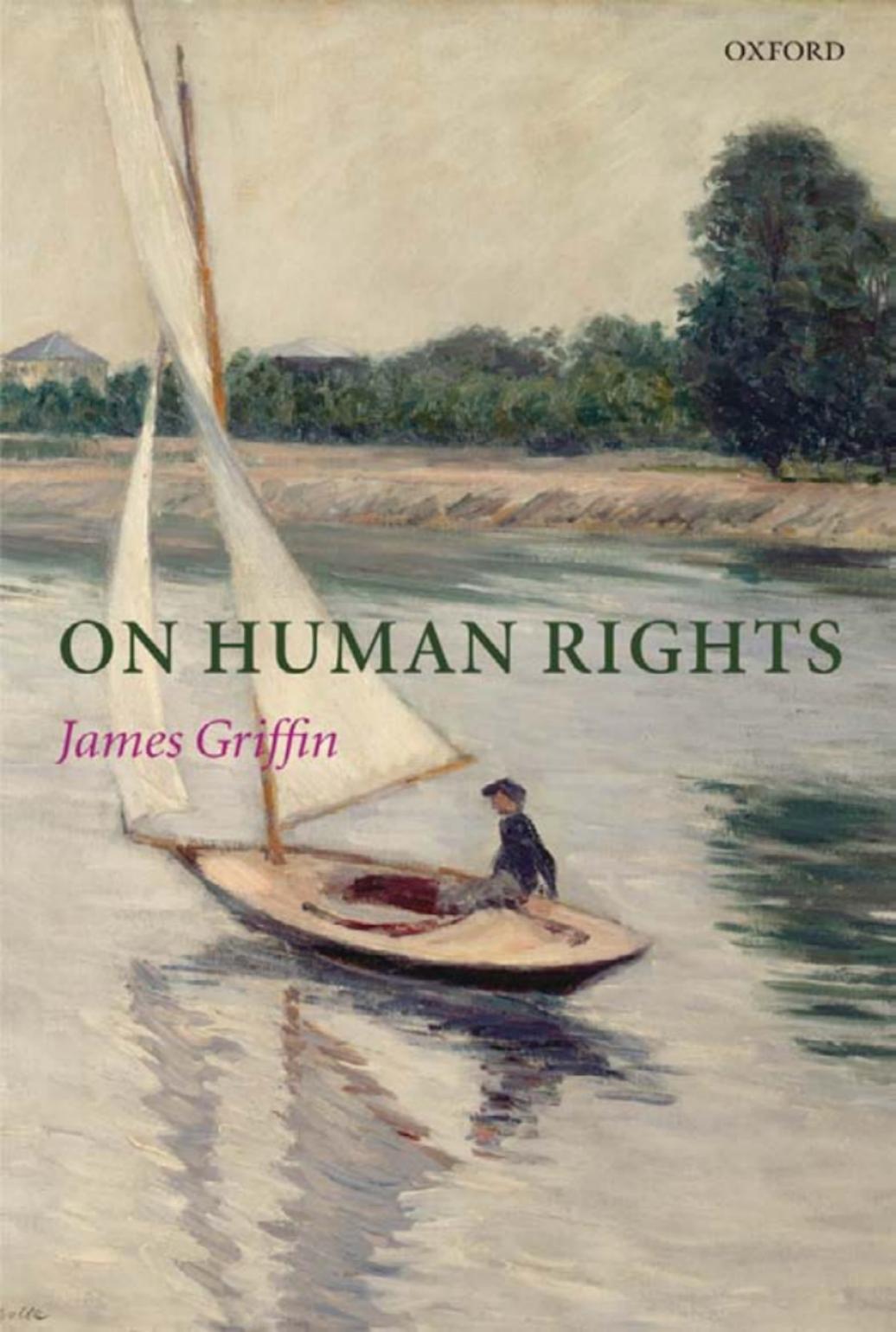


OXFORD

A painting of a small sailboat with a person on a river. The sailboat is in the foreground, with its white sails partially unfurled. A person is sitting in the boat, looking towards the right. The river is calm, and the background shows a shoreline with trees and buildings under a pale sky. The overall style is impressionistic.

ON HUMAN RIGHTS

James Griffin

of how pains feel and how those feelings characteristically figure in human life—that we want to avoid them, to have them alleviated, and suchlike. So, if I say that I am in pain, I make both a statement of fact and an evaluative statement. The most plausible interpretation of the notion of ‘nature’, I should say, is not Hume’s but a more expansive one, including both features such as basic human interests and also events such as their being met or not met. All of this needs much more investigation, some of which I have tried to provide in a book I published some years ago¹¹ and which I shall revisit later in this book.¹² But if this expansive naturalism is, as I think, borne out, it gives hope of restoring a form of that central feature of the human rights tradition: namely, that these rights are grounded in natural facts about human beings.

There are, at the heart of ethics, different ways of understanding the weight of personhood. One might, as Kant does, contrast ‘persons’ with mere ‘things’: ‘things’ have ‘price’ and so have equivalents (the loss of one thing can be compensated by the gain of another of the same value). ‘Persons’, however, have ‘dignity’; they are of unique value; they have no equivalents.¹³ One might want to endow human rights, therefore, with something akin to the power of trumps over all aggregates of other moral considerations. Morality, in any case, is not just a matter of promoting the ends that make a human life good; personhood has a value independent of their promotion. This helps to explain why so many philosophers regard human rights, especially on the personhood account, as essentially deontological.

But that is only one way to understand personhood. Another way is to see our exercise of our personhood—that is, our autonomously and, no doubt, repeatedly choosing paths through life and being at liberty to pursue them—as in itself an end the realization of which characteristically enhances the quality of life. They would clearly be highly important such features, but none the less not, in principle, immune to trade-off with other elements of a good life, such as accomplishment, certain kinds of understanding, deep personal relations, enjoyment, and so on. It is because of the special importance, though by no means necessarily uniquely great importance, of these particular human interests that, on this understanding, we ring-fence them with the notion of human rights. This would explain how we might see human rights within a teleological morality, where ‘teleological’ is a broader term than either ‘consequentialist’ or ‘utilitarian’.

