to our assessment of the quality of their lives if we discover that one freely chose this career path from a range of other valuable options, whereas the other lives in a society in which there is no freedom of occupational choice, and jobs are compulsorily assigned by bureaucrats or passed down the family line. In Sen’s adoption of this putatively non-welfarist conception of freedom, the influence of Benthamism is again discernible. In this case, it is not Bentham’s moral theory that is at issue—his utilitarianism—but rather his subjectivist take on human happiness, according to which human fulfilment ultimately consists in the obtaining of certain mental states. For Bentham, the good consists in mental states of pleasure and the absence of pain, but other subjectivist construals regard it as a matter of desire-satisfaction. Because the freedom that paradigmatic human rights secure for us does not conform to these subjectivist interpretations, Sen apparently concludes that freedom is not a basic human interest. A preferable response, however, is to jettison the subjectivist construal of well-being, and to embrace an objective list of basic human goods. This enables us to treat freedom as a human interest, and at the same time to interpret it as one element of the human good alongside others, such as knowledge, friendship, play, and achievement. This creates space for the possibility of grounding human rights in a plurality of human interests. It also chimes with the fact that the value we accord to freedom is significantly dependent on the prior value of the activities (starting a family,


14 Sen’s most recent defence of the freedom-based account of human rights is presented in a dialectical context in which the only rival position in play is a subjectivist interpretation of welfare: ‘I have argued elsewhere that the perspective of freedom has advantages in social ethical reckoning that utilities, in themselves, do not have . . . I shall not go into the later variants of utilitarianism and confine my comments here to classical utilitarianism, with utilities interpreted in terms of some mental condition or other, such as pleasure, or happiness, or desire fulfilment.’ AK Sen, ‘The Global Reach of Human Rights’ (2012) 29 Journal of Applied Philosophy 91–100, 95. Of course, I do not mean to deny that Sen has independent arguments for treating freedom as distinct from interests; however, I am unable to examine them here.
embarking on a career, participating in political debate, etc) in which one might freely choose to engage. In any case, even if one granted Sen’s thesis that freedom is not itself an element of the good life, this would merely postpone the moment at which such elements are invoked, since capabilities to choose must in the end be specified in relation to some conception of valuable human functionings.

In his influential work of moral philosophy *After Virtue*, Alasdair MacIntyre notoriously compared human rights to witches and unicorns, on the supposed basis that all were equally mythical entities.\(^{15}\) MacIntyre assumed that the doctrine of natural or human rights is a distinctively modernist doctrine, and he additionally assumed that, as such, it purports to be justified without reference to an objective conception of the human good, in accordance with the flawed enterprise he called the ‘Enlightenment project’. But MacIntyre was mistaken about human rights being a modernist doctrine (see ‘History and Truth’, below), and probably mistaken too about the nature of the Enlightenment project, unless the very idea of such a project is to be consigned to the category of the mythical, along with witches and unicorns. Nonetheless, I believe that MacIntyre was profoundly right to this extent: the project of grounding human rights exclusively in some notion independent of the human good—whether it be in a formal norm of universalizability or a specification of moral status or any other non-prudential consideration—is doomed to failure, leaving only scepticism about human rights in its wake.

There is, however, a moderate variety of foundationalism. Unlike hard-line foundationalists, its proponents accept that considerations of the human good are among the roots of human rights. But they restrict the universal interests that can ground human rights to a sub-set of that general class. According to some, for example, only basic human needs can ground human rights, whereas others assign this privileged role to freedom. James Griffin’s *On Human Rights* is the leading contemporary formulation of the second variant of moderate foundationalism. Freedom, as understood by Griffin, comprises two values: autonomy, the capacity to choose a conception of the good life from a range of worthwhile options, and liberty, the capacity to pursue one’s choices

\(^{15}\) ‘There are no such [natural or human] rights, and belief in them is one with belief in witches and in unicorns.’ A MacIntyre, *After Virtue: A Study in Moral Theory* (3rd rev edn, University of Notre Dame Press 2007) 69. For his subsequent recantation of this wholesale scepticism, see A MacIntyre, ‘What More Needs to be Said? A Beginning, Although Only a Beginning, at Saying It’, (2008) 30 Analyse und Kritik 261, 271–72.
without interference from others. Griffin’s master-thesis is that autonomy and liberty are the only interests capable of grounding human rights, and that it is by reference to these interests that we should make sense of the idea of human dignity. Our capacity to choose and pursue a conception of the good life is the relevant dimension along which the human rights tradition regards humanity as set apart from non-human animals, whatever moral significance members of the latter class may possess.

