The Philosophical Foundations of Human Rights
Author(s): Michael Freeman
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The Philosophical Foundations of Human Rights

Michael Freeman

1. THE PROBLEM OF PHILOSOPHICAL FOUNDATIONS

The concept of human rights raises problems that are, on the one hand, practical and urgent, and, on the other hand, theoretical and abstract. For human rights proponents and academics whose work is oriented towards activism, the concept connotes the prevention of political murders, "disappearances," torture, and unjust imprisonment. The concept of human rights also raises theoretical issues about the requirements of legitimate government and the nature of the good life. It is widely recognized that these two dimensions of human rights work exist and should, in principle, be integrated with one another. This integration, however, can prove difficult in practice. For activists, the pressure of rescuing fellow human-beings from actual and imminent injustice relegates theoretical questions to a low priority. Those who look to philosophers and political theorists for assistance may be disappointed, for the theoretical disputation is inconclusive. Thus, there is a gap between human rights activism and theory.

The gap between human rights activism and theory can be bridged by consensus. If all, or most, relevant persons agree upon the principles and practice of human rights, activism can proceed without much concern for fundamental theory. Jack Donnelly has attempted to build a bridge of consensus between human rights activism and theory. He has maintained that human rights in the contemporary world are universal in the sense that they are "almost universally accepted—at least in word, or as ideal standards." There is, in his view, not only a consensus that human rights exist, but also an enumeration of rights in international law. He admits that he cannot defend a particular list of rights with direct philosophical arguments, but maintains that the actual consensus makes this problem unimportant. Donnelly maintains that we can go a long way in dealing with

most of the dominant, contemporary, theoretical, and practical controversies "before issues of philosophical anthropology intrude decisively."

Strong forms of cultural relativism raise issues of philosophical anthropology. The doctrine of human rights, for example, rests upon a certain conception of the "human being." Some cultures may not understand the concept "human being," or, if they do, may not attach any moral significance to it. The domain of morality may be shaped by a system of social stratification and by the boundaries of the community. However, Donnelly claims that such views are "almost universally rejected in the contemporary world." For example, moral distinctions between insiders and outsiders have been "seriously eroded" by a great increase in individual mobility and by "at least [an] aspirational commitment to the idea of a universal human moral community." There is a striking cross-cultural consensus on many of the values that human rights activism seeks to protect. Donnelly concedes that, logically, cross-cultural consensus does not entail any additional force for a moral rule. He responds to this difficulty, however, by maintaining that "most people" believe that such consensus adds force to the rule, so that radical relativism, "although logically impeccable," is "in an important sense" morally defective. If a practice is nearly universal and generally perceived as obligatory, that practice is "required of all members of the community." Verbal acceptance of human rights by most states is a prima facie indication that the underlying moral vision is attractive.[1]

Donnelly's approach has three weaknesses. First, Donnelly concedes that the cultural-relativist objection to universal human rights is "logically impeccable." Second, he moves from consensus to moral obligation on the communitarian ground that the moral beliefs of large majorities are binding on dissenting minorities. This is inconsistent with the view usually held by human rights theorists, and accepted by Donnelly, that individuals and minorities are not necessarily obliged to conform to the values of majorities. If Donnelly were to argue that this consensus is binding because it is a consensus for human rights, he would have to provide a reason for allowing it to override the logic of cultural relativism. Donnelly does offer a critique of cultural relativism, but fails to show why consensus, as such, should override its supposedly impeccable logic.

The third weakness of Donnelly's argument lies in the qualifications he appends to his claim about consensus. Human rights are "almost" universally accepted, "at least in word," or "as ideal standards." International human rights law is "widely" accepted as "more or less" binding. The

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1.   Jack Donnelly, Universal Human Rights in Theory and Practice 1, 23–27, 112–14 (1989).

concept of a universal human moral community is "at least [an] aspirational commitment." A strong commitment to human rights is almost universally proclaimed "even where practice throws that commitment into question." In response to the argument that consensus exists only on a limited set of "basic" rights, Donnelly does not reaffirm the supposed wider consensus, but expresses his disappointment at the extent of contemporary human rights violations. Consequently, the practical consensus on human rights is "often very shallow—merely verbal." Rights discourse has no point except when rights are threatened or denied.[2] Based on this view, claims for rights presuppose some failure in consensus. The consensus argument is, there-fore, both empirically and logically weak. Indeed, it is the weakness of the practical consensus that legitimates the appeal to the theoretical consensus.

Other philosophers and political theorists deal with the problems presented by Donnelly in differing ways. James Nickel has more forcefully stated that there are practical and theoretical problems for human rights. It is very doubtful, he believes, that "there is sufficient agreement worldwide to support anything like the full range of rights declared in contemporary manifestos." All moralities may seek to protect certain fundamental interests such as personal security by prohibiting, for example, murder and rape. Not all moralities, however, condemn racial discrimination or respect freedom of conscience.[3] Underlying the supposed consensus on which Donnelly relies, are those "decisive" issues of philosophical anthropology. There is certainly no consensus on these decisive issues. Human rights activists might be able to ignore the disagreement among philosophers, if the philosophical doubts about universal human rights were not available to violators of human rights. Loren Lomasky has argued that there may be a consensus on rights without a consensus on their theoretical foundations, and the former may be attainable while the latter may not be. Richard Rorty has maintained that the human rights cause needs passion and courage, not reason and theory.[4] However, rights without reasons are vulnerable to denial and abuse. The human rights struggle is certainly motivated by passion, but it is also influenced by argument. Evading the task of finding the best grounding for human rights, in the face of philosophical skeptics and political opponents, demonstrates a lack of intellectual responsibility. Donnelly himself is dissatisfied with the state of human rights theory. He

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2. *Id.* at 10–11, 13–14, 23–24, 42, 113.
3. JAMES W. NICKEL, MAKING SENSE OF HUMAN RIGHTS: PHILOSOPHICAL REFLECTIONS ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 39 (1987).
4. 7 LOREN E. LOMASKY, PERSONS, RIGHTS AND THE MORAL COMMUNITY 13 (1987); RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 63, n.21 (1989); *see generally* Richard Rorty, *Human Rights, Rationality, and Sentimentality, in* ON HUMAN RIGHTS (Stephen Shute & Susan Hurley eds., 1993).

believes that direct philosophical defenses of particular lists of human rights are unconvincing. Currently, there is no adequate theory of human rights, and there is a need for greater theoretical rigor.[5]

Impediments to human rights activism may be theoretical as well as practical. One familiar obstacle for human rights activists is the doctrine of state sovereignty. When governments are accused of human rights violations, they typically assert that their critics are interfering in the internal affairs of the society concerned. This counterclaim rests upon the doctrine of state sovereignty which international law adopted from political theory. The counterclaim may not be well-founded in international law, because human rights are now widely considered a legitimate international concern. Nonetheless, the doctrine of state sovereignty raises the practical problem of persuading governments to improve their human rights performance. This endeavor likewise leads to a theoretical question about doctrinal force of state sovereignty.