The choice between these two understandings of personhood is crucial. It settles the source and degree of the resistance of human rights to trade-offs

with other values. The best account of human rights will make them resistant to trade-offs, but not too resistant. That, of course, is a mere truism, but one surprisingly hard to satisfy. It is not altogether problem-free whichever understanding of personhood one chooses. I shall return to this choice later.¹⁴

2.5 A SECOND GROUND: PRACTICALITIES

Could personhood be the only ground needed for human rights? I think not. It leaves many human rights still too indeterminate. Personhood tells us that each of us has a right to security of person. But that just raises the question that I asked earlier about a supposed right to determine what happens in and to our bodies. It struck me that the right would not be quite as wide as that, and the personhood ground gives us some idea of why it may be narrower. The right is only to what is necessary for living a *human* existence, and the extensive power to determine everything that happens in and to our bodies goes far beyond that. If my blood had some marvellous factor and a few drops painlessly extracted from my finger in a minute's time could save scores of lives, then, on the face of it, the personhood ground yields no right that needs to be outweighed. Pricking my finger would hardly destroy my personhood. But what happens if we up the stakes? Does my right to security of person not protect me against, say, the health authority that wants one of my kidneys? After all, the few weeks that it would take me to recover from a kidney extraction would not prevent me from living a recognizably human life either. Where is the line to be drawn? What is clear is that, on its own, the personhood consideration is often not up to fixing anything approaching a determinate enough line for practice. We have also to think about society. There are practical considerations: to be effective, the line has to be clear and so not take too many complicated bends; given our proneness to stretch a point, we should probably have to leave a generous safety margin. So to make the content of the right to security of person determinate enough to be an effective guide to behaviour, we need a further ground—call it 'practicalities'. We need also to consult human nature, the nature of society, and so on, in drawing the line.

Sometimes we do not need to consult practicalities; personhood alone can fix the content of rights. The right not to be tortured is, I think, one such.¹⁵ But in most cases we do. In those cases, without a more determinate line, we shall be reluctant to say that a right yet exists. What we are after are the

existence conditions for a human right. Its existence must depend, to some extent, upon the concept's being determinate enough in sense to yield human rights with enough content for them to be an effective, socially manageable claim on others. This requirement of social manageability may seem to threaten the universality of human rights. More than just determinateness of sense is likely also to be necessary for human rights to be socially manageable claims on others. Might not certain social institutions such as the police and courts also be necessary? And might not what is necessary vary from one time or place to another, thereby undermining the universality of human rights?¹⁶ But those worries misunderstand what I am claiming. What I claim is that the term 'human right' must be determinate enough *in sense* for it to serve as the *conceptually* adequate part of an effective, socially manageable claim on others—that is, effective and manageable so far as the term goes. What a philosophical account of human rights can reasonably be expected to do is to identify a sense for the term 'human right', through their existence conditions, which will allow us to decide tolerably fully the content of individual human rights—not only *that* they are such rights but also what they are rights *to*. And for that, I suggest, we need to introduce features of human nature and of the nature of human societies as a second ground. Those features are 'practicalities', as I am using the term. And the fact that pure values, such as the values of personhood, unsupplemented by what I mean by practicalities, often yield only highly indeterminate norms is true not just of human rights but of moral norms generally.

Practicalities, as I use the term, are not tied to particular times or places. They are universal, as any existence condition for rights that one has simply in virtue of being human must be. Practicalities will be empirical information about, as I say, human nature and human societies, prominently about the limits of human understanding and motivation. Still, that a requirement of universality is built into the idea of human rights does not imply that the content of a human right cannot make reference to particular times and places. I shall later talk about both basic, universal human rights—for example, freedom of expression—and derived, non-universal human rights got by applying basic rights to particular circumstances—for example, freedom of the press.¹⁷ To this day there are societies in which presses do not exist, perhaps a few in which not even the concept of a press exists, and the human right to freedom of the press therefore has no relevance.

The practicalities ground gives us a further reason to confine human rights to normal *human* agents, not agents generally. Practicalities are needed to

determine the content of many human rights, and the considerations they introduce may well be special to human life.

But is it reasonable to expect that solely universal features, both personhood and those practicalities with universal scope, will give us sufficient determinateness of sense? The best way to answer that question is to look at several human rights and see what is actually needed to achieve the required determinateness, which I shall do later, especially in Parts II and III. And this question raises the further question of the sense in which human rights must be ‘universal’, to which I shall return shortly.

2.6 IS THERE A THIRD GROUND?: EQUALITY

Is there a third ground? The most likely further ground is equality. The idea of human rights emerged with the growth of egalitarianism, and it is an obvious thought that equality is *a*, or even at a deep level *the*, ground for those rights.

The trouble that we face in thinking about equality is that there are very many ethically important principles of equality, easily confused. There is moral standing itself, the moral point of view: we are all moral persons and so command some sort of equal respect—call it, for short, the principle of equal respect. This is different from, and may not even imply, a principle of equal distribution of goods, which, in turn, is different from a principle of equal opportunity, and so on.

It is obvious that on one interpretation of ‘equality’—namely, equal respect—and on one interpretation of ‘grounds’, equality is indeed a ground for human rights. Equal respect expresses the moral point of view itself, and human rights, being moral standards, must likewise be expressions of it. Some philosophers have seen equal respect as itself a human right, indeed the one absolute right—a right, for instance, to equal respect in the procedures that determine the compromises and adjustments between all the other non-absolute rights.¹⁸ It is absolute because it is moral standing itself, and morality can never recommend suspending the moral point of view. But it is doubtful that equal respect, being the whole of morality, should be seen as anything so specific as one human right among others. In any case, it cannot be a *ground* for human rights in the sense that I have been using the term here. Ronald Dworkin has spoken of a ‘favoured form of argument for political rights’: namely, their derivation from ‘the abstract right to [equal]

concern and respect, taken to be fundamental and axiomatic'.¹⁹ Let me concentrate on his invocation of equal respect; the fact that he also speaks of equal concern does not affect what I shall say. The principle of equal respect is extremely vague; it needs content built into it through further notions, such as the Ideal Observer or the Ideal Contractor, though even those particular notions suffer from no small vagueness themselves. But, on its own, the notion of equal respect is far too empty for us to be able to derive from it anything as contentful as a list of human rights. And it is not that we must build more content into the notion of equal respect before we try deriving the list, because the way we shall put more content into it is precisely by settling such less abstract matters as what human rights there are. Morality is built at many different levels of generality at the same time. It does not display the sort of priorities that allow much in the way of what we can call 'derivation' of lower-level ideas from highest-level, axiomatic ones. So what we are after now, in looking for the *grounds* for human rights, are the sorts of ideas that will substantially help to settle what human rights exist and what their content actually is. Those ideas will, therefore, have to have a lot of content themselves, and so are likely to be on more or less the same level of abstraction as human rights.