For all its undeniable attractions, however, the freedom-based view prevents us from endorsing some perfectly natural thoughts. The human right not to be tortured, one might plausibly think, owes its existence to the way in which torture imperils a plurality of human interests. Victims of torture not only suffer excruciating pain, their physical and mental health is threatened, as is their capacity to form intimate relationships based on trust, all this in addition to the way that torture attacks their autonomy and liberty, rendering them unable ‘to decide for [them]selves and to stick to [their] decisions’.16 And, arguably, the same is true of other human rights: a plurality of universal human interests explains their existence. Now, Griffin resists this pluralist move, on the basis that expanding the range of interests that can ground human rights threatens the determinacy we urgently need to instil into human rights thinking.17 But imposing a freedom-based constraint on arguments for human rights is no solution. Even autonomy and liberty can be imperilled in all sorts of ways without there being a human right at stake. My ability to live as an autonomous person may be threatened by a serious disease from which only I suffer and which would cost an astronomical amount of money to cure. But I do not have a human right to that cure because my interest in preserving my autonomy does not warrant imposing a duty on others to provide me with that cure, since this would presumably constitute an excessive burden on them. In other words, even a freedom-based account of human rights requires a threshold, as Griffin himself acknowledges: the threshold at which our interests in autonomy and liberty generate duties on other people.

We can depart from the freedom-based view in favour of a more relaxed pluralism about the grounds of human rights without compromising the rigour of human rights discourse. Potentially any combination of universal interests can lie at the foundations of a particular human right. What provides the intellectual rigour is the need for any such combination of interests to satisfy the criteria for crossing the threshold: the

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16 Griffin (n 5) 52.
17 ibid 55.
threshold that justifies the imposition of the self-same duties as being owed to all human beings. Once we appreciate that the existence of a threshold is common ground between the freedom-based account and the pluralist alternative I favour, this should incline us towards the latter view for a number of reasons. Let me briefly recount two of them.

The first, which I have already mentioned, is that we can give stronger and less circuitous justifications of paradigmatic human rights. The human right to health will directly reflect the importance of health, not just freedom; the human right to work will directly reflect the importance of accomplishment, and so on. Not only will the justifications be more intuitively compelling, they will also confer greater normative strength on human rights, since *qua* human rights they will draw on the full spectrum of interests that underlie them, not just some sub-set of interests specified *ex ante*. This point is additionally fortified by the fact, already encountered in our discussion of Sen, that an adequate account of freedom must in any case ultimately relate that value to other elements of the good life. Another reason is that pluralism ameliorates a problem from which the freedom-based view suffers in an acute form. This is the potential exclusion from the protection of human rights of all human beings who are not agents, such as newborns or those suffering from advanced senile dementia. Rather than finding them troubling, Griffin regards these exclusions as tributes to the determinateness of sense achieved by his theory. But this response potentially involves a conflation of the counterfeit desideratum of parsimony—this time, parsimony in the scope of human rights as opposed to their number or content—with the genuine desideratum of determinateness and rigour. If the justification of human rights is not exclusively tied to considerations of freedom, the prospect of extending their protection to those members of the human family who are not agents is significantly enhanced. They will perhaps not possess the full complement of human rights that are attributable to human beings who are agents, but they will at least possess some, including the human right not to be tortured.

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18 ibid ch 4.
19 For a detailed appraisal of Griffin’s freedom-based theory of human rights along these lines, see Tasioulas (n 7) 647, 658–66. A needs-based view, eg D Miller, *National Responsibility and Global Justice* (OUP 2007) ch 7, which I refrain from discussing here, does not have the same problem regarding the extension of human rights protection to non-agents. Its problem is that standard human rights norms, including rights against discrimination on grounds of race, religion, and sex, afford levels of protection that go beyond anything that could be justified by needs alone, unless needs simply means interests, in which case it is not a true alternative to the interest-based approach.
At this point, it is worth expanding on the idea of a threshold at which interests generate human rights, since it played a pivotal role in my rejection of foundationalism in the previous section, and discussion of this idea will also serve as a bridge to the topic of functionalism.\(^{20}\)

I have already remarked upon the tendency of philosophers to justify their incursions into the human rights field under the banner of stemming the unruly ‘proliferation’ of human rights claims. The rhetorical counterpoint to the proliferation they deplore is provided by the language of ‘minimalism’. Philosophers of varying persuasions repeatedly insist that human rights are ‘minimal standards’, securing only ‘minimum’ conditions of a good, decent, or dignified life. One way of understanding the foundationalist tendency I have been criticizing is as an unsuccessful attempt to make good on this rhetoric about minimalism. But what is sound in the quest for minimalism cannot be satisfied by foundationalist restrictions; we must look, instead, to the workings of the threshold: the requirement that in the case of each individual, the underlying individualistic considerations of moral status and universal interests suffice to generate duties with the same content. Human rights then are not, on the view I am advancing, importantly distinguished by the values that ground them, but by their nature as universal moral rights.

This vital threshold mediating grounding values and duties incorporates at least two stages. The first stage is ‘internal’ since it takes into account only those individualistic values (considerations of status and interests) of the putative right-holders that are supposed to ground the existence of the right. It prescinds from the question of how the recognition of the right may affect those same right-holders as potential duty-bearers. The second stage operates ‘externally’, taking into account the implications of affirming the right for other values and other persons, especially would-be duty-bearers. Both strategies may be thought of as ways of fleshing out the import of the elusive but widely credited maxim that ‘ought’ implies ‘can’.