Other examples might be cited to demonstrate that the obstacles to human rights activism may be both theoretical and practical. Since the end of the Cold War there has been an increased salience of ethnic and nationalist conflicts and the question of minority rights has once again dominated the international agenda. In the face of human rights disasters, such as the collapse of Yugoslavia, the need to protect minority rights is clear. Nonetheless, the modern theoretical tradition of human rights remains strongly individualistic. Some theorists argue that all collective rights, including minority rights, must be reducible to individual rights. Others argue for a distinct set of group rights. This dispute immediately raises the theoretical question of who can have human rights. Such an analysis in turn raises ontological questions of which relevant entities exist, what properties they have, and which properties are necessary and sufficient conditions for having human rights.[6]

Another example of the practical and theoretical obstacles to human rights activism concerns cultural relativism. Although governments accused of human rights violations most often resort to the legal doctrine of state sovereignty to deny the legitimacy of external criticism, this defense is commonly bolstered by some form of cultural relativism. Cultural relativism underlies the assertion that external agents should not interfere with the internal affairs of nation-states on grounds of sovereignty. The philosophy of cultural relativism further asserts that outsiders are not competent to solve

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5. DONNELLY, *supra* note 1, at 44–45.
6. The individualist position is strongly argued by Donnelly. *See supra* note 1, at 143–60. For an alternative, more collectivist view, see Ronald R. Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001–75 (1983).

problems that are internal to another culture. This allegation is often raised in support of the argument that a particular interpretation of human rights, or even the basic notion of human rights, may be alien to a particular culture. Such a culture, continues the argument, should not be judged by standards derived from external sources. This extreme version of cultural relativism exceeds the boundaries of international law. Human rights activists commonly appeal to international law to refute such relativist objections. But international law is not a decisive foundation for the determined cultural relativist. After all, the doctrine of human rights can itself be used to challenge positive law. Faced with a moral objection to international law, the human rights advocate should respond with a moral argument. Underlying the conflict between moral universalism and cultural relativism is the same issue of moral ontology raised by the question of minority rights. The standard liberal argument for human rights is based upon both individualism and universalism, while the argument for cultural relativism typically assigns moral status to some collective entity such as "culture" or "community." The question then raised is whether the doctrine of human rights is "Western," not only as a matter of contingent historical fact, but also in the doctrine's individualistic, ontological implications.[7]

Therefore, practical problems may rest on theoretical difficulties, and these difficulties may be rooted in fundamental philosophical differences. The temptation is to develop a division of labor among human rights workers and invite philosophers to elucidate "the philosophical foundations" of human rights.[8] Some philosophers deny, however, the possibility of there being such foundations. Rorty, for example, has argued that the quest for secure philosophical foundations of human rights practice, found above all in the Kantian tradition, is philosophically doomed to fail and is practically useless.[9] To avoid the charge of moral imperialism, human rights advocates must vindicate the philosophical correctness of their position. To this end, human rights advocates may seek to excavate the foundations of their beliefs, but the philosophical foundations they long for may be chimerical.

A number of arguments can be made against the assertion that human rights advocacy rests upon secure theoretical foundations. It may be argued, for example, that the doctrine of human rights lacks a theoretical foundation because no doctrine can have a theoretical foundation. If a doctrine D is justified by a supposed foundation F, it is logically possible to call for a

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7.   DONNELLY, *supra* note 1, at 63–65.
8.   UNITED NATIONS EDUCATIONAL, SCIENTIFIC, AND CULTURAL ORGANIZATION, PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS 41–43 (1986).
9.   *See generally*, Rorty, *Human Rights, supra* note 4.

justification of F. Such a call presents the foundationalist with a dilemma. The foundationalist may justify F by reference to something more funda- mental (MF). This justification of F creates two problems. Firstly, the foundationalist is conceding that F was not a foundation after all. Secondly, MF is vulnerable to the same challenge, as will be any principles used to justify MF. The foundationalist faces a path of infinite regress. Alternatively, the foundationalist may insist that F is a foundational principle and therefore cannot be justified by anything else. In this case, the foundationalist justifies D by reference to F, but concedes that F is not justifiable. F is a foundation for D, but not a secure, well-justified foundation. A foundationalist theory, not based on a secure foundation, appears dogmatic. The dilemma for the foundationalist then is whether to disappear down a road of infinite regress or to stand firm on a dogma.

The anti-foundationalist argument may ultimately prove too much, in that it may attack the possibility of foundations for all beliefs whatsoever. According to foundationalists, human rights doctrine is no more threatened than the most well-founded beliefs we have. The doctrine is secure for practical purposes because we have to act on certain beliefs. In addition, radical anti-foundationalism is a logical weapon that can be turned on itself. If no beliefs are securely founded, anti-foundationalist beliefs themselves are not securely founded. Those whose primary concern is with the practical problems of human rights violations can consign the radical anti- foundationalists to some suitable philosophical ivory tower where they may debate their own paradoxical doctrine.

Another variant of anti-foundationalism consists of undermining par- ticular foundationalist arguments. Foundationalism is sometimes said, for example, to presuppose the false metaphysical doctrine of "essentialism." Ernesto Laclau and Chantal Mouffe, in an analysis of the concept of "oppression," reject the anthropological assumption of "human nature" and of a unified subject with an essence knowable *a priori*, such that every relation of subordination which denies this essence automatically becomes a relation of oppression. In their view, subordination can be constructed as oppression only in terms of a "discursive formation" such as "the rights inherent to every human being."[10] However, the construction of a particular form of subordination—such as slavery—as a violation of human rights, raises the question of how this construction may be justified. Laclau maintains that there can be no answer to such a question prior to belief. The political theorist must presuppose certain beliefs and values. Such beliefs and values are contingent historical facts. Rationalism gives us "humanity"

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10. ERNESTO LACLAU & CHANTAL MOUFFE, HEGEMONY AND SOCIALIST STRATEGY 153–54 (Winston Moore & Paul Commack trans., 1985).