But surely equality must be somewhere among the grounds for human rights, someone might say, if only because human rights grew out of the egalitarianism of the late Middle Ages. Before then, one's important powers and privileges were derived from one's social status: lord, freeman, slave, and so on. In the late Middle Ages, important powers and privileges, it was claimed, were to be derived simply from one's human status. We differ in social status; we are equal in human status. In that sense, it is undeniable that human rights are based on our equal human status. Still, if one wants to identify the existence conditions for human rights, one would not look to the equality of our human status but to the human status itself, and the personhood ground already captures that. There is no guarantee in late medieval egalitarianism of other forms of equality, as important as they often are—for example, of equal distribution of material goods. To say that we are all equally endowed with rights is not to say that we are all endowed with a right to equality, where that means other forms of equality.

Still, someone might persist, do we not have a human right to *some* other forms of equality? And would they not have to be grounded in some background principle of equality? Imagine this case. You and I are seventeenth-century settlers in the New World. As our boat beaches, you

jump off before me and claim the lush, fertile half of the island, leaving the rocky, barren half to me. When I protest, you point out that my half, if tended, would yield at least the minimum resources necessary for a recognizably human existence, which is all that, on my own account, I have a right to. You can be sure that I would protest, echoing John Locke, that you could claim no more than what left as much and as good for me, that we are moral equals, that my life matters equally as much as yours, that I have a claim to as much of the available resources as you. The word 'equality' would come tumbling from my lips, and rightly so. Part of what I am claiming for myself is equal respect and all that follows from it, such as justice and fairness.

But a human right is a quite particular moral consideration. Human rights do not exhaust the whole moral domain; they do not exhaust even the whole domain of justice and fairness.²⁰ If you free-ride on the bus, you do not violate my rights, even though you act unfairly. That explains why the Enlightenment tradition regards procedural justice in courts as a matter of human rights, but not, at least in general, distributive or retributive justice. Procedural justice protects our life, liberty, and property. There are forms of distributive justice, for all their importance, that do not bear on our personhood—so long, that is, as the human right to minimum provision is respected. Human rights themselves have distributive implications, but ones limited to the protection of personhood. In fact, as most people in most societies never attract the attention of police or courts, their interests are likely to be far more affected by matters of distributive justice than of procedural justice. But matters of justice can be highly important in our lives without being matters of human rights.

Just as there are many different, morally important considerations of equality, so there are of fairness. Some of these considerations of fairness are internal to human rights. If a society respects men's human rights but not women's, then women are being denied their equal rights. A person is a bearer of human rights in virtue of being a normative agent, and women are equal to men in normative agency. Their being denied their rights is therefore unfair. Another form of fairness included in human rights is, as we have seen, a fair trial. But there are also forms of fairness that are not the concern of human rights: for example, the unfairness of free-riding and cheating at cards. My point is that the domains of human rights and fairness overlap but are not congruent.

Because objectionable forms of discrimination have violations of equality and fairness at their base, they too overlap, but are not congruent with,

human rights. Some objectionable forms of discrimination clearly violate human rights, as when the thuggish organs of a government randomly round up members of a hated racial minority and subject them to painful physical abuse. It might seem initially that this periodic abuse need not destroy its victims' autonomous agency, but it usually would. Simply to be a member of a hated—or even a merely scorned or belittled—group would be likely to undermine one's life as an agent. A member of a hated minority would be inhibited from speaking out on unpopular issues, and from acting in a way that would attract the majority's attention. And members of a hated group living in a community with police given to physical abuse would be all the more constrained. And it is hard to maintain self-esteem, hard not to sink into passivity, when one's society as a whole gives one such a demeaning picture of oneself. None the less, even though this is a case of violation of human rights, the most obvious thing to say about it is something different: namely, that it is a monstrous injustice, a flagrant violation of equal respect.

Then there are cases of objectionable discrimination that are not matters of human rights. Two top executives of a multinational firm, equally competent and with equal responsibilities, may receive unequal pay merely because one of them is the CEO's brother. The lower-paid, though still handsomely paid, of the two does not have his human rights violated; what is objectionable about this case is the unfairness, the inequality with no good reason. The cases of discrimination that exercise us seriously nowadays, mainly racism²¹ and sexism, range between these two extremes. In this middle ground it is often hard to tell objectionable from unobjectionable discrimination, the sorts of discrimination that violate human rights and the sorts that do not. I think that, in general, racism and sexism are likely to violate human rights because of their potentially destructive effect on an agent's self-image. However, the case of ageism—say, a compulsory retirement age—is much less clear. I shall return to these matters later.²²

I remarked a moment ago that the domain of human rights includes procedural justice in courts, but not many forms of distributive or retributive justice. But this is speaking roughly. As we saw, human rights include at least one distributive requirement, minimum provision, because it is required by personhood. And for the same reason, human rights include some retributive requirements, such as proportionality in punishment and a ban on cruel and unusual punishment—proportionality because it is a protection of liberty, and the ban because it is a protection of agency generally. Torture, for

instance, which I shall come to shortly, characteristically undermines agency, which is indeed its purpose. But what amount of punishment fits a certain crime, and whether desert alone can justify punishment, are matters of retributive justice, not of human rights.

To return now to my example, when I complain to you that I should have an equal share of the resources of the island, I am citing a principle of equal distribution, which is a principle of justice, which we can see, as our imagined conversation shows, as involved in equal respect. I am sure that you *ought* to divide the riches of the island equally with me. But to make it a matter of rights would create substantial problems. Where would we draw the line between the moral demands of equal respect, or of justice, that are rights and those that are not, other than where the personhood account has already drawn it? What rationale would we have for drawing it elsewhere? Would the line be clear enough?

My proposal to exclude certain, but not all, forms of justice and fairness from the domain of human rights goes against a not uncommon current belief that the domains of human rights and of justice are identical. But that belief is at striking variance with the extension of the term 'human right' as it has stood since the Enlightenment. I acknowledge that I shall sometimes later make appeal to equality, fairness, and justice in arguing for my conclusions about human rights, but they will often be the equality, fairness, and justice internal to the notion of a human right. For example, I claim, as do many others, that our human right to liberty is confined to liberty compatible with equal liberty for all—an equality that arises from our all equally being normative agents.²³ Sometimes, though, I shall appeal to a fairness that is not internal to the notion of a human right. I think that, in assigning the duties correlative to certain human rights to welfare, an appeal to our general ideal of fairness is indispensable.²⁴ It would be surprising if, in working out the implications of human rights, fairness and justice in general did not put in an appearance. But it is a non sequitur to move from a value's being indispensable in working out these implications of human rights to its being foundational to the notion of a human right itself. It should not matter to us that the exclusion of some forms of justice from the domain of human rights means that some of the most heavyweight moral obligations have no connection to these rights (e.g. my entirely justified claim to an equal share of the fertile land on that island). It is a great, but now common, mistake to think that, because we see rights as especially important in morality, we must make everything especially important in morality into a right. I shall return

to the non-congruence of the domains of justice and fairness several times later.²⁵

I propose, therefore, only two grounds for human rights: personhood and practicalities. The existence conditions for a human right would, then, be these. One establishes the existence of such a right by showing, first, that it protects an essential feature of human standing and, second, that its determinate content results from the sorts of practical considerations that I roughly sketched earlier.

