Introduction

The universality of human rights is the central theme of this volume. My principal aim is to explicate and defend an account of human rights as universal rights. I do not, however, argue that human rights are timeless, unchanging, or absolute; any list or conception of human rights—and the idea of human rights itself—is historically specific and contingent. Organized around the competing claims of the universality, particularity, and relativity of human rights, this book demonstrates that the historical contingency and particularity of human rights is compatible with a conception of human rights as universal rights.

If human rights are the rights one has simply because one is a human being, as they usually are thought to be, then they are held "universally," by all human beings. They also hold "universally" against all other persons and institutions. As the highest moral rights, they regulate the fundamental structures and practices of political life, and in ordinary circumstances they take priority over other moral, legal, and political claims. These dimensions encompass what I call the *moral universality* of human rights.

Human rights in the contemporary world are universal in another sense: they are almost universally accepted, at least in word, or as ideal standards. All states regularly proclaim their acceptance of and adherence to international human rights norms,[1] and charges of human rights violations are among the strongest complaints that can be made in international relations. Three quarters of the world's states have undertaken international legal obligations to implement these rights by becoming parties to the International Human Rights Covenants, and almost all other nations have otherwise expressed approval of and commitment to their content. I call this the *international normative universality of* human rights.

Part I of this book tries to outline a theory of human rights that captures this universality without denying historical particularity. Part II turns to the

1. The most widely known international document, cited with almost universal approval by both states and human rights activists, is the Universal Declaration of Human Rights (1948).

historical particularity of human rights. I begin by emphasizing the special connection between human rights and the rise and consolidation of "liberalism" in the modern West, but proceed to argue that this does not preclude their near-universal applicability in contemporary international society.

Part III turns from the "moral universality" of human rights, the fact that human rights are held by all human beings with respect to all persons and institutions, to one aspect of the "international normative universality" of human rights, namely, the multilateral institutions and bilateral foreign policy practices that seek to realize internationally recognized human rights. Part IV concludes the volume by examining four areas of contemporary international controversy: the relationship between human rights, development, and democracy; group rights; discrimination against homosexuals; and humanitarian intervention.

There are two general themes to which I want to draw attention. The first is methodological: the necessarily multidisciplinary character of the study of human rights. The second is more substantive: the interaction of theory and practice.

Consider the range of issues covered by the Universal Declaration of Human Rights, which recognizes personal rights to life, nationality, recognition before the law, protection against torture, and protection against discrimination on such bases as race and sex; legal rights to a fair trial, the presumption of innocence, and protections against ex post facto laws, arbitrary arrest, detention or exile, and arbitrary interference with one's family, home, or reputation; a comparable variety of civil liberties and political rights; subsistence rights to food and health care; economic rights to work, rest and leisure, and social security; social rights to education and protection of the family; and the right to participate in the cultural life of the community. A comprehensive account of these rights would require that we combine, at minimum, the perspectives of law, political science, economics, and sociology, plus philosophy, if we want to understand the conceptual foundations of human rights and the justifications for this particular list.

The study of human rights is an inherently multidisciplinary enterprise.[2] One of my principal aims is to take seriously this often-stated but rarely heeded methodological dictum. To do justice to the scope and complexities of human rights, and to increase understanding of human rights, material and perspectives from various disciplines and subfields are offered. Within my own discipline of political science, I draw principally from the subfields of political theory and international relations. I also draw heavily from work in philosophy

2. The leading scholarly journal in the field, *Human Rights Quarterly* (which began its life as *Universal Human Rights*), bills itself as "A Comparative and International Journal of the Social Sciences, Humanities, and Law."

and international law. The result, I hope, concretely illustrates the fruitfulness, even necessity, of approaching human rights issues without regard to conventional disciplinary boundaries.

The importance of the interaction of theory and practice is especially striking when we consider the practical implications of the theoretical arguments of relativism considered in Part II. The way in which we think about a problem does not determine the way we act, but it may influence our behavior. The way problems are conceptualized may also be important for justifying actions and policies. For example, if it can be established that the sacrifice of human rights is not an imperative of development, but merely a convenience for those who control development policy (or even simply a cover for their self-enrichment), then repressive regimes are deprived of one important defense of their human rights violations.

Clear thinking about human rights is not the key to the struggle to implement them. It may not even be essential to successful political action on their behalf. In fact, such a utopian belief in the power of ideas is itself a dangerous impediment to effective political action. Nonetheless, conceptual clarity, the fruit of sound theory, can facilitate action. At the very least it can help to unmask the arguments of dictators and their allies.

This book thus aspires not merely to analyze the interaction of theory and practice but also to contribute in some small way to improving practice. This hope underlies, and perhaps even justifies, not only this book but much of the scholarly literature on human rights.

PART I

Toward a Theory of Universal Human Rights

1/ 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 three 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 section considers the problem of philosophical foundations of substantive theories of human rights, to which we will turn in Chapters 2 and 3.

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 (compare Dworkin 1977: 188–190). 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.

Rectitude and entitlement both 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.[1]

1. Rights in this sense thus are sometimes called "subjective rights"; they have as their focus a particular subject (who holds them) more than an "objective" standard to be followed or state of affairs to be realized.

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).

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. Rather than a passive beneficiary of Bob's obligation, Anne 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, she 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.

B. EXERCISING, RESPECTING, ENJOYING, AND ENFORCING RIGHTS

Claiming a right can "make 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.

When we consider how rights "work," though, one of the more striking facts is that we typically 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 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 it ever being claimed. We can still talk of the right being respected and enjoyed, even though it has not been exercised. Enforcement procedures are never activated, although they may have been considered by the duty-bearer.
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. We perhaps can talk here about the right—or at least the object of the right—being enjoyed. Ordinarily, though, we would not say that the right has been respected. Neither exercise nor enforcement is in any way involved.