and leaves us with the secondary task of realizing it historically. But "humanity" is "an entity to be constructed." We should, therefore, recognize that the "universality" of our values is a precarious, pragmatic, and non-necessary construction. Laclau claims that this is a renunciation of the rationalistic, epistemological, and ontological foundations of enlightenment values and that it expands the democratic potentialities of that tradition and abandons its totalitarian tendencies.[11]

Laclau's answer does not, however, address the question of the justifiability of human rights. Human rights beliefs and values may be contingent historical facts but this is true of all beliefs and values. Asserting human rights as contingent historical facts does nothing to justify democracy or human rights. "Humanity" may be an idea to be constructed, but this principle cannot distinguish better from worse constructions. Laclau conflates the political precariousness to which all ideas are subject with their rational status, which would determine whether they should be overthrown or defended. The anti-essentialist strategy for the promotion of democracy and human rights is not even pragmatically plausible, for it leaves these doctrines bereft of convincing arguments. Faced with oppressive governments and their cultural relativist apologists, the doctrine that human rights is a precarious historical contingency is a gift to tyrants. Laclau's position is similar to Rorty's because both believe that there are no theoretical foundations for human rights. According to them, our prejudices are all that we have and there is no point in regretting that we lack what we cannot have. Both Rorty and Laclau believe that there is no reason not to fight for our beliefs; nonetheless, in their view, there is no strong reason to do so.

There are other arguments against foundationalism. Foundational concepts may be thought to be "essentially contested": not only are they constantly challenged, but there is furthermore no logical method for resolving disputes conclusively.[12] Foundational concepts may be culturally "relative."[13] Foundational concepts may also have an inherently unstable meaning. Modern human rights theory began with John Locke's claim that we have certain natural rights because we have been made by God to last during his, not our own pleasure.[14] The United Nations, in proclaiming its Universal Declaration of Human Rights, did not, however, refer to God,

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11. ERNESTO LACLAU, NEW REFLECTIONS ON THE REVOLUTION OF OUR TIME 83 (1990).
12. W.B. Gallie, *Essentially Contested Concepts, in* 56 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 167–98 (A.A. Kassman ed., 1956).
13. For a discussion of cultural relativism in relation to human rights, see DONNELLY, *supra* note 1, at 109–24.
14. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT ¶ 6 (Thomas P. Peardon ed., The Liberal Arts Press, Inc., 1952) (1690).

presumably because "God" had become an essentially contested concept. Anti-foundationalism proceeds, at least in part, on the premise of the death of God. A further project of anti-foundationalism is to disallow God-substitutes, such as Reason, Nature, etc. The difficulty facing human rights theorists is that they have three options: 1) to favor foundationalism and seek to derive human rights from God or a God-substitute; 2) to accept the anti-foundationalist case and expose the concept of human rights to the vagaries of contingency; or 3) to find a third way. None of these options promises to provide a convincing justificatory argument.

The anti-foundationalist approach to human rights does not reject the validity of the human rights doctrine, but only the claim that its validity has a foundation deeper than the beliefs and values of human rights supporters. An entirely different argument is the assertion that human rights doctrine is not simply "contingent" or "relative" but false. The contrast between these two arguments is illustrated by the differing theories of Richard Rorty and Alasdair MacIntyre. Rorty objects to attempts to provide human rights with theoretical foundations on the grounds that no such foundations can be "absolutely" or "objectively" true. According to Rorty, "truth" is based on perspectives and there is no super-perspective to justify one perspective over another. Thus, any supposed theoretical foundation for human rights would be perspective-relative and therefore not "foundational" in the required sense.[15] MacIntyre, in contrast, rejects the very concept of human rights. "The best reason for asserting . . . that there are no [human] rights is indeed of precisely the same type as the best reason which we possess for asserting that there are no witches and the best reason which we possess for asserting that there are no unicorns: every attempt to give good reasons for believing that there are such rights has failed."[16] MacIntyre thus differs from Rorty and Laclau, who reject the possibility of rationalistic foundations for human rights, but nonetheless believe it is possible to give reasons for supporting the human rights struggle. MacIntyre treats the belief in human rights as an ontological error, while Rorty and Laclau treat it as a commitment to norms of conduct derived from contingent values.

The difference between these two approaches is discernable in MacIntyre's critique of Ronald Dworkin's defense of fundamental rights.[17] According to MacIntyre, Dworkin concedes that the existence of human rights cannot be demonstrated and yet insists that it does not follow from the fact that a statement cannot be demonstrated that it is not true. MacIntyre admits that this argument is valid, but maintains that it could also be used to

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15.   RORTY, CONTINGENCY, *supra* note 4, at 27.
16.   ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 69 (1981).
17.   RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81 (1977).

defend assertions about unicorns and witches.[18] MacIntyre, however, confuses Dworkin's argument in two ways. First, Dworkin was not discussing the "existence" of human rights but the legal rights that parties have in "hard cases."[19] Second, Dworkin's solution to this problem could not be used to defend claims about unicorns and witches. Dworkin suggests that the supposition that one side in a hard legal case may be right and the other wrong "is cemented into our habits of thought at a level so deep that we cannot coherently deny that supposition."[20] This argument for right answers in hard cases is related to his argument that individual rights "trump" collective goals.[21] Both individual rights and collective goals are rooted in the deep levels of our habits of thought.

The target of MacIntyre's argument is natural or human rights. Therefore, it is surprising that he ignores Dworkin's account of natural rights. The context in which Dworkin's account is presented is a discussion of Rawls' theory of justice. Dworkin claims that the deep theory behind Rawls' device of "the original position" must be rights-based. It must, he says, be a theory that is based on the concept of rights that are natural, in the sense that they are not the product of legislation, convention, or hypothetical contract. Dworkin admits that the phrase "natural rights" has, for many people, "disqualifying metaphysical associations." Such people believe that "natural rights are supposed to be spectral attributes worn by primitive men like amulets, which they carry into civilization to ward off tyranny."[22] This "spectral" conception resembles MacIntyre's view about what a belief in natural or human rights entails.