At the first stage, we ask whether, in the case of all human beings, it is ‘possible’ to serve the underlying values through a duty with the proposed content. Sometimes, when the answer to this question is negative, the impossibility is ‘logical’: there can be no duty to ensure someone’s simultaneous existence and non-existence. Other impossibilities are ‘metaphysical’ or ‘physical’: there can be no right of all human beings,

\(^{20}\) A fuller discussion of the threshold is to be found in Tasioulas (n 7).
including men, to give birth. Some impossibilities are mundanely ‘con-
tingent’: there is no human right to a Rodeo Drive lifestyle given the lack
of resources, now and in any realistically attainable future, to secure such
a lavish way of life for everyone. Some failures to meet this first stage of the
threshold are rather more subtle, involving what might be called directly
‘evaluative’ impossibilities. Who can deny, for example, that love is one of
the most life-enhancing aspects of human experience? And I mean here
not an impartial benevolence towards our fellow human beings, but spe-
cifically romantic love. But does it automatically follow that anyone is
under a positive duty to love anyone else, that there is in this sense a right
to be loved romantically? Such a right seems to be precluded at this first
stage: the very nature of romantic love is at odds with the existence of a
positive duty to love others.21 Romantic love is valuable as a freely
bestowed gift, a spontaneous expression of the lover’s own deepest self,
rather than something one is obligated to deliver and blameworthy for
failing to do so. Making love an object of duty does violence to its nature:
the supposed right-holder stands to receive only a pitiful imitation and
not the genuine article.

But even supposing the right to love survives this first stage, and that a
duty to love another romantically is not inherently self-defeating, the
proposed right to love surely comes to grief at a second stage, one relating
to ‘burdensomeness’. This registers the costs imposed by the putative
right on the bearers of the counterpart duty and on our ability to realize
other values, including other human rights. Even if conferring romantic
love could in principle be a matter of duty, we may reasonably conclude
that no such duty actually exists, because the burden it imposes on poten-
tial duty-bearers in terms of autonomy, spontaneity, and the strains of
psychological self-policing is excessive.

The supposed human right to love is admittedly an exotic case. But the
same line of argument that rules it out plausibly also invalidates the claims
of some items in leading human rights instruments to embody genuine
requirements of human rights morality. For example, on any literal in-
terpretation, the right to the highest attainable standard of health (Article
25 of the Universal Declaration of Human Rights), falls at both stages of
the threshold. First, it is not possible for the ‘highest’ attainable standard
of health to be an object of duty. And this impossibility survives any
attempt to relativize the standard to the right-holder’s genetic

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21 Duties to love another romantically, as understood here, are to be distinguished from
duties we may have to people with whom we already share a romantic relationship. It is
questionable whether the latter can, strictly speaking, count as human rights, because they
are not plausibly understood as possessed simply in virtue of our humanity.
constitution or features of their personal history. This is because a person’s level of health depends upon their own choices in a way that prevents others being able to secure for them the highest attainable standard of health, at least not without massive levels of interference. But even if we adjusted the right’s content so that it refers to the provision of the highest attainable standard of health care and social conditions of health generally, rather than health itself, it would fall at the hurdle of burdensomeness, since it would entail excessive costs, including unacceptable sacrifices in our capacity to fulfil other human rights.

Should we, then, dismiss all talk of a human right to romantic love or to the highest attainable standard of health? Of course not, since it all hinges on the content of the duties associated with the supposed rights, not the names we give to those rights. Presumably, there is a human right to love, but its content would primarily consist in negative duties to refrain from impeding people in certain ways in their pursuit and enjoyment of love. This is one reason why apartheid and anti-miscegenation laws violate human rights. And, similarly, there is good reason to believe that a robust human right to health can be given a defensible formulation.

Philosophers have paid insufficient attention to the threshold question partly because they have succumbed to the allure of foundationalism and partly also because it is undeniably difficult to say anything both true and helpfully general about it. However, two salient features of the threshold are worth noting. The first is that determining the existence and content of any given right is a holistic process. We cannot definitively establish the normative content of human rights one-by-one because in assessing the justifiability of the burdens a putative right imposes we must always be mindful of its implications for the recognition and fulfilment of duties associated with other rights. The second is that it is almost always the case that, for any given right, its effective realization will depend on a more precise specification of its associated duties—the content of the duties and their bearers—than pure moral reasoning itself will yield. The more precise specification will be provided by some mode of social fiat, such as social convention or positive law. But it will be a demand of pure moral reasoning itself that convention or law take up the slack in these cases, and the convention and law must operate within rough but objective parameters identified by that reasoning. This is a point that applies irrespective of whether human rights have mainly negative primary duties, such as the right not to be tortured, or mainly positive primary duties, such as the right to health. To create a properly workable standard in each case, we must supplement the deliverances of pure moral reasoning with publicly
accessible standards detailing what counts as torture or who is entitled to what level of health care from whom.