2.7 HOW WE SHOULD UNDERSTAND ‘AGENCY’?

If we adopt the personhood approach, we shall have to sharpen considerably the notion of ‘agency’ that is at its heart.

Agency can quite reasonably be seen as appearing in degrees. Children become agents in stages. Some adults are better than others at reflecting about values, or more effective at achieving them. Must a personhood account, then, imply that human rights come in proportionate degrees? Does it justify, in the end, less an egalitarian than a Platonic vision of society, with different classes having rights appropriate to their different reflective and executive capacities?²⁶

This worry arises from using a different conception of ‘agency’ from the one that an account of human rights should employ. As we saw a while ago, our concept of rights emerged at the historic stage when belief in human equality started to supplant belief in a natural social hierarchy. Up to a point, egalitarianism is a bundle of factual claims (though usually laced with evaluations). One is the claim that many striking differences between social groups—for example, the far cruder taste and judgement of some—are not ordained by nature but are the brutalizing effect of social deprivation or the accidental effect of cultural development. Another of the factual claims is that among normal human beings there is not much correlation between IQ and a sense of what matters in life. And these, and many other factual claims in the bundle, are defensible on empirical grounds. Even if differences in taste and judgement persist because deprivation too persists, the overriding moral interest is not in giving them weight but in removing the deprivation. Of course, egalitarianism is an ethical thesis too. What we attach value to, what we regard as giving dignity to human life, is our capacity to choose and to pursue our conception of a worthwhile life. Mental defectives present difficult

borderline problems here, and there is, of course, the question of when a child becomes an agent. But the vast majority of adult mankind are capable of reaching (a factual claim) this valuable state (an evaluative claim). Anyone who crosses the borderline, anyone who rises any degree above the threshold, is equally inside the class of agents, because everyone in the class thereby possesses the status to which we attach high value.²⁷ It is true that, above the threshold, certain differences in degree persist: for example, differences in IQ, in sensitivity to and skill in characterizing good-making features of life, in knowing how to realize these values, and so on. But none of these continuing differences in degree prevent there being a status entered just by passing the threshold, and a status that does not come in degrees. One might call it, as the United Nations does, ‘the dignity of the human person’. Any further differences in sensitivity to values or skill in realizing them, and so on, will no longer matter to being a normative agent or a bearer of human rights—in short, to possessing this dignity.²⁸

I say that what we attach value to, in this account of human rights, is specifically our capacity to choose and to pursue our conception of a worthwhile life. So the word ‘agency’ alone is not enough; there is an acceptable sense in which higher animals are agents. The term ‘rational agents’ is not specific enough. What we are concerned with is the agency involved in living a worthwhile life. Call it ‘normative agency’.

This now leads us to the view that normative agency is the typical human condition. But is not having a conception of a worthwhile life, on the contrary, an exceedingly rare achievement? We must not, though, confuse having ‘a conception of a worthwhile life’, as I am using the term, with having ‘a plan of life’. Having a plan of life is indeed exceedingly rare, and also questionably desirable. Why live by a plan of life when we are constantly learning more about the ways of the world, our values continually mature, and any plan of life is bound, to a fairly large degree, to be wrong? If one should adopt a plan of life, one should, at least, always be prepared to revise it. Even then, we should not aim to have highly detailed plans. One cannot predict what opportunities or mishaps will come one’s way; one cannot know how one’s emotional attachments will develop or how other persons will behave; and one cannot get one’s mind around all the circumstances that would have to enter the rational calculation of even a fairly rudimentary plan of life. And the rough, incomplete plan of life that one might rationally formulate would amount to no more than a few policies—such as to spend more time with one’s family, to go to concerts more often, and so on. Then having set oneself

such goals, some planning would no doubt be sensible—say, planning one's weekly schedule so that one can indeed fit in these activities. This is as much planning as most of us ever do, or should try to do, and a weekly schedule is well short of a plan of life.

Nor should we confuse having 'a conception of a worthwhile life' with living 'an examined life', in Socrates' sense, when he famously declared that 'an unexamined life is not worth living'. Socrates regarded virtue as a matter of knowledge and vice as a matter of ignorance. We reach virtue through a long process of dialectic: doubting, challenging, recognizing our ignorance, and slowly working our way to an understanding of the good. One might regard this arduous dialectic as necessary to human life either because its very exercise is itself the peak of human excellence or because it is the only means to a good life. But neither is true. It is not the exercise of rationality that is the peak of excellence; the peak is, at most, what the use of reason might lead us to. And it is not true that an unexamined life, in the Socratic sense, is not worth living. Autonomously achieving a good life does not require periods of rational deliberation. Some persons are just by nature good at distinguishing true values from false; they simply have a good nose for these matters. Anyone who has the capacity to identify the good, whatever the extent of the capacity and whatever its source, has what I mean by 'a conception of a worthwhile life'; they have ideas, some of them reliable, about what makes a life better or worse. The ideas are not, and should not be, about the whole shape of one's life; they are piecemeal and, to varying degrees, incomplete. And it is the mere possession of this common capacity to identify the good that guarantees persons the protection of human rights.

There is another worry about the notion of 'agency'. An obvious objection to a personhood account is that a person can be denied religious freedom, even be cruelly persecuted, without ceasing to be an agent. Could anyone plausibly deny that at least some of the martyred saints were agents? On the contrary, there is a sense in which persecution can even enhance agency. When Alexander Solzhenitsyn was sent to a gulag, he seems to have become a more focused and determined agent than ever. But that is not the picture of agency at the heart of my account of human rights. My somewhat ampler picture is of a self-decider (i.e. someone autonomous) who, within limits, is not blocked from pursuing his or her conception of a worthwhile life (i.e. someone also at liberty). If either autonomy or liberty is missing, one's agency, on this ampler interpretation, is deficient. What we need is a normative picture of agency: autonomy and liberty are of special value to us, and thus attract the special

protection of rights. Further, it is characteristic of human beings that they do not choose their goals once and for all. People mature; their values change. Liberty is freedom to live this sort of continually evolving life.