In opposition to this "spectral" conception of natural rights, Dworkin proposes a constructive model. The origin of this model is beliefs about justice that we hold because they seem right, not because we have deduced or inferred them from other beliefs. Based on this model, we may believe that slavery is unjust. When we argue about justice, we test theories of justice against these intuitions, as Rawls' technique of "reflective equilibrium" suggests.[23] Dworkin offers two models of this technique. The first, which he calls the "natural" model, asserts that theories of justice describe an objective moral reality. They are not created by men or societies but are rather discovered by them. The second, the "constructive" model, treats intuitions of justice not as clues to the existence of independent principles, but rather as stipulated features of a general theory to be constructed. The

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18. MacIntyre, *supra* note 16, at 70.
19. Dworkin, *supra* note 17, at 81.
20. *Id.* at 290.
21. *Id.* at xi–xii.
22. *Id.* at 176.
23. John Rawls, A Theory of Justice 48–51 (1971).

constructive model does not assume, as the natural model does, that principles of justice have some fixed, objective existence, so that descriptions of these principles must be true or false. It assumes rather that we should fit the particular judgments on which we act into a coherent program of action.[24]

The constructive model of natural rights is then not metaphysically ambitious. It requires only the hypothesis that the best political program within the model treats the protection of certain individual choices as fundamental and not as subordinate to any goal, duty, or combination of these. This requires an ontology no more dubious than any other fundamental concepts would provide. To say that rights are natural is to postulate that rights are not only derived from legislation or social custom, but are also independent grounds for judging legislation and custom. On the constructive model, the assumption that rights are in this sense natural, is an assumption to be examined for its power to unite and explain our political convictions.[25]

The argument of Dworkin is therefore similar to those of Rorty and Laclau. MacIntyre misses his target, and the target he misses is a non-foundationalist defense of rights. Paradoxically, Dworkin's apparently strong defense of fundamental rights is more threatening to the doctrine of human rights than is MacIntyre's attack. Our reasons for believing that individuals have human rights are quite different from the reasons for believing that there are witches or unicorns. Dworkin, however, derives his defense of rights from "our" habits of thought and political convictions and he provides no arguments against the cultural relativist, since he is one himself.[26] Dworkin's use of the phrase "natural rights" for his constructivist model is misleading from both a historical and an ontological point of view. It is more precise to say that Dworkinian rights are constructed rather than natural.

The contemporary human rights doctrine poses a striking paradox. On the one hand, it consists of a well established set of international moral and legal standards. On the other hand, human rights doctrine either is not or cannot be theoretically founded. We have seen that it is not the hostile attack of MacIntyre, but rather the supportive theories of Rorty, Laclau, and Dworkin that call into question the universalist claims of the doctrine. This doctrine is, from their view, practically required but theoretically unfounded. Actions to protect human rights are actions taken on principle, but the principles upon which they proceed lack rational foundation. Rorty and Laclau believe that this problem is insoluble but that this should not inhibit action.

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24.   Dworkin, *supra* note 17, at 157–58.
25.   *Id.* at 176–77.
26.   *Id.* at 168.

However, there are serious practical objections to the plan proposed by Rorty and Laclau. The problem of human rights theory arises primarily from conflict between the moral, legal, and political claims of the doctrine and the actions of governments in violation of the doctrine. Those who violate the doctrine can and often do appeal precisely to the contingent and culturally relative character of moral beliefs. Rorty believes that human rights practice does not require a meta-ethical theory.[27] But his own clear advocacy of human rights action presupposes the meta-ethical theory that we should act according to our own convictions, since we can do nothing else.[28] The problem with anti-foundationalist arguments for human rights is that their meta-ethical theory, which approximates cultural relativism, is the same as that of the opponents of human rights. The problem for human rights theory is that it needs what some of its philosophical friends claim is impossible—a meta-ethical foundation which can "trump" cultural relativism. The task for human rights theory is to inquire whether it has more solid foundations than the theories so far considered can provide.

2. THE GROUNDS OF HUMAN RIGHTS

In arguing for human rights, Donnelly eschews philosophical foundations in favor of de facto international consensus. Donnelly's position is similar to Laclau's because both agree that human rights beliefs and values are historically contingent. Neither the concept of contingency nor that of consensus is theoretically or practically useful for human rights work. Donnelly maintains, however, that the contingency of human rights is consistent with a conception of human rights as universal moral rights.[29] His argument for this thesis merits close attention.

Donnelly does not rely only on the fact of international consensus to support the prescriptions of the human rights doctrine. Donnelly believes that international consensus is morally valid and he defends it without the aid of the philosophical anthropology that both he and Laclau reject. Even though he jettisons this support because he believes it to be unreliable, he cannot quite leave it alone. Human rights, he argues, are based on a conception of human nature, but we should first distinguish two different conceptions of human nature. According to the first conception, human needs define the human nature that gives rise to human rights. This approach is not helpful, he suggests, because the concept of "human needs"

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27.   *See generally* Rorty, *Human Rights, supra* note 4.
28.   *See generally*, RORTY, CONTINGENCY, *supra* note 4.
29.   DONNELLY, *supra* note 1, at 1, 17, 19, 27.

is almost as obscure as that of "human nature." Human needs are obscure because science gives us a very limited set of needs. If we look beyond science, the concept of "needs" assumes a metaphorical or moral meaning, which leads us back to philosophical disputes about human nature. To understand the source of human rights, therefore, we must turn to philosophy.

Donnelly's argument in favor of philosophy is puzzling. Donnelly says that, in the search for the "source" of human rights, what he calls "the pseudo-scientific dodge of needs" does not suffice. But he proposes no argument against the relevance of scientific accounts of human needs to the construction of human rights theory except for the unsubstantiated claim that science gives us a very limited set of needs. He gives no reasons why the set of needs derived from science is not relevant to the concept of human rights, nor does he explain what he means by "pseudo-scientific," nor why an appeal to human needs is a "dodge." Notwithstanding his reluctance to rely on philosophical anthropology, it is to philosophy rather than to human needs that he says we must turn in our quest for the source of human rights.

The source of human rights, Donnelly affirms, is man's moral nature. This is linked only loosely to the human nature defined by scientifically ascertainable needs. Human rights are needed not for life but for a life of dignity, that is, for a life worthy of a human being. Human rights arise from the inherent dignity of the human person. The human nature that grounds human rights is "a moral posit" that is to say, "a moral account of human possibility." The scientific account of human nature sets the bounds of human possibilities. The moral nature that grounds human rights is a social selection from these possibilities. It specifies a level beneath which we may not permit ourselves to fall. Human rights represent a social choice of a particular moral vision of human potentiality, which rests on a particular substantive account of the minimum requirements of a life of dignity. Thus, human nature is a social project as much as it is a presupposition. The human nature underlying human rights combines natural, social, historical, and moral elements.[30]

A philosophically defensible list of human rights, therefore, must be derived from a moral account of human nature, which in turn must be philosophically defended. Donnelly does not offer such a philosophical defense for two reasons—which he does not clearly distinguish between, but which are significantly different. The first is that this is a task beyond his scope. The second is that it would require solutions to the problems of philosophical anthropology, which he apparently finds intractable. What

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30.   See id. at 16–19, 22–23.