**Against Functionalism**

The understanding of the nature of human rights I have assumed so far in this article is one according to which they are moral rights possessed by all human beings simply in virtue of their humanity.\(^\text{22}\) Conceptualizing human rights in this way renders them essentially equivalent to what were traditionally called ‘natural rights’. The second philosophical tendency I wish to discuss—functionalism—rejects this equivalence as anachronistic. The idea of human rights differs significantly from that of natural rights, according to functionalists, even if all human rights are ultimately a sub-set of the general class of natural rights, and this is in virtue of the fact that human rights possess certain distinctive functions. Whereas foundationalism imposes constraints on the input to arguments for human rights, functionalism imposes constraints on their output: the practical significance that defines their nature as human rights.

Of course, even on the orthodox view of human rights as universal moral rights, they have a defining normative function: they impose duties that are ‘owed to’ all people simply in virtue of their humanity. Over and above this defining function, they perform other functions, including political functions. Human rights are relevant to assessing the status and performance of governments, including their legitimacy, and in making judgments about the assistance we owe to people in other countries and, in more extreme cases, about the justifiability of intervening in, or even declaring war against, foreign states. But it is not written into the concept of a human right that they perform these other functions. One can adequately grasp what a human right is without reference to any political role, just as one can understand what a nuclear weapon is without reference to its political uses. Whether and to what extent a particular human right should play any such political role is a matter for substantive argument; it is not something constitutive of its nature as a human right.

The most influential proponent of the political version of functionalism is John Rawls. In *The Law of Peoples*, Rawls treats the doctrine of human rights as something akin to the Swiss army knife of international political theory. Its defining functions include drawing a limit to the

\(^\text{22}\) For an attempt to unpack this deceptively simple formulation, see Tasioulas (n 1) 26–43.
pluralism of peoples, acting as a trigger for military intervention, setting necessary conditions for the legitimacy of any government, and also—it would seem—helping determine the upper limit of assistance those in well-ordered societies are duty-bound to provide to people in what Rawls calls burdened societies. One might reasonably wonder whether a doctrine, pressed into the service of such disparate roles, does not end up tearing itself apart.  

However that may be, one consequence of the strain is that Rawls endorses a meagre number of rights as authentic human rights, something we may take as a signal that his theory was not constructed with the aim of making sense of contemporary human rights practice. But other advocates of functionalism defend that thesis, in significant part, on the grounds that it is a better fit for contemporary human rights practice than the orthodox view. Unlike Rawls’ account, the functionalist views I shall examine are disaggregated, appealing not to a multiplicity of political functions, but rather to a single function. In Ronald Dworkin’s case, it is the function of establishing conditions of political legitimacy. In Joseph Raz’s case, it is the function of placing limits on state sovereignty by specifying certain defeasible grounds for international intervention.

In his recent wide-ranging treatise, *Justice for Hedgehogs*, Ronald Dworkin characterizes human rights as a subset of the general category of political rights, i.e. rights that confer on their individual holders ‘trumps’ over what would otherwise be adequate justifications for government action. Political rights express the demand of justice that governments respect the dignity of all members of the political community. Dignity, as construed by Dworkin, has two components. First, a community must treat its members’ fates as equally objectively important; second, it must respect their personal responsibility for defining what counts as success in their own lives. But a government’s laws can be morally binding on its subjects—they can possess legitimacy—even when they are unjust. Human rights, however, are those rights which cannot be flouted without impairing the government’s legitimacy. They emanate from a more general human right, the right to be treated as a human being whose dignity fundamentally matters.

Although governments inevitably make ‘mistakes’ regarding what dignity...
requires, and to that extent act unjustly, human rights violations are committed only when these mistakes rise to the level of manifesting ‘contempt’ for the dignity of some or all members of the political community. For Dworkin, a government is legitimate to the extent that it operates on a ‘good faith’ understanding of what dignity requires, and the touchstone of good faith is acting on principles that constitute an intelligible, even if ultimately flawed, conception of dignity’s two components. Human rights are the political rights that trace the outer boundaries of an intelligible conception of dignity.\(^{25}\)

Whether or not this constitutes an adequate theory of legitimacy, it seems to me doubly problematic as an account of human rights, failing to capture the universality and the extent of human rights protections as ordinarily conceived. To begin with, Dworkin’s account seriously compromises the idea that human rights confer on all people entitlements to the self-same object, such as a substantive level of health care. This is because judgments as to the ‘good faith’ of government are sensitive to variations in local political, economic, and cultural conditions. Hence, as Dworkin says, a ‘health or education policy that would show good faith effort in a poor country would show contempt in a rich one’.\(^{26}\) This leaves open the disquieting possibility that \textit{in vitro} fertilization treatment, or even some forms of cosmetic surgery, are human rights entitlements in developed societies, whereas inhabitants of poor countries are only entitled to the most rudimentary levels of health care. Given the potentially enormous divergence in normative content from one society to another, such a right is universal only in a highly attenuated sense. Moreover, since legitimacy consists in the obtaining of a certain kind of relationship between a particular government and individual members of a particular political community, any theory that makes compliance with human rights anything approaching a sufficient condition of legitimacy will arguably encounter similar problems in capturing their uniformity of content. A way out of this difficulty is to hold the substantive content of human rights standards uniform across societies, but to treat them as only necessary conditions of legitimacy. This is Rawls’ approach but, as we have already seen, it issues in a minimalist schedule of human rights that Dworkin rightly wishes to avoid given his objective of fidelity to the contemporary, Universal Declaration-inspired human rights culture.