From the point of view of society, objective enjoyment must be the norm. The costs, inconveniences, discontent, or tension 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 not only out of sight but out of mind as well.

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" (possessing) and "not having" (not enjoying) a right at the same time, with the "having" being particularly important precisely when one does not "have" it.

We thus should be careful not to confuse possessing 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 not to deny the right-holder the object of her right.[3] Only an accidental coincidence of interests (or self-help enforcement) would allow a right-holder to enjoy her right.

Such differing circumstances of respect and enforcement, however, tell us

2. In the first edition, I used the label "direct enjoyment," which now seems to me not only less informative but also actually misleading in drawing attention to the right-holder's enjoyment rather than the duty-bearer's respect for the right.

3. If rights are social relations, one might think that there would be no rights in the state of nature. His state of nature, however, is a world without government, not a world without ordered social interaction (however rudimentary and anarchical that society may be).

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. Violations of rights are a particular kind of injustice with a distinctive force and remedial logic.

2. Special Features of Human Rights

Human rights are, literally, the rights that one has simply because one is a human being.[4] In the third section in this chapter, Human Rights and Human Nature, we will consider the relationship between being human and having (human) rights. In this section we will focus on the special characteristics of human rights.

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). They are also *inalienable* rights: one cannot stop being human, no matter how badly one behaves nor 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 the remainder of this book explores the political implications of rights that are equal, inalienable, and universal. Here I will stress the implications of human rights being rights (in the sense discussed above) and their function as standards of political legitimacy.

A. HUMAN RIGHTS AS RIGHTS

The thorny problem of the things to which we have human rights will be addressed in Chapter 2. Here I simply note that we do not have human rights to all things that are good, or even all *important* good things. 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

4. I emphasize the differences between (human) rights and other social practices and grounds for action. The similarities are perceptively emphasized in Nickel (1987), which is available on line at *http://spot.colorado.edu/~nickelj/msohr-welcome.htm*. Chapters 2 and 3 in particular make a good complement to the argument I develop here.

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 many people would find unappealing or even destructive.

Most good things are not the objects of human rights. The emphasis on human rights in contemporary international society thus implies selecting certain values for special emphasis. But it also involves selecting a particular mechanism—rights—to advance those values.

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.

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 rest on custom or statute.

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 contingently granted by the state dramatically alters 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 later, international (and in some cases national and regional) legal rights. Many states and local jurisdictions have human rights statutes. And the object of many human rights can be claimed as "ordinary" legal rights in most national legal systems.

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 on the job 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 addition, a victim of discrimination may appeal to

considerations of justice or righteousness and claim moral (rather than legal) rights.

One can—and usually does—go very far before human rights arguments become necessary. 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).[5] For example, homosexuals in the United States often claim their human right against discrimination because U.S. courts have held that constitutional prohibitions of discrimination do not apply to sexual preference.

Rights are a sort of "last resort"; they usually are claimed only when things are not going well. Claims of human rights are the final 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.

A set of human rights 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 important, though, human rights authorize and empower citizens to act to vindicate their rights; to insist that these standards be realized; 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 simply as demands for rights, 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, in addition to suggesting that one ought to have or enjoy 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.

Legal rights ground legal claims to protect already established legal entitlements. Human rights ground moral claims to strengthen or add to existing legal entitlements.[6] That does not make human rights stronger or weaker, just different. They are human (rather than legal) rights. If they did not function differently, there would be no need for them.[7]

5. The "higher" claims are always available, but in practice rarely are appealed to until lower-level remedies have been tried (if not exhausted).

3. Human Rights and Human Nature

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

A. THE SOURCE OF HUMAN RIGHTS

From where do we get human rights? Legal rights have the law as their source. Contracts create contractual rights. Human rights would appear to have humanity or human nature as their source. With legal rights, however, 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?

Human needs are a common candidate: "needs establish human rights" (Bay 1982: 67); "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).[8] 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). And Abraham Maslow, whose expansive conception of needs comes closest to being an adequate basis 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; compare 1971: 382–388).

Without a grounding in hard empirical science, though, "needs" takes on a

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

7. 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 is Austin 1954 [1832]). Whatever the grounds for stipulating such a definition, it is inconsistent with ordinary usage and understandings, which readily comprehend moral and unenforced (even unenforceable) rights. (It also has highly controversial moral implications, ruling out certain kinds of claims by definitional fiat.) That a right is not legally enforceable often is an important fact about that right, but it is a fact about a right, not about some other kind of claim.

8. Compare Benn (1967), Pogge (2001 [1995]: 193) Gordon (1988: 728).

metaphorical or moral sense that quickly brings us back to philosophical wrangles over human nature.[9] 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.[10]

The source of human rights is man's moral nature, which is only loosely linked to the "human nature" defined by scientifically ascertainable needs. The "human nature" that grounds human rights is a *prescriptive* moral account of human possibility. 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. "There is a human right to *x*" implies that people who enjoy a right to *x* will live richer and more fully human lives. Conversely, those unable to enjoy (the objects of) their human rights will to that extent be estranged from their moral nature.

We have human rights not to the requisites for health but to those things "needed" for a life of worthy of a human being. What these things are—what is on a defensible list of human rights—is addressed in Chapter 2. Here I focus on exploring how "human nature" (whatever its substance) gives rise to, and is in turn acted upon by, human rights.

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 will be realized. Today this selection is significantly shaped by the practice of human rights, which is rooted in a substantive vision of man's moral nature.