Donnelly offers instead is an indirect justification of a list of human rights by showing that it rests on a plausible and attractive account of human nature. He concedes that, if there were competing and contradictory lists of human rights confronting either philosophers or politicians, his inability to defend a particular theory of human nature might be a serious shortcoming. He believes himself fortunate to have been rescued from this philosophical embarrassment by the international consensus on the list of human rights. This consensus is based on a plausible and attractive theory. This argument is, however, circular. The consensus is based on the theory. The theory is not defensible, but, to Donnelly, this is not a defect because there is a consensus. The circularity of this argument is vicious because Donnelly himself admits that both consensus and theory are weak.[31]

Donnelly's difficulties derive from his ambivalent attitude toward philosophical anthropology. Philosophical anthropologies, he says, are more like axioms than theorems; they are starting points that are more assumed, or at best indirectly defended, than they are the results of a philosophical argument. Most philosophical anthropologies do not afford persuasive justification for human rights. Direct philosophical justifications of a particular list of human rights are therefore not likely to be compelling. Donnelly does not support this view of philosophical anthropology with arguments, and consequently his argument is not very plausible. He cites Kant's moral ontology as an example, but does not say why he believes that this was not the result of philosophical argument. It is also puzzling that he objects to some philosophical anthropologies on the grounds that they are indirectly defended, while he himself offers an indirect justification of human rights. His solution to the problems posed by philosophical anthropology is to claim that his account of human rights is compatible with many but not all theories of human nature.

Donnelly's theory is weakened by its inability to defend, directly and in detail, a substantive theory of human nature, which would specify a precise and determinate source of human rights. This failure leaves his theory dangerously abstract and even empty. His theory does not provide a comprehensive philosophical account of human rights, but rather an analytic theory of the concept of human rights. Donnelly's argument is descriptive, not normative. It seeks principally to describe and explain how human rights "as they are usually understood today" actually work in contemporary social relations. This analytical theory explains how a comprehensive philosophical justification for human rights could be accomplished, but provides little substantive guidance for carrying out such a

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31. *See id.* at 21, 23.

justification. This is a shortcoming of Donnelly's theory, but it is "almost unavoidable."[32]

Donnelly does not give a consistent account of his own project and its justification. On one hand, he says that his theory is analytic and not normative. On the other hand, he argues that his inability to defend a particular theory of human nature might be "a serious shortcoming" were it not for an international consensus based on a plausible and attractive theory of human nature. At one point the absence of a theory of human nature is justified on the ground that the project is not normative, but analytic, and here the international consensus is the object of analysis rather than a ground of justification. At another point the consensus plays a justifying role supported by "a plausible and attractive theory of human nature." Donnelly contradicts himself on two central points. First, he denies that his theory is normative but is clearly trying to marshal normative considerations in its favor. Second, he claims that his theory is compatible with many accounts of human nature but also maintains that the international consensus is based on a particular theory of human nature.[33]

Notwithstanding his claim that he need not rely on a particular account of human nature, Donnelly is committed to the view that the source of human rights is man's moral nature. This is linked, albeit "loosely," to what he considers the scientific conception of human nature. This conception of moral-scientific human nature has normative implications as indicated by the fact that Donnelly holds it to be the basis of human rights, which are needed for a life "worthy of a human being." The ground of human rights is a conception of human nature which postulates that dignity is inherent in the human person. This postulation is a social choice. It is a particular substantive account of the minimum requirements of a life of dignity. Donnelly clearly relies on a particular conception of human nature, despite his own explicit denials, but the status of this conception is less clear. Is this conception an analytical and descriptive account of the ground of the contemporary concept of human rights? Or is it a conception that Donnelly not only describes but also endorses as "plausible and attractive"? If the former, Donnelly does not normatively justify the concept of human rights. If the latter, his normative theory rests on a postulation of inherent dignity that is neither justified nor explained.

Donnelly's approach to the theory of human rights is vulnerable to the criticism that Charles Taylor has made of all moral philosophies that descend from the radical Enlightenment. Taylor maintains that high standards need strong sources because if the sources are unknowable, then the

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32. See generally, id. at 21–23.
33. Id. at 23.

resultant philosophy is self-concealing and parasitic. The philosophy is parasitic because it relies on its adversaries for its own moral force and on those previous accounts of the good which it calls into question but cannot replace.[34] Donnelly bases his conception of human rights on the "moral posit" of the dignity inherent in the human person, while refusing to acknowledge any particular account of human nature. The consensus to which he appeals has no moral force unless this posit has moral force. Donnelly tells us that the moral posit is plausible and attractive, but he does not tell us why. Without a supporting account of human nature, Donnelly is incapable of explaining the attraction.

Donnelly believes that the concept of human rights and any list of human rights are historically specific and contingent. Conceptions of human rights change because conceptions of human dignity, of the subjects of human rights, and of the threats to human dignity, all change.[35] Alan Gewirth, by contrast, holds that human rights are based not on contingent values but on necessary truths. He derives this thesis from his conception of morality. Different moral precepts, he argues, require different and specific modes of action. All moral precepts, however, presuppose that the intent of the persons who advance them is to guide the persons to whom they are directed to act according to the precepts. Thus, all moral precepts deal directly or indirectly with how people ought to act. Morality presupposes that those to whom its precepts are addressed can control their actions through their own choices. Moral people can attempt to achieve the ends prescribed by such precepts or they can intentionally refrain from complying with the precepts. From this it follows that action, in the sense that it is relevant to moral precepts, has two invariant, interrelated generic features: voluntariness or freedom, and purposiveness or intentionality. Action provides the necessary content of all morality and the generic features of action give content to action. Morality, therefore, has a necessary content, which is to be found in action and its generic features.[36]

Action is defined, in the context of morality, as purposive and voluntary. Thus, agents necessarily regard their purposes as good. Agents must value not only their purposes but also the generic features of action, for they regard as good that which is necessary to successful purposive action. People act for different purposes, but the generic requisites for successful purposive action are universal. Action is a means of attaining something the agent regards as good. The agent regards as a necessary good the voluntariness or freedom that is a necessary feature of action, for without this, the agent would not be able to act for any purpose or good at all.

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34. CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY 339, 516 (1989).
35. DONNELLY, *supra* note 1, at 1, 14, 17, 26–27.
36. ALAN GEWIRTH, REASON AND MORALITY 25, 26–27 (1978).