\(^{25}\) Human rights are respected ‘only when a government’s overall behaviour is defensible under an intelligible, even if unconvincing, conception of what [the] two principles of dignity require’. Dworkin (n 24) 335–36.

\(^{26}\) Dworkin (n 24 above) 338.
The second objection is that it is deeply questionable in any case whether Dworkin can avoid an unduly short list of human rights. The standard of a ‘good faith effort’, an effort manifested by the adoption of a policy on the grounds of an ‘intelligible’ conception of dignity, seems excessively lax. For it looks as though many political ideologies that sponsor paradigmatic human rights violations are plausibly interpretable as acting in the light of *intelligible* conceptions of dignity. For example, Dworkin insists that ‘in our age, laws that forbid property, profession, or political power to women cannot be reconciled with women’s responsibility for their own decisions’, which is the second principle of human dignity. Yet it is hardly obvious that deep-rooted ideologies that exclude women from certain public or religious offices, on the basis of a supposedly divinely ordained division of labour among the sexes, embody ‘unintelligible’ (as opposed to just radically mistaken) conceptions of women’s responsibility to determine what counts as success in their lives. Instead, they may be interpreted as defining the range of options among which women are free to choose differently from the range of options applicable to men. Indeed, we should be hard pressed to explain the persistence of such ideologies in the present age, even among members of Western societies, did they not embody some intelligible conception of women’s dignity.

Two further observations are worth making regarding the second objection. First, it is perfectly consistent with Dworkin’s insistence that the good faith test turns not on mere psychological facts—eg the sincerity of a government’s stated belief that its measures are respectful of human dignity—but on how the relevant law or policy is best interpreted. In other words, there can be governmental analogues to the case, discussed by Dworkin in *Law’s Empire*, of the paternalistic culture that confers upon fathers the right to choose the spouses of their daughters but not their sons. Just as Dworkin countenanced the possibility of circumstances in which the father’s choice is morally binding on his daughter, so too it seems that a law enforcing such marriages could be legitimate by the lights of his theory, embodying an intelligible conception of human dignity.

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27 ibid 337.
28 For a contemporary example, consider the Cairo Declaration of Human Rights in Islam (1990), Art 6(a) of which provides that ‘Woman is equal to man in human dignity, and has rights to enjoy as well as duties to perform; she has her own civil entity and financial independence, and the right to retain her name and lineage’. As Michael Rosen observes, the declaration seems to affirm equal human dignity, but not equal rights as between the sexes, see M Rosen, *Dignity: Its History and Meaning* (Harvard University Press 2012) 53–54.
29 Dworkin (n 5) 335.
and hence not a violation of human rights.\textsuperscript{30} Even if Dworkin is right about the legitimacy of laws that embody a ‘good faith’ understanding of human dignity, something I am anyway inclined to doubt, the extension of this criterion to the demarcation of human rights protection has highly revisionary, and regressive, implications. The second observation relates to the invocation of a religiously inspired conception of human dignity in the previous paragraph. It might be objected that religion cannot render intelligible what would otherwise be an unintelligible conception of dignity.\textsuperscript{31} But even if this thesis is correct, it fails to parry the thrust of the counter-example to which I appealed. The idea that men and women have divergent natures—different capacities, needs, inclinations, vulnerabilities, and so on—that define for them significantly different ranges of eligible goals in life from which they may choose does not clearly lack intelligibility outside of a religious or theistic intellectual framework. The stubborn persistence of sexist prejudices among many people who lack any religious faith is ample testimony to this effect. The religious interpretation I invoked may therefore be understood as a way of fleshing out an independently intelligible conception of women’s dignity.

I turn now to the other influential functionalist view that follows in Rawls’ footsteps. Joseph Raz’s functionalist theory of human rights is a comparatively modest departure from the orthodox view.\textsuperscript{32} It seemingly presupposes the existence of universal moral rights but identifies human rights as that sub-set of these rights that satisfies two conditions. First, the state has a duty to ensure their fulfilment (it is unclear whether this is always a primary duty, or whether it can be a secondary duty, one that relates to the fulfilment of human rights duties by other agents, including private citizens or corporations). Second, the state’s failure to discharge this duty can, in principle, justify forms of intervention by outside agents that would normally be prohibited by a sound principle of state sovereignty.\textsuperscript{33} Human rights, on this view, are the individual moral rights that

\textsuperscript{30} RM Dworkin, \textit{Law’s Empire} (Fontana Press 1986) 205.

\textsuperscript{31} I owe this objection to Ronald Dworkin (personal communication). See also his discussion of human rights and religion in Dworkin (n 5) 339–34.