Based on a moral vision of human nature, human rights set the limits and requirements of social (especially state) action. But the state and society, guided by human rights, play 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 that moral vision.

9. 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).

10. One might even suggest that it is positively dangerous to insist that rights are rooted in needs but then be unable to come up with a list of needs adequate to produce an attractive set of human rights.

"Human nature" is a social project more than a presocial given.[11] 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 for and a set of practices to realize this work of self-creation.

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 those rights have shaped society in their image. Where theory and practice converge, it is largely because the posited rights have shaped society, and human beings, in their image. And 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, however, this is precisely when, and perhaps even why, having human rights is so important: they demand, as 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." But they also say "Here's how you treat someone as a human being," and proceed to enumerate a list of human rights.

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

11. In Donnelly (1985a: 37–44), I argue that within the Western tradition of political theory, Marx and Burke provide important examples of such a theory of human nature. As these exemplars suggest, such a conception is not tied to any particular political perspective.

to realize the possibilities of human nature, which provided the basis for these rights in the first place.

In an earlier work (1985a: 31–43), I described this as a "constructivist" theory of human rights.[12] 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 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.

Human rights thus are constitutive no less than regulative rules.[13] 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 important, however, human rights *constitute* individuals as a particular kind of political subject: free and equal rights-bearing citizens. And by establishing the requirements and limits of legitimate government, human rights seek to constitute states of a particular kind.

C. ANALYTIC AND SUBSTANTIVE THEORIES

The theory I have sketched so far is substantively empty (compare Morsink 1987: 131–133)—or, as I would prefer to say, conceptual, analytic, or formal. I have tried to describe the character of any human right, whatever its substance, and some of the basic features of the practice as a whole, but I have yet to argue for the existence of even a single particular human right.

The obvious "solution" of presenting and defending a theory of human nature linked to a particular set of human rights, however, forces us to confront that fact that few issues in moral or political philosophy are more contentious or intractable than theories of human nature. There are many well-developed and widely accepted philosophical anthropologies: for example, Aristotle's

12. Had I been more prescient about the rise of "social constructivism" in international relations (and the social sciences more broadly), I would have done much more with the label. My route to that characterization, however, arose not out of an engagement with postmodern or poststructural social theory, or even constructivist sociology of knowledge (à la Berger and Luckmann 1967) but rather from my own work within the tradition of Wittgenstein and Anglo-American ordinary language philosophy, with the support and guidance of my dissertation supervisor Hanna Pitkin. Holt (1997: chap. 1) provides a recent argument that gets at much of what I find attractive about Wittgenstein for thinking about human rights—although I find her ultimate appeal to Oakeshott (1997: 128–141) unattractive and unpersuasive. On Wittgenstein and political theory more broadly, see Pitkin (1972). The immediate impetus was John Rawls's Howison Lecture, delivered at Berkeley in 1979 when I was working on my dissertation. It was first published as Rawls (1980) and appeared in a refined version as Lecture III of *Political Liberalism* (1996).

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

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. But there are few moral issues where discussion typically proves less conclusive. I doubt that there is much really new that can be said in defense of any particular theory of human nature. I am certain that I have nothing significant to add.

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 simply are 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, this inability 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 International Human Rights Covenants (see Chapters 2 and 3). 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 and the issue of group human rights (which are addressed in §2.3 and Chapter 12, respectively).

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 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[14]) starting point for analysis. It also helps to clarify what is (and is not) at stake between competing substantive theories. But ultimately—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."

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

4. The Question of Foundations

If the preceding account is even close to correct, "human nature" cannot be the foundation, in any strong sense of that term, for human rights. I want to conclude this chapter by suggesting that there is no other foundation either.

A. 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: to paraphrase Jefferson, we have all been endowed by our Creator with certain inalienable rights. The Universal Declaration of Human Rights makes an apparently foundational appeal to "the inherent dignity . . . of all members of the human family." Needs, as we saw earlier, are often advanced as an "objective" foundation.

Such grounds have often been accepted as persuasive. None, however, can through logic alone force 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, religious) communities that are defined in part by their acceptance of, or at least openness to, particular foundational arguments.[15] For example, all the major parties in the English Civil War took for granted that God was a 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 Him, 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

15. 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 II).

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 he dared raise his head) who rejected appeals to the Bible or divine donation.

Natural law theories today face much the same problem. 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. For Finnis, though, 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.[16] But a skeptic cannot be compelled by reason alone to start there.

Or 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, and almost nothing that is truly logically necessary for the existence of, human communities.

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 though they were indisputable facts about the world.

Consider a very different contemporary example. The 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 are not irrational, however substantively misguided we may 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, even the existence, of our common humanity on thoughtful and carefully justified grounds.

Moral and political arguments require a firm place to stand. But that place appears firm largely because we have agreed to treat it as such. "Foundations"

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

"ground" a theory only through an inescapably contentious decision to *define* such foundations as firm ground.[17]

"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."

In the following chapters I will argue 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. Part II of this book is devoted to problems of arguing and acting across such moral divides.

B. COPING WITH CONTENTIOUS "FOUNDATIONS"

The common complaint that nonfoundational theories leave human rights "vulnerable"[18] is probably true but certainly irrelevant. 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. But this is the reassurance of internal consistency, not of objective external validation.[19]

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)

We can say precisely the same thing, though, 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.

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

18. 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 in which he presents them in this essay.

19. 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 "Aquinas and the Rationality of Tradition." I take this to be very close to an admission that "foundations" operate only within discursive communities.

Human rights ultimately rest on a social decision to act as though 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. But those justifications appeal to "foundations" that are ultimately a matter of agreement or assumption rather than proof. Problems of "circularity" or "vulnerability" are common to all moral concepts and practices, not specific to human rights.