These last remarks help to answer another question about agency. By ‘agency’ we must mean not just having certain capacities (autonomous thought, executive action) but also exercising them. One can trample on a good many of a person’s human rights (e.g. Solzhenitsyn’s) without in the least damaging these *capacities*. In general, all that a person needs in order to *have* human rights is these capacities, but what human rights *protect* is something more: their exercise as well. I said earlier that on the personhood account we have a human right to education. But is not an illiterate peasant with no education still an agent in the sense we mean? So education it seems, is not necessary for this sort of agency; if basic literacy is not necessary, then neither is primary or secondary or university education. How, then, can education be a human right? It is a human right because it is necessary for the *exercise* of this sort of agency. The value behind human rights is not just the dignity of being able to be this sort of agent but also of being one. This sort, however, centres on our being able to form a conception of a worthwhile life and then pursue it; that is the source of its dignity. And that requires more than a life entirely devoted to the struggle to keep body and soul together. One’s horizons must not be so low. We must know something about the options the world offers, or could offer with change that is well within human capacity to bring about. Otherwise, in our ignorance, we shall suffer from a kind of paucity of options that, as I shall argue later,²⁹ can violate our liberty. Our choices must meet certain standards for being informed. And literacy is an important means to being informed. We need also to be able to pursue our aims, and that requires more than mere literacy: for example, some skills and some knowledge of the world, including the world beyond the edges of our direct experience. And we need knowledge not only to protect autonomy and liberty but to protect other rights too: for example, in many developing countries the best way to reduce mortality, say from AIDS, is to increase literacy. Of course, we face the task of determining the level of education guaranteed by human rights, which requires more of the line of thought we have just begun. But, in one way or another, we face the task of fixing the level with most human rights, and we face it not just on the personhood account but on any plausible understanding of human rights.³⁰

A last clarification of ‘agency’. I say that ‘agency’, as used in the personhood account, includes both having certain capacities and exercising them. I want

now to add that ‘exercising’ in this context must also include succeeding, within limits, in realizing the aim of the exercise. Suppose our governors wish us to live a simple life and, to that end, keep our society poorer than it need be, thus closing off options that many of us would find much more choice-worthy. At first glance, it may seem that the personhood account would have no complaint. After all, our governors leave us still able to form a conception of a worthwhile life and to pursue it; it is merely that in many cases we should have almost no chance of achieving it. But what our governors have done amounts to coercion—a violation of our liberty. What is valuable in normative agency must also include actually being able to make something good of our lives. If normative agency did not often make possible that final stage of realization of our aims, it would lose a large part of its value. Of course, the right to liberty offers no guarantee of success; the right to the pursuit of happiness is not a right to happiness. Still, the right to ‘pursuit’ is not limited to a right merely to expend effort; it is, at the very least, a right to expend effort without certain deliberate impediments, still to be specified. Indeed, much more about ‘pursuit’ needs to be specified, so much that I shall have to leave it until later when I come to liberty.³¹

The word ‘agency’ is used more or less broadly within the spectrum from deliberation to choice to action to outcome. In the personhood account it is used broadly—to cover all of these stages. If one of those parts is missing, we do not have the values that, according to the account, are the ground of human rights.

2.8 IN WHAT SENSE ARE HUMAN RIGHTS ‘UNIVERSAL’?

Human rights, it seems, must be universal, because they are possessed by human agents simply in virtue of their normative agency.

But there is the following sceptical line of thought.³² Virtually all, perhaps all, examples we cite of human rights are not in fact universal, so not true human rights. If there are *any* true human rights, any that are indeed universal in the class of human agents, they are not especially important to us. And what are important to us are the merely supposed human rights—such as freedom of expression—which, not being universal, are not true human rights.

The argument goes like this. Freedom of expression, for example, is highly important in certain social settings and quite unimportant in others. Anyone who lives, as we do, in a society with democratic political institutions, culturally heterodox citizens, a complex economy needing mobility of labour and having to absorb fast-developing science and technology, vitally needs freedom of expression. It is sufficiently important to us in this setting to justify promulgating the right and imposing the correlative duties. But anyone who lived in a traditional medieval hamlet, with static technology and an unchallenged social tradition, and where necessary skills were acquired just by growing up in the place, quite rightly had a relatively minor interest in freedom of expression—an interest too minor to justify the burdensome apparatus of a right. So whatever freedom of expression is, it is not a human right because it is not universal.

But this argument misunderstands what the right to free expression protects. True, we may not need it for the economy of the medieval hamlet to flourish. True, if I am terribly shy and have no wish to speak, I may mind much less that I am not allowed to. But the ground for freedom of expression lies in a normative notion of agency: we are self-deciders; that is part of the dignity of human standing. To be a tolerably successful self-decider typically requires an ability to ask questions, hear what others think, and so on. It would not matter to my having the right that I am shy and may not exercise it. Others can ask or offer answers, and that itself would help me. Medieval hamlets too can be grossly oppressive. One might well have wanted to question the sort of life that the local lord or the abbot of the monastery imposed upon one, discover whether others too were discontent, and decide with them what to do. And the lord or the abbot might have wanted to stifle free speech to protect orthodoxy. One's status as a self-determiner is vulnerable in any social setting. Applying the right in the setting of the medieval hamlet might produce different derived principles from the ones that it would produce in a large, modern, industrialized society. But there would still be a robust enough sense of the identity of the right through the various applications of it needed in different social settings.

One's status as a self-determiner, I just said, is vulnerable in any *social* setting. Is that not a problem? What of non-social settings—say, hunter-gatherers in family units with no social structure to speak of between them? Would human rights apply even to them? Well, why not? There would be vulnerability even there: one could still be murdered, enslaved, or oppressed by others. But even if human rights were not to apply to hunter-gatherers, they

could still have a qualified, though quite good enough, form of universality. One could just gloss the claim: human rights, one could say, are rights that we all have simply in virtue of being *human agents in society*. That must be, in any case, all the universality that the original advocates of human rights ever dreamt of. Besides, human rights, on the personhood account, are not universal in the class of human beings; they are restricted to the sub-class of human normative agents. It would not be a revolutionary step to restrict them further to the class of human normative agents in society. Not even morality, to my mind, applies universally to moral agents regardless of conditions: for example, it does not apply if conditions get desperate enough—*sauve qui peut* situations. Despite that, it is perfectly reasonable to go on saying that moral principles apply universally, that is, to us all simply in virtue of our being moral agents (i.e. given that morality applies at all).