\textsuperscript{32} Raz (n 23). Another important account of human rights belonging to this genre, which construes human rights as triggers of international ‘concern’—a type of response that encompasses but goes significantly beyond international intervention—is outlined in CR Beitz, \textit{The Idea of Human Rights} (OUP 2009).

\textsuperscript{33} ‘[Human rights] normally derive from three layers of argument: First, some individual interest often combined with showing how social conditions require its satisfaction in certain ways … establishing an individual moral right … The second layer shows that under some conditions states are to be held duty bound to respect or promote the interest (or the rights) of individuals identified in the first part of the argument … The final layer
draw a limit to the immunity from external intervention conferred by a sound principle of state sovereignty. Raz’s approach is an advance on Rawls’ because it does not insist that a human right is such that its violation can generate a *pro tanto* justification for ‘military’ intervention, which is the feature of Rawls’ theory that is most directly responsible for his very truncated list of human rights. Indeed, Raz’s key argument for this theory is its fidelity to the current practice of human rights on the basis that universal moral rights include many rights, such as the right not to be personally insulted or betrayed, that do not figure in core human rights documents and are not suitable candidates for limitations on state sovereignty.34

But it is precisely on the score of fidelity that we should resist this view. To begin with, a key explanation of the widespread acceptance of the idea of human rights in recent years is that such rights can be coherently endorsed without thereby committing oneself to any stance on the appropriateness of outside intervention in the event of their violation. Geoffrey Wilson, the British member of the Universal Declaration drafting committee, cautioned that the absence of an effective means of international enforcement threatened to make that instrument ‘a perpetual source of mischief’.35 In retrospect, however, as historians have shown, this proved to be a key to the impressive subsequent uptake of the human rights idea, since the Great Powers would not have supported the Universal Declaration had it included enforcement mechanisms. Someone might respond that even if the contemporary human rights practice began by sidelining issues of international intervention, this is no longer the case. Such a response would have to reckon with the countervailing evidence provided by the political scientist Beth Simmons. In what is the most rigorous study of the contemporary human rights treaty regime, Simmons shows that the crucial role in ensuring compliance with human rights treaties belongs not to white knight foreign or international agents, but rather to domestic mechanisms such as elite-initiated agendas, litigation, and popular mobilization. Tethering human rights conceptually to international intervention flies in the face of these facts that give primacy to ordinary domestic politics over high politics.36

shows that they [states] do not enjoy immunity from interference regarding these matters’. Raz (n 33 above) 336.

34 I have argued elsewhere that these concerns about fidelity can be defused by a proponent of the orthodox view of human rights, without adopting Raz’s interpretation of human rights as triggers for intervention, see Tasioulas (n 1) 17, 52–56.


Finally, and perhaps most importantly, Raz’s theory is internally conflicted. In order to ensure a sufficiently generous list of human rights, one that broadly matches the Universal Declaration, he needs an expansive understanding of ‘intervention’, one that encompasses forms of action well short of military intervention, economic sanctions, or territorial incursions. Indeed, he very probably needs to insist that formal criticism of a state, whether by another state or an international organization, constitutes a form of intervention that is normally precluded by a principle of state sovereignty. In the absence of this expansive interpretation, it is difficult to see how such rights as the rights to work or an adequate standard of living, at least on the standard construals of their content, could hope to qualify as authentic human rights. But this is an idiosyncratically hyper-protective view of state sovereignty, one perhaps endorsed at present by China, but by very few other states. Hence the internal conflict: Raz cannot be faithful to both the contemporary practice regarding human rights and that regarding sovereignty. And the deeper explanation of this failure is that existing practice does not plausibly embody the idea that human rights are essentially limitations on state sovereignty. Indeed, one recent well-informed study of the principle of state sovereignty in international law finds the distinctiveness of that principle to consist in its availability to be asserted by ‘violators’ of human rights, an interpretation of sovereignty diametrically opposed to Raz’s.37

Let me conclude my discussion of these two variants of functionalism by mentioning a general problem with functionalist views of human rights that make the concept of human rights parasitic on the idea of the state, with its claim to legitimacy, or the idea of a system of states, subject to a regime of intervention. The problem is that the language of human rights is often deployed by those implacably opposed to the state, or to its assertions of legitimacy, such as philosophical anarchists, and also by those who believe that the state system should be abolished in favour of a unitary cosmopolitan government. It is decidedly odd, if not strictly speaking incoherent, to ascribe to such people, who have perfectly intelligible reasons for supposing that human rights are best fulfilled outside

37 BR Roth, Sovereign Equality and Moral Disagreement: Premises of a Pluralist International Legal Order (OUP 2011) 91. Contrary to Raz’s apparent commitment to an expansive understanding of intervention, Roth argues that the legal norm of sovereignty is not concerned with protecting states from ‘moral judgment’ or ‘political pressure’, but rather from ‘a limited set of unilateral coercive measures amounting to dictatorial interference in the internal affairs of a foreign political community’, at 94.
the state or the state-system, a concept of human rights according to which it essentially concerns the state or the system of states.