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. They operate within rather than across communities or traditions.[20] 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."[21] Through such work, moral progress, in a very real sense of that term, may be possible—even if it is progress only within an ultimately conventional set of foundational assumptions.

Whatever their limits, substantive theories of human rights are both necessary and possible. The next two chapters offer my efforts to provide substantive content to the analytic theory offered earlier 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.

20. This does not mean that there are no points of agreement across traditions. (On overlapping consensus, see §3.2.) But any such overlaps are not evidence for a higher metatheory that is "natural" rather than conventional.

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

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 Universal Declaration of Human Rights[1] in establishing the contours of the contemporary consensus on internationally recognized human rights. Adopted by the United Nations General Assembly on December 10, 1948, by a vote of 48–0 (with eight abstentions), the Universal Declaration has been endorsed, regularly and repeatedly, by virtually all states. For the purposes of international action, "human rights" means roughly "what is in the Universal Declaration of Human Rights."[2] This chapter outlines its main features. Chapter 3 begins to offer a substantive defense.

1. The best study of the development and substance of the Universal Declaration is Morsink (1999). See also Samnoy (1990) and Eide and Swinehart (1992).

2. It is often argued that the Universal Declaration is distinctively Western and thus not really universal. On the dangers of confusing origins with substance, see §4.10. But even the claim that the West played a dominant role is problematic.

The principal drafters were Canadian (John Humphrey) and French (Rene Cassin), and the American representative on the Commission on Human Rights, Eleanor Roosevelt, played a leading role in ushering the Declaration through the UN machinery. But important contributions in the drafting were also made by Charles Malik (Lebanon), P. C. Chang (China), Hernan Santa Cruz (Chile) and Alexi Pavlov (USSR). See Morsink (1999: 28–34)and Samnoy (1990: chap. 7). On the important role of small states, see Waltz (2001).

In addition to twenty Latin American states, thirteen "non-Western" countries voted for the Universal Declaration: Afghanistan, Burma, China, Egypt, Ethiopia, India, Iran, Iraq, Lebanon, Pakistan, Philippines, Syria, and Turkey. In other words, "Western" states, understood as the states of Europe plus the United States, Canada, Australia, and New Zealand, made up only about a third of the votes for the Universal Declaration. Muslim states provided half as many votes to the final total as Western states.

There simply was no North-South split in 1948. Quite the contrary, countries from what would later be called the Third World were at least as enthusiastic about the Universal Declaration as Western countries. The only serious disagreement was *within* the West, as the Soviet bloc countries abstained because they wanted greater emphasis on economic and social rights. (Saudi Arabia's abstention rested primarily with disagreements with parts of Articles 16 and 18.) Just one country, South Africa, could be seen as fundamentally opposed to the Declaration (Morsink [1999: 21–28]).

1. The Universal Declaration Model

The Universal Declaration of Human Rights includes a short but substantial list of rights that has been further elaborated, with modest additions, in a variety of later treaties, most notably the 1966 International Human Rights Covenants. Table 2.1 provides a list of the rights recognized in these documents.

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

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

Second, all the rights in the Universal Declaration and the Covenants, with the exception of self-determination of peoples, are rights of individuals, not corporate entities. §2 examines the logic behind this restriction and addresses some common misconceptions about individual human rights. We will return to the issue of group rights in Chapter 12.

Third, internationally recognized human rights are treated as an interdependent and indivisible whole, rather than as a menu from which one may freely select (or choose not to select). §3 explores this dimension of the Universal Declaration model, with special attention to the relation of civil and political rights to economic, social, and cultural rights.

Fourth, although these are universal rights, held equally by all human beings everywhere, states have near exclusive responsibility to implement them for their own nationals. §4 explores the special place of the state in the contemporary practice of human rights.

2. Individual Rights

With the exception of the right to self-determination,[3] all the rights in the Universal Declaration and the Covenants are the rights of individuals. Enumerations of rights thus typically begin "Every human being . . . ," "Everyone has the right . . . ," "No one shall be . . . ," "Everyone is entitled. . . ." Even where one might expect groups to appear as right-holders, they do not. For example, Article 27 of the International Covenant on Civil and Political

Ashlid Samnoy 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)" (1990: 210).

3. For the remainder of this chapter, I omit further reference to this exception, to which we will return in §12.11.

TABLE 2.1 The Substance of the Universal Declaration Model*

Nondiscrimination (U2, E2, C2)
Life (U3, C6)
Liberty and security of person (U3, C9)
Protection against slavery (U4, C8)
Protection against torture (U5, C7)
Legal personality (U6, C16)
Equal protection of the law (U7, C14, C26)
Legal remedy (U8, C2)
Protection against arbitrary arrest, detention, or exile (U9, C9)
Access to independent and impartial tribunal (U10, C14)
Presumption of innocence (U11, C14)
Protection against ex post facto laws (U11, C15)
Privacy (U12, C17)
Freedom of movement (U13, C12)
Nationality (U15, C24)
Marry and found a family (U16, C23)
Protection and assistance of families (U16, E10, C23)
Marriage only with free consent of spouses (U16, E10, C23)
Equal rights of men and women in marriage (U16, C23)
Freedom of thought, conscience, and religion (U18, C18)
Freedom of opinion and expression (U19, C19)
Freedom of assembly (U20, C21)
Freedom of association (U20, C22)
Participation in government (U21, C25)
Social security (U22, E9)
Work (U23, E6)
Just and favorable conditions of work (U23, E7)
Trade unions (U23, E8, C22)
Rest and leisure (U24, E7)
Adequate standard of living (U25, E11)
Education (U26, E13)
Participation in cultural life (U27, E15)
Self-determination (E1, C1)
Protection of and assistance to children (E10, C24)
Freedom from hunger (E11)
Health (E12, U25)
Asylum (U14)
Property (U17)
Compulsory primary education (E14)
Humane treatment when deprived of liberty (C10)
Protection against imprisonment for a debt (C11)
Expulsion of aliens only by law (C13)
Prohibition of war propaganda and incitement to discrimination (C20)
Minority culture (C27)

* This list includes all rights that receive explicit mention in both the Universal Declaration and one of the Covenants or receives a full article in one of these three instruments.