Of course, there are human rights that clearly do not apply even in all societies—say, freedom of the press. There are a few present, and many past, societies with no press, or even the concept of one. Such apparent failures in universality have been used as a reason for us to abandon the idea that human rights are grounded in universal human nature itself and to adopt a different ground and possibly, as a consequence, a much revised list of rights³³—say, Rawls’s much shortened list.³⁴ But we must keep in mind the distinction between basic rights and applied or derived rights. Rights may be expressed at different levels of abstraction. The highest level would emerge when we articulate the values that we attach to agency: as I listed them earlier, autonomy, minimum provision, and liberty. Then less abstract characterizations would come about as a result of the application of these highest-level considerations with increasing attention to circumstances. Freedom of expression is derived from, as a necessary condition of, autonomy and liberty. Freedom of the press is derived, in certain social circumstances, from freedom of expression. We should expect abstractly formulated rights, when applied to the conditions of a particular society, to be formulated in the language of its time and place and actual concerns, and we should expect no one particularly to notice when the move down the scale of abstraction passes from global to local vocabulary. We should claim only that universality is there at the higher levels.

Still, is it not a consequence of saying that we have these rights simply in virtue of being human that we should have them even in the state of nature? Yes. How, then, may I so easily allow that it would be possible for human rights to have point only in society? The claim that we should have human

rights even in the state of nature should be taken to mean that we have human rights solely in virtue of features of our humanity, not because of any social status or relation. Our normative agency may need protection only in society (though I doubt that), but it is a status we have independently of society.

But what of the whole range of welfare rights, now generally accepted as human rights? Do they not violate the universality requirement? Classical liberty rights are doubly universal: all human agents have them, and all owe the correlative duties. But welfare rights, it seems, are doubly particular: only members of a particular society can claim them, and they can claim them only from their own society. And in the case of classical liberty rights one can read off the duty-bearer from the content of the right: the right not to be interfered with imposes a duty not to interfere upon all others. But the content of a welfare right, being a claim of the needy to be helped, does not indicate who of all those able to help has the duty to do so. Indeed, Kant thought that duties to help, being 'imperfect' duties—that is, not perfectly (fully) specified—lack correlative rights. That is the strongest doubt: not only are so-called welfare rights not really human rights, they are not any kind of moral right either. And, one might go on, as welfare rights do not themselves specify the correlative duty-bearers, they can be specified only by an authoritative social institution, and therefore welfare rights cannot be, as they are supposed to be, independent of society.³⁵ To my mind, these lines of reasoning fail; some welfare rights are human rights and they, like all human rights, are universal—indeed, doubly universal. But the arguments for this conclusion involve many further issues and will have to wait till later.³⁶

2.9 DO WE NEED A MORE PLURALIST ACCOUNT?

My personhood account can be seen as trinitist (if I may coin a word to come next in the sequence 'monist', 'dualist'). Human rights, I propose, have their ground in the three values of personhood: autonomy, liberty, and minimum provision. My confining the ground to these three values is, of course, at the centre of my attempt to give the term 'human right' a sufficiently determinate sense—an attempt that everyone interested in making the term part of serious thought about morality must, in some form or other, make. An obvious worry, though, is whether all human rights can be derived from such a relatively slender base. Personhood, sceptics may allow, is an important part

of the story, but not the whole story. Human rights, they may say, both need and can have a broader base.³⁷

Take an example. The long-established right not to be tortured does not seem to be derived just from the values of normative agency. True, torture typically renders us unable to decide for ourselves or to stick to our decision. What is wrong with torture, though, is not just that it thus undermines normative agency, but also, and far more obviously, that it involves excruciating pain. So it seems more plausible, and certainly more straightforward, to say that the basic human interest in avoiding pain is weighty enough on its own to justify promulgating a right against torture and imposing the correlative duty on others. Think, too, of our right to education. No doubt it is based partly on education's being a necessary condition for effective agency. But another obvious ground for the right is simply our considerable interest in achieving certain forms of understanding. And so on.

We cannot finally settle the issues between my account and this more expansive pluralist account now, but we can make a start on them.

If we were asked what is wrong about torture, of course the most obvious thing to say would be that it causes great pain. But the question that concerns us now is not nearly so broad. Our question is: Why is torture a matter of a human right? And the answer to that could not be, Because it causes great pain. There are many cases of one person's gratuitously inflicting great pain on another that are not a matter of human rights. One partner in an unsuccessful marriage, for example, might treat the other coldly and callously, and the suffering caused the second partner over the years might mount up into something much worse than a short period of physical torture. The first partner, however, simply by being cruel, does not thereby violate the second's human rights. Or an older sibling might beat a younger sibling about the head from time to time, out of the common resentment that a displaced older child feels of a younger, but, even if painful, it would be hard to call it 'torture'—except in the extended sense in which any considerable pain (bad sunburn, say) may be called 'torture'.

Torture has characteristic aims. It is used to make someone recant a belief, reveal a secret, 'confess' a crime whether guilty or not, abandon a cause, or do someone else's bidding. All of these characteristic purposes involve undermining someone else's will, getting them to do what they do not want to do, or are even resolved not to do.³⁸ In one way or another, they all involve an attack on normative agency. If the older sibling were to beat the younger about the head in order to extract a secret, the word 'torture' would

fit much better. As we can have infliction of great pain without the intention to destroy normative agency, we can also have intentional destruction of normative agency without infliction of great pain. People use torture to undermine agency usually because they have no better way. Now sometimes we do: there are truth drugs that sometimes help in extracting secrets, and with time there may be far more successful painless techniques for imposing one's own will upon others or discovering what they think.³⁹ We could not call this 'torture' because it is essential to 'torture' that the infliction of great pain be the means. But what concerns us here is whether the painless chemical destruction of another person's will raises any issues of human rights. And it does. It does so because painless domination is still a gross undermining of personhood.

The same approach suits the other example I just mentioned, the right to education. There is a difference between the varied benefits that make education valuable and what makes it a human right. There is a minimalist character to human rights, which different writers will explain in different ways. I explain it as coming from human rights' being protections not of a fully flourishing life but only of the more austere life of a normative agent. But we should all agree that there are highly valuable forms of education that lie beyond what is required by human rights. This is a common phenomenon. There are levels of health,⁴⁰ and forms of privacy,⁴¹ and of several other human interests of which it is also true. On their own, the examples fall short of demonstrating a need for a more pluralist account.