The thesis that agents regard their freedom as a necessary good is not contradicted by the fact that some people reject their ability to make choices by placing themselves under the control of some individual or collective authority. Such persons remain agents so long as they control their actions and they regard this control as good insofar as it is necessary to achieve their ends. They are agents at the point at which they give up this control and they are potential agents so long as they can resume control of their actions. However, if they surrender control of their actions permanently, they cease to be agents and therefore subjects of morality. Gewirth believes such cases are pathological because, empirically, they generally occur when a person's ability to obtain the minimal necessities required for agency is so severely threatened that the surrender of freedom is preferred. Such a threat may arise either from adverse social conditions or from individual life histories marked by insecurity and dependence. Thus, it remains true that agents value their freedom as a necessary good so long as the possibility of successful purposive action remains.[37]

Agents value their generic purposiveness as a necessary good. It follows that agents regard as good those basic conditions of their well-being that are proximate and necessary to the performance of their actions. These basic goods comprise certain physical and psychological dispositions ranging from life and physical integrity to mental equilibrium and a feeling of confidence. The general capabilities of action are necessary goods for all purposive agents.[38]

Freedom and well-being are therefore necessary goods for all agents. These goods do not serve all particular purposes, but they are necessary for a life of purposive agency. It logically follows, Gewirth maintains, that agents believe that they have rights to these goods. Agents must claim, against all other agents, the right of noninterference with their freedom and well-being by virtue of its being required for all their purposive actions. Such a claim to one's rights is implicit in agency itself because to be an agent is to will certain ends. To will certain ends entails the freedom and well-being to attempt attainment of those ends. To will such freedom and well-being is to will that others not interfere with them. To have such a will is to claim the right to freedom and well-being against others. The grounds to which agents appeal, in order to justify their having the rights to freedom and well-being, are not moral because they do not refer to the most important interests of other persons. The grounds agents use to justify their rights are prudential because there are agency needs for those who claim rights. Though prudential, the claim is not necessarily egoistic, because the reasons for which freedom and well-being are demanded may be altruistic.

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37. *Id.* at 41, 52–53.
38. *Id.* at 53–54, 56, 59–60.

Gewirth claims, contrary to the views of MacIntyre and Donnelly, that the concept of rights is not modern. All societies recognize the rights of some persons, though not all societies recognize that all persons have equal rights. Even in societies in which effective rights are denied to some persons, all actual or prospective agents necessarily make implicit claims to prudential rights to freedom and well-being. Claims to rights are trans-historical because they are grounded in the general requirements of action. Action entails purpose. Purpose entails judgment as to the good. Judgment as to the good entails claims of right for that which is necessary to attain the good. Therefore, rights are necessarily, rather than contingently, connected with being human insofar as agency is characteristically human. Prudential human rights must, however, be universalized to all agents. Each agent claims the right to freedom and well-being by virtue of the requisites of agency. Accordingly, each agent is logically committed to recognizing that all actual and prospective agents have these rights. Agency, the presupposi-tion of morality, is therefore the ground for universal moral rights.

Thus, we have now arrived at the basis of human rights. For the generic rights to freedom and well-being are moral rights, requiring that every agent recognize the most important interests of all other prospective agents, namely, the interests grounded in their needs for basic conditions of agency. These generic rights are also human rights, since every human being is an actual, prospective, or potential agent.[39]

The concept of human rights is therefore grounded in the fundamental idea that human lives can and should have value, and that they acquire value only through purposive, voluntary actions. Agents act because they believe that their purposes are good. They may be wrong according to certain criteria external to their own judgments. They may change their minds and conclude that they were wrong. They may be perplexed. They may despair. They may believe themselves to be faced with a choice among evils. Nonetheless, to act is to will, and to will is to hold a certain purpose to be good. A good life is one in which good purposes are, on the whole, successfully achieved.[40]

Gewirth objects to the argument that persons have moral rights because they have inherent dignity on the ground that such an argument is tautological. Such "descriptions" are normative and therefore are neither more nor less plausible than the assertion they are supposed to justify. The concept of "dignity" is abstract and its meaning contestable. The ultimate purpose of human rights is to secure for each person a certain fundamental moral status, to enable persons to be rational, autonomous agents, to

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39.   *Id.* at 61–64, 66, 68–69, 71, 95, 99–102; ALAN GEWIRTH, HUMAN RIGHTS: ESSAYS ON JUSTIFICATION AND APPLICATIONS 51–52 (1982).
40.   GEWIRTH, HUMAN RIGHTS, *supra* note 39, at 28–29.

control their own lives, to develop themselves, to pursue and sustain
effectively their purposes without being subject to domination and harm
from others, and to relate to other persons on a basis of mutual respect and
cooperation. All agents value their purposes because agents are the source
of the value of their purposes, and they must themselves have value. Persons
therefore have dignity by virtue of their agency. Agency is both a metaphysi-
cal and a moral basis for human dignity.[41]

The basic objects of human rights are those goods that are necessary for
the very possibility of action and successful action. They are therefore not
contingent upon one's variable choices or decisions. No person can
rationally deny either the necessary goods or the consequent human rights.
Human beings have human rights by virtue of their nature as actual or
prospective agents. Whatever else may be demanded of moral rules and
principles, their minimal point is to require that persons' rights to the
necessary conditions of action be protected. Without such requirements,
other provisions of a morality would lack foundations. The goods, interests,
utilities, or duties with which morality concerns itself would exclude
requirements that must be presupposed by all others in the actions,
institutions, or states of character with which they deal. Normative necessity
is therefore a distinctive feature of human rights.[42]

Gewirth's theory is both rational and systematic. He believes that these
qualities are necessary grounds of its truth, absent a moral dilemma or tragic
choice. Human rights, it is generally agreed, may conflict with other human
rights or with other values. Dworkin asserts that rights trump collective
goals, although he concedes that it is difficult to distinguish satisfactorily
between rights and goals. Donnelly, apparently following Dworkin, con-
ceives of rights as "ordinarily" trumping utility, social policy, and other
moral and political grounds for action. Gewirth insists that a human right
may be overridden only by another human right when the object of the
latter is more necessary for action than the object of the former. A right may
be overridden by the general welfare only if the latter is composed of the
rights of individuals. Gewirth's test for overriding rights is apparently stricter
and clearer than those of Dworkin and Donnelly, but it provides guidance
only in very general terms as to how conflicts between rights should be
resolved.[43]

