

OXFORD

The background of the cover is a painting of a small, light-colored wooden sailboat with a single white sail. A person wearing a dark cap and jacket is seated in the boat, looking towards the right. The boat is on a wide, calm river. The far bank is a sandy, eroded bank with some green trees and a few buildings in the distance. The sky is a pale, hazy color. The overall style is that of a classic oil painting.

ON HUMAN RIGHTS

James Griffin

case of informational privacy; that sort of privacy is a necessary condition of normative agency, and so is instrumentally valuable. But why should we care about, say, a private space? There is an ancient saying that still exerts an influence on our modern thought about private space: 'An Englishman's home is his castle.' For a long while, a man (the gender is essential) was accepted as an absolute sovereign in his own house. This sentiment originated in an age when a man had his goods and chattels, with his animals included among his chattels and his wife and children often not a big step above them. But now we think that society has urgent and still insufficiently recognized duties to regulate what goes on inside the private space, even in the marital bed. Society now rightly exerts control over marital rape, violence against a spouse, a parent's physical or sexual abuse of a child, the parents' neglect of their child's health or education, and a family's cruelty to its animals. Justice Blackmun avers that what is particularly protected against state regulation is 'intimate behaviour that occurs in intimate places',¹⁶ but that is doubtful. The ancient idea of an Englishman's home, with a privacy that was a near-absolute bar to outsiders, has given way to a much more permeable modern privacy. These remarks bring out the force of the feminist attack on privacy; but feminists have an objection not to the true human right to privacy but merely to a patriarchal distortion of it.¹⁷

Our question is not whether private space is of *some* value. Of course it is. One needs private space the better to relax, and the better to be creative—Virginia Woolf's 'room of one's own'.¹⁸ But though Virginia Woolf's point might be good reason for my family's aspiration to, say, our each having a room of our own, it is most implausible that it gives us a human right to one. There are levels of health and education, as well as kinds of privacy, that are highly desirable, but beyond what is required by human rights. But what of other cases? We are often concerned for the privacy of non-agents—for example, patients with advanced dementia in a nursing home. Their privacy is not only morally important, but it is also, we say, a matter of the dignity to be accorded to the human person. Why does not this non-agency value therefore, contrary to what the personhood account says, support a human right? But one cannot conclude merely from the fact that we speak here of 'human dignity' that a human right is involved; the expression 'human dignity' is far too widely used for that inference to be valid. Is not the more plausible explanation instead this: that those sunk in dementia still deserve deep respect for the full persons they once were, traces of whom may still survive, and anyone who lacks that respect has grossly defective feelings?

The same is true, though to a somewhat lesser degree, of someone who lacks deep feelings of respect for the dead body of a beloved parent. But in neither case does the respect seem to be best explained in terms of possession of a human right. Appropriate behaviour does not always have to be determined by rights.

Does an undetected peeping Tom with a blissfully ignorant victim, then, not violate his victim's right to privacy? After all, he does not actually inhibit his victim's agency. But a human right is a right that one has simply in virtue of being human; one does not actually have to be a victim. What grounds the right to privacy is that certain forms of publicity typically inhibit human agency. The right is borne universally by human beings simply because of this typical vulnerability. So the right would be violated even by an undetected peeping Tom. Besides, the second ground of human rights, practicalities, which is also universal in scope, will lead to an easily grasped and widely drawn private domain: one that will foster the levels of assurance that agency needs, as well, perhaps, as supplying a reassuring buffer zone. There are the demands of the human right to privacy in any society, but the exact levels concerned may vary in time and place. To employ an earlier distinction,¹⁹ basic human rights are universal in the class of persons. But derived human rights, ones that arise from applying a basic human right to a particular time and place, may vary in content from society to society. In our present society it might require, at least for a while longer, protection of our nakedness and certain other culturally determined forms of modesty, which we know not all other human societies, or groups within our own society, need.²⁰

What we have been looking for is a value attaching to private space besides, on the one hand, one that though undoubtedly a value is insufficient to support a human right and, on the other, a value that supports a human right but only because of its instrumental connection to informational privacy. At a certain point one must just either produce such a value or confess that one cannot find any. I confess that I cannot find any.

I believe, none the less, that we should retain a form of the right to privacy of space—only much more restricted than, and differently based from, the one that the Supreme Court employed. There is this instrumental argument. It is doubtful that society would be successful in keeping my correspondence and beliefs and sexual practices private if its officials were free to walk into my house whenever they liked. Also laws, even moral laws, need to work with fairly clear, easily understood boundaries, and the walls of one's house form a far clearer boundary than the line between one's beliefs and practices that are

relevant to informational privacy and those that are not. And around what is especially valuable to us, we like, for good practical reasons, to have an ample buffer zone. So perhaps for reasons such as these, the right to privacy will include a private space. But, even if so, the value of a private space would, on this explanation, depend on the value of informational privacy. So this gives us no reason to treat privacy of space as an independent addition to informational privacy.