References are to the article, by number is the Universal Declaration (U), International Covenant on Civil and Political Rights (C) or International Covenant on Economic Social and Cultural Rights (E).

Rights 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.

If human rights are the rights that one has simply as a human being, then only human beings have human rights; if one is not a human being, by definition one cannot 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—cannot be—human rights, unless we substantially recast the concept. Although it is worth taking seriously claims for radical revisions of the Universal Declaration model, this chapter is explicitly restricted to explicating that model and beginning to lay out some of its attractions. In Chapter 12 I argue against the idea of group human rights and defend the general adequacy of an individual human rights approach.

Society does have legitimate claims against individuals. Individuals do have important duties to society,[4] many of which correspond to rights of society. But from none of this does it logically follow that society, or any other social group, has *human* rights.

Human rights, however, are not held by atomistic individuals, nor are they necessarily corrosive to community.[5] In addition to being separate persons, individuals are participants in many associations and members of a variety of communities. And individual rights are a *social* practice.

As we saw in Chapter 1, all (human) rights are embedded in a social context and have important social dimensions. A's right to x with respect to B establishes and operates through social relationships. Individual and group rights differ in who holds the right—individuals or corporate actors—not in their sociality.

In fact, 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 rights that would be of little significance, or even be incomprehensible, in the absence of community. Freedom of association, obviously, is a right of collective action.

4. These duties, however, are not a condition for the possession or 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.

5. See Howard (1995) for an account of human rights that emphasizes their compatibility with strong communities.

Workers' rights, family rights, and minority rights are enjoyed by individuals as members of social groups or occupants of social roles.[6]

Even where group membership is essential to the definition of a human right, however, the rights are held by individual members of protected groups and not by the group as a collective entity. Families, for example, are protected by a number of internationally recognized human rights. From a human rights perspective, however, the family is a social group that is valued only because its intermediation typically protects, helps to develop, or enriches the life of individual family members.[7] Furthermore, the human rights of families, understood as associations of rights-holding individuals, apply only against the broader society. Families may not exercise their rights in ways that infringe on the human rights of their members (or on any other persons). Families may not, for example, deny their adult members freedom of religion or the right to participate in politics.

The Universal Declaration envisions individuals deeply enmeshed in "natural" and voluntary groups, ranging from families through the state. Due process and equal protection, for example, make no sense except in the context of a political community; speech, work, and politics take place only in communities; torture and education alike occur only in a social context.[8]

The very ideas of respecting and violating human rights rest on the idea of the individual as part of a larger social enterprise. Rights-bearing individuals alone cannot effectively implement their rights. Alone, individuals cannot make for themselves a life worthy of human beings. 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. Or, as Hobbes put it, life would be solitary, poor, nasty, brutish, and short.

6. 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).

7. Families, of course, have other (perhaps even more important) dimensions. The love between spouses or the often heroic sacrifices parents make for their children lie outside the realm of human rights. In much the same vein, freedom of religion and the associational rights of churches and religious communities fail to exhaust—even fail to scratch the surface of—the meaning and significance of religion. We must not confuse human rights with all good things.

8. At the risk of belaboring the point, consider a few more examples from the Universal Declaration. Human beings "should act towards one another in a spirit of brotherhood" (Art. 1). "Everyone has the right to own property alone as well as in association with others" (Art. 17). "Everyone has the right . . . to seek, receive and impart information and ideas through any media and regardless of frontiers" (Art. 19). "Everyone has the right to take part in the government of his country" (Art. 21). "Everyone, as a member of society, has the right to social security" (Art. 22). "Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection" (Art. 23). "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family" (Art. 25). "Everyone has the right freely to participate in the cultural life of the community" (Art. 27).

Nonetheless, a human rights conception of human dignity and political legitimacy rests on the fact that human beings have an essential, irreducible moral worth and dignity independent of the social groups to which they belong and the social roles that they occupy. We will return to this point in Chapter 3.

3. Interdependence and Indivisibility

The Universal Declaration model treats internationally recognized human rights holistically, as an indivisible structure 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."

During the Cold War, this doctrine was regularly challenged. In particular, the relationship between civil and political rights 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 and political rights. Conversely, many Western (especially Anglo-American) conservatives and philosophers—but, significantly, only the government of the United States—disparaged most economic and social rights.

Such debates have largely receded from international discussions,[9] but their legacy remains in the persistence of the categories of civil and political and economic, social, and cultural rights. We should also note that in some Western circles a lingering suspicion of economic and social rights persists.[10] This is particularly true in the United States, where skepticism persists across much of the mainstream political spectrum.

A. THE STATUS OF ECONOMIC AND SOCIAL RIGHTS

In international discussions it has become almost a reflex to talk of "civil and political rights" and "economic, social, and cultural rights." Although I too occasionally use these categories, they are seriously misleading. A dichotomous

9. For example, as of October 22, 2001, only ten states were party to just one of the Covenants (and five of those had signed but not yet ratified the other). One hundred forty states were parties to both (and an additional four had signed but not yet ratified both). http://www.unhchr.ch/pdf/report.pdf.

