Universal Human Rights in Theory and Practice

2d Edition

Jack Donnelly

CORNELL UNIVERSITY PRESS
ITHACA AND LONDON

First published 2003 by Cornell University Press
First printing, Cornell Paperbacks, 2003

Printed in the United States of America

Library of Congress Cataloging-in-Publication Data

Donnelly, Jack.
Universal human rights in theory and practice / Jack Donnelly. — 2nd ed.
p. cm.
Includes bibliographical references and index.
ISBN 0-8014-4013-0 (cloth : alk. paper) — ISBN 0-8014-8776-5 (pbk. : alk. paper)
1. Civil rights. 2. Human rights. 3. Cultural relativism. I. Ttile.
JC571 .D755 2002
323—dc21

2002006707

Cornell University Press strives to use environmentally responsible suppliers and materials to the fullest extent possible in the publishing of its books. Such materials include vegetable-based, low-VOC inks, and acid-free papers that are recycled, totally chlorine-free, or partly composed of nonwood fibers. For further information, visit our website at www.cornellpress.cornell.edu.

Cloth printing 10 9 8 7 6 5 4 3 2 1
Paper printing 10 9 8 7 6 5 4

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).