Gewirth argues that human rights can be derived from the concept of

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41.   *Id.* at 44, 5, 27–30, 103, 186–87.
42.   Gewirth, Reason and Morality, *supra* note 36, at 129, 135, 145, 151, 327; Gewirth, Human
      Rights, *supra* note 39, at 6, 7.
43.   *Compare* Donnelly, *supra* note 1, at 1, 14, 17, 26–27 and Dworkin, *supra* note 17, at xi,
      90–91 with Gewirth, Human Rights, *supra* note 39, at 6, 57 and Nickel, *supra* note 3, at 3,
      14–15, 49–50.

morality itself. Morality entails action. Action entails necessary goods. Necessary goods entail claims of prudential rights. Prudential rights entail recognition of universal human moral rights. MacIntyre disputes the move from the necessary goods of action to rights. He argues that necessary goods differ from rights in that the latter presuppose, as the former do not, the existence of a historically contingent and specific set of socially established rules. Rights are therefore not universal. MacIntyre accepts Gewirth's argument that the existence of a language of rights, though a recent innovation, is not necessary for the embodiment of the concept of rights in action. MacIntyre disagrees with Gewirth to the extent that MacIntyre believes that the existence of particular types of social institutions or practice are necessary for the concept of rights to be intelligible, and that such institutions and practices are not universal. Thus, under MacIntyre's theory, the concept of rights does not depend completely on agency.[44]

At the heart of the dispute between Gewirth and MacIntyre is Gewirth's assertion that implicit claims to rights are universal and MacIntyre's counter assertion that intelligible claims to rights are not universal. The resolution of this issue depends on whether human rights are necessary or contingent. Donnelly agrees with MacIntyre on the question of contingency. This leaves the moral force of the human rights concept dependent upon a dubious consensus and a conception of human dignity, which is itself contingent and changing. Donnelly claims to have demonstrated that the contingency of the concept of human rights is completely compatible with a conception of human rights as universal moral rights. Donnelly therefore argues for Gewirthian universality on the basis of MacIntyrian contingency. This argument would be rejected by Gewirth, who denies contingency, and MacIntyre, who denies universality. Donnelly needs his contingent universality to defeat opposition to human rights on the ground of cultural relativism.[45]

Is Gewirth's theory of necessary universality defensible? MacIntyre poses several questions for Gewirth. Is the concept of human rights universally intelligible? MacIntyre is surely correct in answering this question negatively, because, as Donnelly points out, the required meaning of the concept of human being is not universally intelligible. Can a concept of right be implicit in action even if it is not intelligible? Gewirth answers affirmatively, but MacIntyre again argues correctly that human beings cannot implicitly claim rights in circumstances in which they cannot understand the meaning of such claims. For example, whether x (e.g., necessary goods) implies y (e.g., claims to rights) depends on rules of

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44.   MacIntyre, *supra* note 16, at 64–65.
45.   Donnelly, *supra* note 1, at 1.

implication. Such rules are MacIntyrian social practices or are the "discursive formations" of Laclau and Mouffe and therefore socially specific and historically contingent. As a consequence, Gewirth's claim of universal necessity fails.

Gewirth derives his conclusion that human rights are universal from two concepts which he assumes have a universal meaning and applicability: morality and reason. Morality is the object of his analysis; reason its method. Gewirth has a conception of morality, as a set of categorical obligations for all agents, which he claims, without demonstration, is the "core meaning" of all human moralities. His conception of reason includes only the canons of deductive and inductive logic. He justifies this conception on the ground that, because deduction achieves logical necessity and induction reflects what is empirically ineluctable, they are the only sure ways of attaining a truth that reflects the requirements of the subject matter. One may ask for justification of religious beliefs or social traditions, and such justifications must make use of reason.[46] Gewirth admits that difficulties may be raised concerning the justification of deduction and induction, but does not explore the implications of such difficulties for the status of his moral theory.

It is this failure of Gewirth to which MacIntyre implicitly refers in his objection to the principle of universality. Gewirth's conception of reason treats ontology and epistemology as if they were not problematic. Donnelly correctly notes that the theory of human rights presupposes a moral ontology in which human persons not only exist but have special value. Such an ontology is not universal. In its absence, the MacIntyrian problem of the intelligibility of human rights arises. Even if this problem could be solved, the canons of deduction and induction would not yield the same results among different people whose cultures give them different basic descriptions of the world. Induction, according to Gewirth, is based on sense perceptions. But sense perceptions have meaning only when interpreted by a cultural code. Thus, even if we assume that reason consists only of deduction and induction, and there is no philosophical consensus on this, Gewirthian reason could not produce necessary moral rules.

Gewirth's theory is a monistic conception of morality and of human rights. Donnelly argues for universalism without monism. He acknowledges that in traditional communities, individuals lack most of the rights that are valued in liberal democracies. However, many of the interests that are protected by the institutionalization of individual human rights may be socially protected in such communities. It is even possible that the introduction of individual human rights into traditional communities would

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46. GEWIRTH, REASON AND MORALITY, *supra* note 36, at 1, 21–23.

reduce their members' chances of achieving lives of dignity. Donnelly is willing to consider that the traditional society, which offers community and security in place of the autonomy and freedom provided by liberal societies, has a superior conception of human dignity. He emphasizes lists of human rights, and especially the rights contained in the International Bill of Human Rights. These lists presuppose a certain social form, which is not universal. For example, the right to join a trade union is not necessary in a society in which trade unions are not required to protect important interests. In addition, the individual right to own property may threaten the dignity and well-being of many members of societies traditionally based on collective property rights. Donnelly's case for contingent universal human rights is based on the sociological claim that the social form, presupposed by international human rights norms, is now virtually universal.[47] Gewirth's case for necessary universal human rights is weakened by the possibility of a plurality of trade-offs between freedom and well-being, none of which is logically necessary. Gewirth's theory is also weakened by the fact that it requires a conception of human rights different from the familiar one embodied in the International Bill of Human Rights if it is to have even a prima facie plausibility for societies organized in ways that differ significantly from the modern industrial nation-state.

3. CONCLUSIONS: IMPLICATIONS FOR PRACTICE

Although this discussion has been very abstract, it may be helpful to recall its practical importance. Human rights activists, in their struggle for the protection of human rights, face political difficulties that raise issues of theoretical justification. These include claims of state sovereignty, cultural autonomy, and group rights. Such problems cannot always be solved by an appeal to law, either because the law is silent, ambiguous, or inapplicable, or the results of the law are morally and politically questionable. The right to self-determination is an example of a legal right which raises more questions than it answers. In the face of such difficulties, some hope that a clarification of the "philosophical foundations" of human rights will solve the theoretical problems and thereby indicate how practical problems ought to be solved.