There are, as well, theoretical problems facing a more pluralist account. Clearly, not any human interest will be a ground of a human right. How, then, will the more pluralist account identify the interests that are a ground? And how will it meet our pressing initial problem: that the sense of the term 'human right' must be made much more determinate?⁴² And, faced with a choice between my personhood account and a more pluralist account, there is the question, Which is the better way to speak about human rights? Nearly all of us want to see a less free-wheeling, more criteria-governed use of the discourse of 'human rights'. Unless the more pluralist account can reduce its considerable vagueness, the likelihood of its having the desired effects will be low. What is lacking, I have admitted, is not a verbal definition of the term 'human right'; a determinate sense for the term could come about simply by its having a settled use, even a quite complex one. And might not authoritative institutions, such as international law, be just the agency to bring this about? As I said earlier,⁴³ I think not. When it comes to human rights, it is not

enough for the appropriate international institutions, following the proper procedures, to reach and declare agreement. International law, being positive law, can certainly create positive rights. But the international law of human rights aims, or should aim, at least in part, to incorporate certain extra-legal ethical standards. The creators of international law do not, and cannot plausibly, say that what they deem to be a human right *is* a human right, that on this subject they are infallible. And as human rights in international law should incorporate something ethical, why should we let the use settle down without influence from ethical thought? More must be said, and I shall return to international law later.⁴⁴ It may seem that the answer to the question, Which is the better way to speak about human rights?, is: As their moral content requires, independent of practical effects. I think not, and shall return to the question later.⁴⁵

An advocate of a more pluralist account might respond to these challenges along the following lines. There are various constraints on the human interests that can serve as a ground of human rights. They are, first of all, restricted to the interests of human beings as human beings; that follows from the sort of universality that human rights have. But well-being, even at high levels, qualifies as such a human interest. An obvious further constraint, then, would be that the human interests be *important* or *major* or *urgent*. But not all important (or major or urgent) interests can plausibly be a ground for a human right. Things can be of great importance to our lives—indeed, greater than a lot of issues of human rights—without themselves thereby becoming grounds for human rights. I touched on this earlier. According to the rights tradition, procedural justice is a matter of human rights, but not many forms of distributive justice, although distributive justice may well be more important in most people's lives than procedural justice. Recall too the example of the cold and callous spouse: the cold and callous treatment may well be worse than the infringement of certain of the unfortunate spouse's human rights (say, a minor infringement of the unfortunate spouse's right to privacy).

Now, the advocate of a more pluralist account might appeal, as I did a moment ago in stating the account, to the highly influential explanation of a 'right' that we owe to Joseph Raz. Applied to the case of human rights, it would go like this: a human right arises when there are universal human interests sufficient to justify imposing the correlative duties on others.⁴⁶ This definition has the advantage of allowing more human interests to serve as grounds for human rights than just autonomy, liberty, and minimum

provision, yet imposes the constraint on the additional interests that they be able to justify the imposition of duties on others. This is still not enough, though. The suffering of the spouse with the cold and callous partner is surely enough to justify imposing a duty on the partner to stop this treatment. This case is only one instance of a general worry: human rights must not expand to fill most of the domain of well-being. We have an important interest, for example, in there being a rich array of options in life from which we may choose. The benefits of our having such a rich array are so considerable that they would justify imposing on certain agents—perhaps on our fellow citizens—the burden of promoting them. The trouble with this is that it is likely to justify a human right to even quite high levels of well-being. It would justify any level, no matter how high, at which the benefits are great enough to justify imposing the burden. The benefits of a flourishing life—for example, of having a rich array of options from which to build one's life—are characteristically so enormous that they are likely to justify imposing a burden on others, particularly as the burden would not be so great. To have a rich array of options would require having a fairly high level of social wealth and a fairly advanced culture, which most of us are already independently motivated to produce. But this undermines our belief that we have a human right to material and cultural resources only up to a minimum acceptable level beyond which they are *not* a matter of right.

Let me follow the theoretical problems facing more pluralist accounts through just one more twist. One might say, as Raz himself does, that the benefit must be great enough to justify imposing not any duty but a particular kind of duty—namely, a duty that supplies an 'exclusionary reason'.⁴⁷ An exclusionary reason is the kind of reason that excludes a certain range of other reasons from being taken into consideration. Promising is a paradigm case. The fact that one has promised excludes one's then giving weight to every consideration of one's own convenience that in other circumstances would quite properly have weight. But I doubt that the introduction of exclusionary reasons is enough. It is not at all easy to see how this particular deontic notion—a duty with this exclusionary effect—is supposed to work in ethical thought, nor when it is present. Where on the spectrum from one spouse's minor unpleasantness to the other, at one end, to the spouse's most damagingly callous behaviour, at the other, do we reach interests that produce an exclusionary duty? And where on the spectrum of levels of well-being, or of flourishing life, do we reach that point? It is hard to say. These cases have none of the clarity of the case of promising. We do not understand what a

human right is until we understand roughly where along such spectra we are to make the break. It is not that there are no ways of explaining that. One can say, as I propose we do, that in the case of the spouse's cruelty, for example, the break comes when the cruelty starts to undermine the other's ability to function as an agent, which at some point it certainly will. But that simply takes us back to the personhood account. My belief is that Raz's account does not supply a sufficient condition for the existence of a right, and that therefore there will be many cases in which the interests at stake are sufficient to justify imposing on others whatever the appropriate sort of duty is, yet are not matters of human rights. It would, at least, take radical revision to our intuitions for us to accept them as human rights.

This chapter has been a preliminary canter across our terrain. I shall return to many parts of it later on.

3

When Human Rights Conflict

3.1 ONE OF THE CENTRAL QUESTIONS OF ETHICS

There is no better test of an account of human rights than the plausibility of what it has to say about rights in conflict. There is no better way to force thought about human rights to a deeper level than to try to say something about how to resolve conflicts involving them. If one human right conflicts with another, or with some other moral consideration, then we try to resolve the conflict by somehow or other weighing the conflicting items. To weigh them, we have to decide what gives them their weight in the first place. If we favour the personhood account, for example, then we are forced to decide between a deontological and a teleological understanding of the value of personhood. That abruptly brings us to the heart of normative ethics.