10. The continuing policy relevance of the debate is suggested by a recent issue of *The Economist* (August 18–24, 2001), which devotes its cover, the principal leader, and a three-page Special Report to the status of economic and social rights. Given that newspaper's position on the right of the European political spectrum, it is of some significance that the leader accepts (with only moderate reluctance) the reality of economic and social human rights—although it does question the practicality of implementing many and claims that "the moral imperative to stop poverty or disease is . . . not as convincing as the moral imperative to stop torture" (2001: 19).

division of any complex reality is likely to be crude and easily (mis)read to suggest that the two categories are antithetical. This is especially true because the dichotomy between civil and political rights and economic, social, and cultural rights was born of political controversy, first in working-class political struggles in the nineteenth and early twentieth centuries and then in Cold War ideological rivalry. But the argument against economic and social rights has also been philosophical, not merely political or polemical.

Maurice Cranston offers the most widely cited argument that whereas traditional civil and political rights to life, liberty, and property are "universal, paramount, categorical moral rights" (1964: 40), economic and social rights "belong to a different logical category" (1964: 54)—that is, they are not truly human rights.[11] As Chapter 1 suggests, I accept universality and paramountcy as central indicators of rights that might appropriately be considered human rights. But Cranston is simply wrong that internationally recognized economic, social, and cultural rights fail to meet these tests.

Cranston notes that the right to work, like many other economic and social rights, refers directly to a particular class of people rather than all human beings (1973: 67). Many civil and political rights, though, also fail such a test of universality. For example, only citizens who have attained a certain age and completed any necessary formalities of registration have the right to vote.

As for (lack of) paramountcy, Cranston singles out the right to periodic holidays with pay (1973: 66–67). But is such a right any less important than, say, the right of juveniles to separate prison facilities, a right recognized in the International Covenant on Civil and Political Rights? Questions concerning paramountcy arise in both cases because the right in question has been specified in rather detailed terms (compare §6.4). In the case of paid holidays, the full right recognized is a right to "rest, leisure, and reasonable limitation of working hours and periodic holidays with pay." Denial of this right would indeed be a serious affront to human dignity; it was, for example, one of the most oppressive features of unregulated nineteenth century capitalism.

In any case, the right to periodic holidays with pay is hardly the typical economic and social right. For example, the right to work is arguably as important as most basic civil and political rights; the psychological, physical, and moral effects of prolonged enforced unemployment may be as severe as those associated with denial of, say, freedom of speech. A right to education may be as essential to a life of dignity as freedom of speech or religion. (Economic and social) rights to food and health care may be as essential for protecting life as the (civil or political) right to life.

Cranston's appeal to (im)practicality is more complex. "'Political rights' can be readily secured by legislation.[12] The economic and social rights can rarely, if ever, be secured by legislation alone" (1964: 37). In fact, however, no right can be reliably realized through legislation alone. Unless legislation is backed by enforcement, the right is likely to be legally and politically insecure.

"There is nothing essentially difficult about transforming political and civil rights into positive rights," whereas realizing economic and social rights is "utterly impossible" in most countries (Cranston 1973: 66). "To guarantee civil and political rights is relatively cheap, whereas to guarantee economic and social rights is potentially enormously costly" (Economist 2001: 20). Both sides of such claims are problematic.

There are in fact severe impediments to establishing an effective positive right to, say, freedom of speech, press, or assembly in North Korea, Liberia, Cuba, China, or Burma. Only in particular kinds of political circumstances—for example, where there has already been considerable progress in implementing many internationally recognized human rights—are civil and political rights likely to be systematically easier to implement. Even then, the differences are more matters of degree than kind. And they vary considerably from right to right and with time and place.

If we insist on the standards of, say, Sweden, it may not be false to say that realizing most economic and social rights is "impossible" in most countries. But Northern European standards for civil and political rights would be nearly as "impossible." Resource shortages, as even the most conservative international financial institutions have come to understand, usually are largely attributable to poor governance. The problems to which Cranston points are matters of *political* economy, not natural scarcity.

Because rights impose correlative duties and, as the old moral maxim puts it, "ought implies can"—no one has an obligation to attempt what is truly impossible—Cranston argues that it is logically incoherent to hold that economic and social "rights" are anything more than utopian aspirations (1973: 68). The "can" in "ought implies can," however, refers to physical impossibility; unless it is physically impossible, one may still be obliged to try to do something that proves to be "impossible." The impediments to implementing most economic and social rights, however, are political. For example, there is more than enough food in the world to feed everyone; widespread hunger and malnutrition exist not because of a physical shortage of food but because of political decisions about its distribution.[13]

This leaves Cranston with little more than an argument that civil and polit-

11. Cranston goes so far as to claim that such rights "[do] not make sense," and he suggests that claims of such rights probably are not even "intelligible" (1973: 65, 69).

12. He even claims that civil and political rights "generally . . . can be secured by fairly simple legislation" (1973: 66).

13. In fact, over the past half century famines have occurred only in places where there was enough food for everyone within the borders of the famine-stricken country (Sen 1981; Dreze and Sen 1990).

ical rights are relatively easy to implement. Hugo Adam Bedau advances a similar "argument from indifference to economic contingencies" (1979: 36–37). Even granting such empirically dubious claims, I cannot see why ease or expense of implementation should have any conceptual or moral significance. It seems odd to me to suggest that something is a real human right only if it is relatively easy to implement. Ease of implementation is certainly irrelevant to determining moral paramountcy.

B. "POSITIVE" AND "NEGATIVE" RIGHTS

Underlying many criticisms of economic and social rights is the distinction between "negative" rights, which require only forbearance on the part of others, and "positive" rights, which require others to provide goods, services, or opportunities. Henry Shue (1979; 1980), however, has shown that this distinction is of little moral significance and in any case fails to correspond to the distinction between civil and political rights and economic and social rights.