Unfortunately, there are no uncontested philosophical foundations of human rights. There are, however, two basic approaches to the questions concerning the foundations of human rights. The first approach emphasizes contingency, construction, and relativity. Laclau and Mouffe, Rorty, Dworkin,

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47.   See DONNELLY, *supra* note 1, at 23–25, 50, 59, 62, 77, 123.

MacIntyre, and Donnelly all adopt some form of this approach. Although adopted by these theorists, this approach has diverse implications for human rights theory. MacIntyre is hostile to the concept of human rights. Laclau, Rorty, and Dworkin support human rights on the basis of a prerational commitment to liberal culture. Donnelly endorses the particular list of rights in international texts on the grounds that they are required to protect human dignity under modern conditions. All these theorists hold that under different conditions different lists of rights, different conceptions of human rights, or even quite different moral concepts might properly be defended.

The second approach locates objective foundations for human rights in reason and morality. The doctrine of human rights is objectively and universally true. This is a position supported by Gewirth. This position has its weaknesses and it does not necessarily provide determinative answers to the questions that prompted the inquiry into philosophical foundations. If, for example, a state restricted freedom of speech on the grounds of national security, Gewirth might find that the rights to freedom and well-being are in conflict. His theory does not provide a way to balance the conflict between rights to freedom and well-being. Conceivably, no theory may provide determinate solutions to such problems, but, even if this is so, Gewirth's theory loses its supposed necessary force as we move from abstract to concrete questions.

The contingency and constructivist approaches are alarming because human rights are reduced from universal values to either arbitrary products of power or particular cultural developments. It is precisely this arbitrariness that Gewirth seeks to avoid through an appeal to reason. Unfortunately, Gewirth's solution requires a universal conception of reason, which is not available. Thus, the search for the philosophical foundations of human rights, which was intended to solve theoretical and practical problems, paradoxically calls into question the rationality of the concept. This result is good news for tyrants and is counter-intuitive for human rights supporters. Donnelly tries to establish foundations for human rights upon the concept of human dignity, but he admits that the concept itself is subject to contingency and therefore is not readily defensible. Considering the problems that theorists encounter, what, then, is to be done?

Joseph Raz suggests that in practical terms the specific role of rights is to ground duties in the interests of others. Assertions of rights are typically intermediate conclusions that exist between ultimate values and duties. Raz agrees with Dworkin that a consensus on intermediate conclusions about rights is constituted by particular cultures. Raz differs from Gewirth in holding that ultimate values are characterized by haziness and disagreement. Rights are grounded in interests and the interests that ground rights must themselves be grounded in the problematic ultimate values. However,

Raz does not hold that ultimate values are arbitrary. To say that something is of ultimate value is not to say that it cannot be justified; rather, it is to indicate that its value is not derived from its contribution to something else.

The foundations for human rights can now be established through a formula. The foundations will be created by accepting the challenge of philosophical anthropology rejected by Donnelly, by reformulating Gewirth's thesis and by combining these with Raz's epistemology. The result will then be shaped by a moral axiom proposed by Dworkin. Gewirth's thesis is that human beings are purposive agents and as such they require at least minimal levels of physical and psychological well-being and freedom. Gewirth's thesis is both a descriptive anthropological axiom and a stipulated interpretation of what it means to be human.

Well-being and freedom are also Razian ultimate values. According to Raz, well-being and freedom are not valued for their contribution to something else but because they are constitutive of human persons. Such values are contingent, in the sense that it is not logically necessary to hold such values. One could, without logical error, assign no value to human life. Such values are not arbitrary, however, because they are presupposed by a wide range of cultures. This argument garners greater force, if, following Donnelly, we limit our concerns to the contemporary world. Values can, therefore, constitute common ground for most of those who engage in controversies over human rights.

Finally, Dworkin provides the principle that each person has the right to equal concern and respect. This is a moral axiom that is subject to contingency and controversy. The axiom of equality is, again considering Gewirth's theory, not necessary. Even if all persons are agents, they are not necessarily equal agents, and they do not, as a matter of logical necessity, have equal rights. This does not mean that Dworkin's moral axiom is arbitrary. This moral axiom is grounded in the universal anthropological experience of vulnerability to violations of well-being and freedom. Facts about persons do not logically entail the axiom of moral equality because facts cannot entail moral principles and axioms are not logically derived. Facts about persons do provide, however, reasons for moral equality. The force of this principle depends on contingent factors that are not arbitrary such as culture, empathy, and imagination.[48]

There is a tension in contemporary philosophy between the concept of universal human rights and that of moral pluralism. If, as Raz has proposed, rights are grounded in interests and interests are grounded in ultimate values which are not rationally decidable, then rights are subject to disagreements

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48.   JOSEPH RAZ, THE MORALITY OF FREEDOM 177, 180–81 (1986); see DWORKIN, supra note 17, at xii,
       182, 198–99, 269, 272–73, 274, 367–68.

that are not rationally decidable. Human rights then can have foundations. The foundations for human rights cannot, however, be superior to all rival means of reason. Rorty argues that human rights activists should rely not on reason but on their sentiments and the courage of their convictions. Undoubtedly, nonrational human qualities, such as sympathy and imagination, are important components of the moral psychology of human rights activism. Human rights practice, however, raises theoretical problems both because human rights violators seek to justify their actions with reasons, and because reflective human rights supporters may find themselves perplexed by moral dilemmas.

In the face of such challenges, it is not enough, considering Rorty, to know that we support human rights. We need to know why we do so. As Taylor noted, high standards need strong sources. God is not universally available as a source. Nature and reason play a role because human rights may be derived from reasoning about human nature. As an ultimate source, nature and reason do not speak unequivocally. Human rights may be derived from shared deep values, as Donnelly hopes, or they may be agreed upon without common deep values, as Lomasky and Raz suggest. The deep foundations of human rights are found in the principles of equal concern and respect for human persons. This principle is not necessary; it is contingent and constructed. This principle is also not arbitrary, because it is based on general anthropological realities and contemporary political conditions. A theory of human rights that is contingent and not arbitrary should not be alarming. A conception of human rights should be flexible enough to allow space for the human creativity it seeks to defend and to address the changing conditions of the world that may threaten its values. It is logically and empirically possible to reject the philosophical foundations of human rights. One must make a nonrational decision either to accept or reject solidarity with humanity. There is no logical or empirical guarantee that solidarity will be chosen. There are, nevertheless, deep reasons to desire that it will be chosen.