I spoke earlier of two different ways of understanding the value of personhood.¹ One might, following Kant, contrast ‘persons’ with mere ‘things’. ‘Things’ have ‘price’, and so have equivalents. ‘Persons’, however, have ‘dignity’; they are of unique value; they have no equivalents. One might want to endow human rights, therefore, with something akin to the power of trumps over all aggregates of other moral considerations. Or one might want to make a somewhat weaker claim: that the value of personhood cannot be outweighed by a mere surplus of other values also to be promoted; it can be outweighed, rather, only by a substantial surplus. Personhood, that is, has a value independent of promoting the ends that make a human life good.

The second way to understand the value of personhood is to see the exercise of our personhood as an end the realization of which enhances the value of life. It would clearly be a highly important such feature, but none the less not, in principle, immune to trade-off with other things that make a life good, such as accomplishment, certain kinds of understanding, deep personal relations, and so on. It is because of the special importance, though by no means necessarily uniquely great importance, of these particular human

interests that, on this understanding, we ring-fence them with the notion of human rights. This would explain how we might place human rights within a teleological morality.

The way to resolve conflicts of human rights should not come as an afterthought, or as a matter of merely spelling out the consequences of an account of human rights already decided independently. It should occupy centre-stage when one is trying to settle the most important issue: the existence conditions for human rights.

3.2 CONFLICTS BETWEEN HUMAN RIGHTS THEMSELVES

Some apparent conflicts between human rights themselves turn out to be merely pseudo-conflicts. Once the content of each of the apparently conflicting human rights is spelt out sufficiently, one often finds that there is no conflict after all. For example, it is widely thought that one person's liberty can all too easily conflict with another's. Freedom for the pike, the saying goes, is death for the minnows. There are, however, constraints on the content of the right to liberty. The ground for my liberty is a ground for your equal liberty; the ground cannot justify my being more at liberty than you are. That identifies a formal constraint on the content of the right: each person's liberty must be compatible with the same liberty for all. If that is so, then instead of conflict, a degree of harmony is built into people's liberties. There is also a material constraint on the right to liberty: according to the personhood account, what makes liberty an important value demanding protection by something as strong as a human right is its being a constituent of our personhood. My being able to gratify a passing whim (e.g. driving the wrong way down a one-way street) would certainly not be that, while my being able to pursue central features of what I regard as a worthwhile life would be. My apparent human right to drive the wrong way down a one-way street does not conflict with your apparent human right to efficiently regulated traffic. Neither is a human right. With this further clarity about the content of the right, many supposed conflicts disappear. Much more will have to be said in defence of this understanding of liberty, of course, and I shall come to it later.²

That outcome prompts the thought: might we find, when we understand the content of all human rights fully enough, that there are no conflicts

between them? One can see how one might come to think so. I distinguished earlier top-down and bottom-up approaches to explaining human rights.³ We can see how certain top-down approaches might imply harmony between human rights. Consequentialists might be able to show (though I doubt that their calculations would be nearly reliable enough to be taken seriously) that a set of human rights framed so that, fully articulated, they did not conflict had best consequences overall. But the more promising approach is Kant's. What Kant calls 'The Universal Principle of Right' can be stated as a principle for distribution of freedom: 'Any action is *right*', the Principle says, 'if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law.'⁴ The formal constraint on liberty that I adopted a moment ago has some similarity to Kant's constraint on the distribution of freedom: one person's liberty must be compatible with equal liberty for all. Does Kant's constraint ensure that one person's exercise of a human right must be co-possible with another's?⁵

For the moment, however, I want to carry on with my preferred bottom-up approach and not assume the correctness of any highly abstract, systematic moral view. Once I develop the personhood account further, though, it soon brings us up against the Kantian view and the question of co-possibility.

On my bottom-up approach, there may still be arguments for the harmony of human rights—for example, further piecemeal arguments of the sort that I just deployed to dissolve certain apparent conflicts of liberties. Even if the class of pseudo-conflicts can, as I suspect, thus be enlarged considerably further, I want to claim that there remain conflicts of rights that resist such dissolution. It is widely, perhaps nearly universally, accepted that if a threat to the survival of the nation is great enough, if its ability to protect the life and liberty of its citizens is in sufficient peril—in short, in a grave emergency—a government may set aside certain human rights. In the first days of the US Civil War, just after the fall of Fort Sumter, Lincoln suspended *habeas corpus* in federal areas where enemy troops were operating, and asked rhetorically, and in powerful justification of his decision, 'Are all the laws *but one* [viz. *habeas corpus*] to go unexecuted, and the government itself go to pieces, lest that one be violated?'⁶ Once in the 1970s, and once again in the 1980s, at the height of terrorism in Northern Ireland, the British government introduced arbitrary detention. After the terrorist attacks on New York and Washington on 11 September 2001, both the United States and Britain introduced detention without trial. Explicit exemptions at times

of emergency are distributed throughout the basic twentieth-century human rights documents.⁷ The Universal Declaration of Human Rights (1948), Article 29. 9, is particularly generous, perhaps too generous, in that respect:⁸

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect of the rights of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

We may dispute whether the threat in the three cases I just mentioned was great enough to justify detention without trial; all that I want to claim is that *if* the threat is indeed great enough, we may detain suspects without trial.⁹ We can admit the likelihood of our having thereby detained, along with the real terrorists, say, some innocent people. We should certainly be violating *their* liberty. The liberty of the real terrorists is unlikely to extend to bombing innocent civilians, but the liberty of the innocent detainees certainly extends to their going about their perfectly innocent business. But what we think justifies the violation of their true liberty is that only by detention without trial can we save many civilian lives. We should be all the more willing to accept this exchange if the detention were fairly brief. Is this not a conflict of human rights: the liberty of the innocent detainees in conflict with the rights to life and to personal security of the civilians?¹⁰

3.3 ARE HUMAN RIGHTS CO-POSSIBLE?

Perhaps not all of morality is by nature free of conflict, but only a part of it, including, in some strict sense, our exercise of our human rights. Several writers think so. Robert Nozick, for instance, says, though without explanation, ‘Individual rights are co-possible: each person may exercise his rights as he chooses.’¹¹ Perhaps the counter-examples I just offered do not fall into this central class.

I have suggested that the best case for co-possibility is Kant’s. What does Kant think ‘natural rights’ (to use his term for them) are? His fullest account is found in Part I of his late work *The Metaphysics of Morals* and is part of his much broader ‘Doctrine of Right’. He speaks variously of ‘right’ (*Recht*), ‘the right’ (*das Recht*), and ‘a right’ (*ein Recht*): ‘right’ is the adjectival notion of being right; ‘the right’ is the set of principles that determine what is right and wrong; and ‘a right’ is our modern notion of an entitlement that an