The right to protection against torture is usually advanced as the archetypal negative right: it requires "nothing more" than that the state refrain from incursions on personal liberty and bodily integrity. But protecting people against torture always requires positive endeavors by the state. Guaranteeing this "negative" right as a practical political matter requires major "positive" programs to train, supervise, and control the police and security forces. In many countries this would be not only extremely expensive but also politically "impossible" (without changing the regime).

Conversely, in some circumstances government restraint may be the key to realizing the positive-sounding right to food. Consider government development programs that in numerous Third World countries have encouraged producing cash crops for export rather than traditional food crops for local consumption. In such cases, the right to food would have been better realized if the government had done "nothing more" than refrain from interfering with agricultural incentives (compare Shue 1980: 41–45).

All human rights require both positive action and restraint on the part of the state.[14] Furthermore, whether a right is relatively positive or negative usually depends on historically contingent circumstances. For example, the right to food is more of a negative right in the wheat fields of Kansas than in Watts or East Los Angeles. Equal protection of the law is somewhat more positive in the South Bronx than in Stockholm. In Argentina, protection against torture was a very positive right indeed in the late 1970s. Today it is a much more negative right.

14. Shue (1980: 52–60) usefully distinguishes duties to avoid depriving, duties to protect from deprivation, and duties to aid the deprived. Most rights demand all three kinds of duties in at least some circumstances.

Even if all civil and political rights were entirely negative, though, they would not therefore deserve priority. Cranston (1964: 38) and Bedau (1979: 38) suggest that "negative" civil and political rights deserve priority because their violation involves the direct infliction of injury (an act of commission), whereas violating "positive" economic and social rights usually involves only the failure to confer a benefit (an act of omission). Even accepting this (false) description of the rights, Shue shows that often there is little moral difference.

Imagine a man stranded on an out-of-the-way desert island with neither food nor water. A sailor from a passing ship comes ashore but leaves the man to die. This act of omission is as serious a violation of human rights as strangling him, an act of commission. It is killing him, plain and simple—indirectly through "inaction" but just as surely, and perhaps even more cruelly (Shue 1979: 72–75). The moral difference lies not in the essential character of the acts per se but in contingent, empirical circumstances. In each case, culpable killing occurs.

C. THE RIGHT TO PROPERTY

Finally, we can note that most critics of economic and social rights do not in fact reject all such rights. Quite the contrary, almost all accept a right to private property.

For example, Cranston, like Locke, offers a list of exactly three basic human rights, to life, liberty, and property ("estates" in Locke's older terminology).[15] But Cranston never thinks to challenge the status of the (economic) human right to private property.[16] Quite the contrary, he concludes his property chapter by insisting that property "is inseparable from liberty" (1973: 50).[17]

Advocates of such a view face the insurmountable task of providing a plausible theoretical ground that yields precisely this one economic right. For example, property is often defended because it provides needed resources and space for the effective exercise of liberty. A right to work, however, seems at least as plausible a way to ensure resources for every person, given what we know about the tendency of private property to be very unevenly distributed and readily alienated in most legal systems.

This is not to criticize a limited right to property. Such a right can make an

15. From a more explicitly libertarian perspective, Tibor Machan devotes considerable effort to arguing for "the nonexistence of basic welfare rights" (Machan [1989: 100–123, 193–205]) while giving centrality of place in his scheme to the right to property. Compare Boaz (1997: 60–68).

16. This suggests that he, quite bizarrely, considers it a civil or political right. Compare Machan (1999: 4, 86). This is occasionally even argued explicitly (e.g., Yates [1995: 123]; Hernandez-Truyol [1996–1997: 224]). But if private property is not an economic right—and an often extravagant one at that—it is hard to imagine what is.

17. Even if true, this is largely irrelevant. Enough food to remain alive and guaranteed rest and leisure are also inseparable from liberty, but Cranston denies human rights to these things. That *a* is essential to the enjoyment of *x*, to which we have a human right, does not make *a* a human right.

important contribution to a life of dignity. But this single economic right alone simply cannot provide economic security and autonomy for all. In fact, for many people—in the Western world, most people, whose principal "property" is their labor power or skills—other economic and social rights would seem to be a better mechanism to realize economic security and autonomy.

D. TRANSCENDING THE DICHOTOMY

The conventional dichotomy also obscures the immense diversity within each of its two classes. Consider the great variety of rights in the category of civil and political rights. Rights to life, protection against discrimination, prohibition of slavery, recognition before the law, protection against torture, and nationality provide bodily, legal, and moral integrity to individuals. Rights to habeas corpus, protection against arbitrary arrest and detention, the presumption of innocence, and protection against ex post facto laws provide procedural guarantees for individuals in their dealings with the legal and political system, and especially the criminal law. The rights to freedom of thought, conscience, speech, press, association, and assembly define both a private sphere of conscience and belief and a public space in which these "private" issues, as well as public concerns, can be freely discussed, criticized, and advocated. The right to popular participation in government, and many public aspects of civil liberties such as the freedoms of speech, press, and assembly, empower citizens to participate in politics and exercise some control over the state.

Economic, social, and cultural rights are no less varied. The rights to food and access to health care provide survival and minimal physical security against disease or injury. Rights to social security, work, rest and leisure, and trade unions reflect not only the material necessity of labor but also the fact that meaningful work is in itself highly satisfying and can be central to personal dignity and development. The rights to education, to found and maintain a family, and to participate in the cultural life of the community provide social and cultural membership and participation.