The general rejection of a state-centred view of human rights, which I am advocating, not only makes sense of the discourse of anarchists and cosmopolitan theorists, it also resonates with the beliefs of the drafters of the Universal Declaration. A rejection of statism is implicit in Eleanor Roosevelt’s claim that human rights begin ‘[i]n small places, close to home - so close and so small that they cannot be seen on any maps of the world’, and it also explains the change in the Declaration’s name, from the initial International Declaration to the eventual Universal Declaration. In the words of René Cassin, another drafter of the Declaration, human rights must be conceived ‘in relation not only to the State, but to the different social groups to which [one] belongs: family, tribe, city, profession, religion, and more broadly the entire human community’. In terms made familiar by GA Cohen and feminist writers, what is in question is not merely a legal-institutional structure, but a human rights ethos that pervades our lives, cutting across boundaries between public and private, society and state. From this point of view, it gravely distorts the significance of human rights to regard them, in the words of one prominent functionalist, as essentially ‘revisionist appurtenances of a global order composed of independent states’.

Human rights certainly have powerful implications for states and the state system, but contrary to the functionalist views we have been considering, we should resist the hypothesis that their very nature encodes some specific relation to either of those institutions.

History and Truth

In a quest for clarity and rigour, philosophers of human rights have often succumbed to the allure of foundationalism and functionalism. By adopting foundationalism, they constrain the values that ground human rights: either by winnowing out interests altogether or permitting only a sub-set of interests specified ex ante, such as freedom or basic needs, to ground the existence of human rights. By adopting functionalism, they characterize the distinctive nature of human rights in terms of certain political

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38 Glendon (n 35) 113.
39 Quoted in Glendon (n 39 above) 113.
40 Beitz (n 32) 197.
functions: in particular, the functions of setting benchmarks of governmental legitimacy or triggers for international intervention.

I have argued that these constraints are strait-jackets that distort, rather than clarify and facilitate, our thought about human rights. Liberation is to be found in adopting a more pluralistic view. At the level of foundations, a plurality of values plays a role in grounding human rights. On the one hand, there is the value that consists in the equal basic moral status of all human beings. On the other hand, there is the plurality of interests that are the potential constituents of a flourishing human life, interests that include, but are not limited to, basic needs and freedom. Similarly, at the level of the normative implications of human rights, we should recognize, as Onora O’Neill has argued, that human rights have implications for a variety of agents and contexts, so that it is a distortion to privilege their implications for the state or relations within the state system in articulating their nature.41

The picture of human rights that emerges once we renounce the dogmas of foundationalism and, especially, functionalism is, I think, one that presents strong continuities between human rights and the traditional idea of natural rights. Both are, fundamentally, moral rights possessed by all human beings simply in virtue of their humanity. Hence I reject the increasingly popular view that the Universal Declaration ushered in a new concept, one marking a radical departure from the natural rights tradition. Recently, one historian has gone so far as to say that ‘human rights were the creation of . . . events’ that ‘occurred only a generation ago’, in the 1970s.42 Here I feel somewhat as Bernard Williams did in responding to a sociologist’s claim that quarks arose from the activities of particle physicists—‘the 1970’s is rather late for the beginning of the universe.’43 Partly, these historians are led astray by functionalism, especially that version which interprets human rights as essentially limitations on state sovereignty or triggers for some kind of international action. But the deeper point is that human rights morality is not, in the first place, a code, but a distinctive moral sensibility. And, moreover, it is a sensibility that we have good reason to believe reflects an objective moral reality. Indeed, this is a vital commonality between the discourses of human rights and natural rights: both (purport to) convey truths that are apprehendable by ordinary or natural reason, as opposed to being the

deliverances of either supernatural revelation or social decision. If so, it would be extremely surprising were no intimation of these truths ever vouchsafed to anyone prior to the 1970s or, for that matter, the 20th century. And, indeed, the writings of some of the best historians of human rights confirm these suspicions. Brian Tierney regards human rights as essentially natural rights, and traces the dawning of natural rights thought to the humanistic jurisprudence of the 12th century that sought to reconcile canon law and Roman law. Others find a human rights sensibility in the writings of the classical Roman jurists, while still others push further back to Aristotle. If human rights morality is a sensibility genuinely attuned to ethical realities, then none of this is surprising.

But most contemporary historians treat neutrality regarding the truth of moral propositions as an unshakeable methodological tenet. Like the religious sceptic Edward Gibbon, whose explanation of the dramatic rise of Christianity in the ancient world ironically set aside the influence of truth and reason, on the one hand, and divine providence, on the other, they believe an account of what human rights are and how belief in them arose must be given without taking a stand on whether they embody true requirements of morality. In this arm’s length relation towards the moral truth, they have found allies among philosophers. And here I do not mean those self-described ‘critical’ or ‘post-modern’ theorists who repudiate the very idea of objective truth—a position that, as Plato showed long ago—leaves its advocates floundering in incoherence. I mean John Rawls and his legion of followers.

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47 E Gibbon, *The Decline and Fall of the Roman Empire* (Penguin Books 1952) ch VIII.
48 Perhaps the most sophisticated formulation of this ‘post-modern’ view in recent years, one that he extends to human rights, is that elaborated by Richard Rorty, see eg R Rorty, *Human Rights, Rationality, and Sentimentality*, in S Shute and SL Hurley (eds), *On Human Rights: The Oxford Amnesty Lectures 1993* (Basic Books 1993). I have argued elsewhere that Rorty’s view involves profound misconceptions regarding what an objective grounding of moral propositions, including propositions about human rights, must involve. These misconceptions include the ideas that objective moral truths are derived from non-evaluative premises and that their truth ensures their historical triumph, see J Tasioulas, ‘Relativism, Realism, and Reflection’ (1998) 41 Inquiry 377, 397–400 and J Tasioulas, ‘The Legal Relevance of Ethical Objectivity’ (2002) 47 American Journal of Jurisprudence 211.
Since reasonable people disagree about the moral truth, Rawls claims that unlike ‘natural rights’, human rights must be justified by a form of ‘public reason’ that is discontinuous with ordinary moral reasoning, levitating above the fray of the interminable quarrels about the truth of morality, human nature, and divinity. To argue on the basis of the supposed truth, says Rawls, is to fail properly to respect those reasonable others who disagree with you. I have argued in previous work that the beguiling Rawlsian construction is, in the end, a house of cards, one that collapses back into a dogmatic commitment to a liberal democratic perspective. It can therefore provide no real solace to anyone concerned to fend off the accusation that human rights doctrine is ‘ethnocentric’, a hegemonic extension of a peculiarly Western perspective. Insofar as anyone is attracted to Rawls’ very short list of human rights on the grounds of its exportability to non-Western cultures, the fact is that the brevity of this list is the outcome not of his putting the standard of truth in abeyance, but of his narrowly conceiving of human rights as triggers for military intervention.

But the key point about views that bracket the truth is that the first question is not whether we can justify human rights to others, but whether we can justify them to ourselves: we who are already committed to them, or whose commitment to them is wavering or under threat, or who are just wondering whether or not they merit our commitment. And in justifying them to ourselves, how can we stop short of anything but our reasoned beliefs about the truth of the matter? And if this is so in our own case, can respect for others consist in anything less than giving them our reasons for taking human rights morality to be true, and acting towards them in the light of that truth? Indeed, there are not really two distinct stages here, since the truth is best discovered through a dialogue with

49 ‘[Human rights] do not depend on any particular comprehensive religious doctrine or philosophical doctrine about human nature. The Law of Peoples does not say, for example, that human beings are moral persons and have equal worth in the eyes of God; or that they have certain moral and intellectual powers that entitle them to those rights. To argue in these ways would involve religious or philosophical doctrines that many decent hierarchical peoples might reject as liberal or democratic, or as in some way distinctive of Western political tradition and prejudicial to other cultures. Still, the Law of Peoples does not deny these doctrines.’ J Rawls, The Law of Peoples (Harvard University Press 1999) 68.

others whose beliefs and inherited assumptions differ from ours. However, our ability to act on these truths about human rights will be constrained in certain ways. By the content of these rights themselves, naturally, but also by a proper respect for pluralism, for the fact that different individuals and societies may legitimately order objective values in different ways, without committing any mistake; and by a respect for others’ self-determination, even in cases in which we judge that a mistake has been made. But respect for pluralism and self-determination are yet further moral truths, along with the truth about human rights, to which we need to be responsive.

And yet, when it comes to what we can say to those, sometimes from other cultures, who are not committed to human rights, the pluralist view has its advantages. In virtue of rejecting foundationalism, we avoid presenting human rights as basic, underived moral standards that either you ‘get’ or you do not, or as reflecting what might be seen as an idiosyncratically Western privileging of the claims of freedom over other values. Instead, the possibility opens up of showing that human rights can find support from any eligible ordering of the basic interests that are the components of a good human life. In virtue of rejecting functionalism, we resist linking human rights conceptually with particular institutional arrangements or roles. Too often it is assumed that, if a norm is a human right, then certain highly specific institutional consequences automatically follow; for example, that it ought to be enshrined in a country’s constitution and protected by the institution of judicial review, that it is a basis for external intervention in the case of violation, including intervention by international courts whose judgments presumptively trump those of national courts. It is vitally important what stand we take on these questions, but they are questions to be addressed by substantive argument. No answer to them is written into the conceptual fibre of human rights.

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Against certain prevailing tides in the philosophy of human rights, I have argued in this essay that human rights are doubly pluralistic. They are pluralistic both in the moral and prudential values that ground them and in the practical implications that they generate. We should therefore resist the foundationalist and functionalist enterprises which seek to bind human rights to specific normative grounds or political implications.
Yet pluralism itself can encounter resistance, at least insofar as it appears to foster the unnerving implication that everything comes down to an arbitrary decision, whether on the part of an individual or a group, in response to a range of potentially conflicting considerations. However, the pluralism that I have recommended does not displace rigorous thought about human rights; instead, it is the framework within which that thought unfolds. And as it unfolds, its aim should be nothing less than the truth.