In fact, affinities are often as striking across as within the conventional categories. The right to work, for example, is a right to economic participation that is instrumentally and intrinsically valuable in ways very much like the right to political participation. Cultural rights are perhaps most closely related to individual civil liberties, given the integral place of religion, public speech, and the mass media in the cultural life of most communities. The social or cultural right to education is intimately connected with the civil or political rights to freedom of speech, belief, and opinion, and so forth.

Abandoning the conventional dichotomy can give us a clearer picture of the nature and range of human rights and allow us to see much more clearly their manifold interrelationships.[18] Our lives—and the rights we need to live them

18. For one alternative typology, see Donnelly and Howard (1988).

with dignity—do not fall into largely separate political and socioeconomic spheres. Economic and social rights usually are violated by or with the collusion of elite-controlled political mechanisms of exclusion and domination. Poverty in the midst of plenty is a political phenomenon. Civil and political rights are often violated to protect economic privilege. We must think about, and categorize, human rights in ways that highlight rather than obscure such social realities.

In particular, we must overcome the dangerous illusion—shared by conservative critics of economic and social rights, radical critics of civil and political rights, and authoritarian regimes of various types—that the state can be a neutral instrument of technocratic management and an impartial arbiter of politically neutral rules of social order. Those who wield political power often do not rise above their personal, group, party, or class interests. Rarely do they exercise their power completely uninfluenced by such affiliations.

How one thinks about human rights does not and cannot determine political practice. Nonetheless, certain ways of thinking, such as about the traditional dichotomy, can help to support widely prevalent patterns of human rights violations. In every country where ruling elites have been able to enforce such a dichotomization of human rights, the consequence has been the systematic violation of a wide range of internationally recognized human rights.[19] Conversely, well-conceived theory, even at the very basic level of classificatory schemes, can aid in the struggle for greater respect for human rights.

The careful reader will note that this section has not directly defended the interdependence and indivisibility of the rights recognized in the Universal Declaration. (Section 3.4 begins to make such an argument, which is pursued further in the discussions of cultural relativism in Part II.) By undermining the conventional dichotomy between civil and political rights and economic, social, and cultural rights, however, it has addressed one of the principal philosophical and political challenges posed to this central element of the Universal Declaration model.

4. The State and International Human Rights

If human rights are held universally—that is, equally and by all—one might imagine that they hold (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 international understanding (compare §4.10).

19. As an American, I want to note explicitly that this includes the United States, where economic and social rights are systematically violated in significant measure because they still are seen as not really matters of rights (entitlement) but as considerations of justice, charity, or utility.

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 international practice means "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).

Human rights norms have been largely internationalized. Their implementation, however, remains almost exclusively national. As we will see in Chapter 8, 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 regime, the supervisory organs of the European Court of Human Rights regulate 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 to protect foreign nationals abroad from, for example, torture. They are not even at liberty to use more than persuasive means on behalf of, for example, foreign victims of torture. Current norms of state sovereignty still prohibit states from acting coercively abroad against torture and virtually all other violations of human rights.[20]

This focus on state-citizen relations is also embedded in our ordinary language. The human rights of a person who is beaten by the police have been violated, but it is an ordinary crime, not a human rights violation, to receive an otherwise identical beating at the hands of a thief or an irascible neighbor. Internationally, we distinguish human rights violations from war crimes. Even when comparable suffering is inflicted on innocent civilians, we draw a sharp categorical distinction based on whether the perpetrator is (an agent of) one's own government or a foreign state.

Although neither necessary nor inevitable, this state-centric conception of

20. Genocide seems to be emerging as an exception. See Chapter 14.

human rights has deep historical roots. The idea of human rights received its first mature expression in, and remains deeply enmeshed with, liberal social contract theory, the only major tradition of political theory that assumes that individuals are endowed with equal and inalienable rights. And the contractarian notion of the state as an instrument for the protection, implementation, and effective realization of natural rights is strikingly similar to the conception of the state in international human rights instruments. Both measure the legitimacy of the state largely by its performance in implementing human rights.

The restriction of international human rights obligations to nationals, residents, and visitors also reflects the central role of the sovereign state in modern politics. Since at least the sixteenth century, 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, working men, 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 such as 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 beyond 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.).

Precisely because of its political dominance in the contemporary world, however, the state is the central institution available for effectively implement-

ing internationally recognized human rights. "Failed states" such as Somalia suggest that one of the few things as frightening in the contemporary world 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, and opportunities.

This more positive human rights vision of the state also goes back to seventeenth and eighteenth century social contract theories. Contractarians such as Locke, Kant, and Paine emphasized that the rights one possesses naturally, simply as a human being, could not be enjoyed in a state of nature. Society and government are essential to the enjoyment of natural or human rights. In fact, within the contractarian tradition the legitimacy of a state 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 inclusion among those whose rights are protected by the state. 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 ensure enjoyment of these rights.

A positive role for the state, however, is no less central to civil and political rights. The effective implementation of the right to nondiscrimination, for example, 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. And free, fair, and open elections do not happen through state restraint and inaction. The state must not merely refrain from certain harmful actions but create a political environment that fosters the development of active, engaged, autonomous citizens.

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 include protecting individuals against abuses by other individuals and private groups. The "classic" 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 in the contemporary world the principal institution we rely on to tame 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 two decades in Latin America, Central and Eastern Europe, Africa, and Asia (although not [yet?] in most of the Middle East).

Most of the alternatives to human rights treat people as objects rather than as agents, beneficiaries but not 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 a right 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. Or, to use the language that I develop in Chapter 3, they fail to treat citizens with equal concern and respect. This requirement is the substantive core of the Universal Declaration model.