What holds of private space holds too of private life. 'Private life' covers, among other things, certain personal relationships. They are a major component of a good life and, indeed, central enough in most people's conception of a good life to help support a human right, usually liberty. Liberty is being free to pursue one's conception of a worthwhile life, and society can improperly interfere with its pursuit both by erecting a barrier between one and one's ends, say by legal prohibition, and by undermining the necessary conditions of the end itself, say by destroying the privacy that personal relations need. But the privacy that they need is informational privacy, as a necessary condition for autonomy and liberty. The privacy of space and of relationships is playing no further, independent role.

13.4 A PROPOSAL ABOUT THE RIGHT TO PRIVACY

My proposal is that we reduce the human rights that we appeal to in settling the cases we have had before us to two: the fairly circumscribed right to informational privacy and the long-established right to liberty.

Early on I listed some of the heterogeneous issues claimed to be settled by the right to privacy. If my proposal is accepted, the list will have to be considerably trimmed. On my proposal, the following issues are to be settled, not by appeal to privacy, but by appeal to liberty: contraception, abortion, homosexual acts, pornography, interracial marriage, same-sex marriage, and euthanasia.

The following issues, however, *are* to be settled by appeal to privacy: wire-tapping, planting listening devices in a person's house, unauthorized photographs of or other forms of information about one's sexual life or intimate personal relations, publishing membership lists of political organizations, disseminating information about one's sexual life or personal relations unless there is an overriding public interest, and, if practicalities do indeed

counsel extending the exclusion zone to the walls of the house, then a derived right to the privacy of that space.

Then there are what are claimed to be issues of privacy that are in fact issues neither of privacy nor of liberty: nuisance noises and smells that penetrate the house (is this an issue of human rights at all? is it not a matter for some other part of tort law that has no bearing on human rights?), attacks on one's honour and reputation (again, is this an issue of human rights? should it too not be left to another part of tort law?), and two closely related matters—rights to security of person and to bodily integrity. Each of these two rights is derivable from normative agency. One would have no security of agency without certain kinds of security of person or of body. So these rights do not seem to be a matter of either liberty or privacy. There is also the supposed right to determine what happens in and to one's body. One interpretation of this further right is that it asserts that one's body is a private space, within which one is sovereign or near sovereign. It has prominently been cited to defend a woman's right to abortion.²¹ In this use, it echoes the ancient claim of male domination: an Englishman's home is his castle. It becomes the modern claim of female domination: a woman's body is her castle. And it is equally suspect. Would it protect a woman's taking drugs likely seriously to deform her foetus, or having as many children as she wants? Would it protect a woman's, or a man's, refusal to be safely inoculated against a disease that seriously endangers public health, or to supply a breath or blood or urine or DNA sample? Would it make mandatory drugs tests for airline pilots an infringement of their rights? Would it give us a human right to sell our body parts? I suspect that there is nothing to this supposed right except what is already included in the right to liberty or in the right to security of person. In any case, it seems not a matter of privacy.²²

13.5 PRIVACY VERSUS FREEDOM OF EXPRESSION AND THE RIGHT TO INFORMATION

There is a worry. Will one person's right to privacy not constantly be in conflict with other persons' freedom of expression? And if the right is specifically to *informational* privacy, will it not often be in conflict with other people's right to information?²³ I think not.

To decide whether two rights really conflict, it is not enough to know their names. One must know their content. Freedom of expression is freedom to

state, discuss, and debate anything relevant to our functioning as normative agents: religion, ethics, learning, art, and whatever goes on in society or government that bears on our thinking and deciding autonomously and being free to pursue our conception of a worthwhile life. If I stop a friend from mischievously shouting 'Fire' in a crowded theatre, or simply from boring us with stories about his holiday, I do not infringe his freedom of expression, even in a small way. Similarly, the right to information is a right to the information needed to function as a normative agent: access to the relevant thoughts of others, to the arts, to exchange of ideas, and, in a democracy, to information about the issues before the public, certain of the government's acts and intentions, and so on. If the government of my country does not reveal certain of its acts and intentions, my right to information may be infringed. If the newspapers in London fail to publish the results of my favourite baseball team in Cape Cod, I may be maddeningly frustrated, but my right to information will not be infringed.

With an adequate understanding of the public-private distinction in place, society could then demand much finer-grained arguments for the existence of a public interest than anything we are offered now.²⁴ The argument that adopting a public life forfeits a private life is ridiculous. So too is the argument that, it is reported, many journalists use to establish a public interest: '*anything* may be relevant to assessment of a person's character'.²⁵ True, anything may be relevant to a person's character, but not everything relevant to a person's character is of public interest. The odious practice of outing homosexuals, for instance, has also been defended on the ground of public interest. In 1994 Peter Tatchell, the head of the British organization Outrage!, urged ten (unnamed) Anglican bishops to admit their homosexuality, with the threat of outing hanging over their heads. Outing, he said, was justified 'when public figures abuse their power to harm other gay people'. 'Queer homophobes', he went on, 'are hypocrites, and their hypocrisy deserves to be exposed.'²⁶ There is an apparent public interest here: a society is the healthier for combating certain forms of hypocrisy; it is certainly better for combating injustice. But a homosexual bishop who believes, even if misguidedly, that priests should not be active homosexuals is not necessarily abusing his power. Not all persons whose appearance differs from their reality are thereby hypocrites. A homophobe, whether homosexual or not, who acts hostilely towards homosexuals solely because they are homosexual is unjust. The injustice deserves exposure. *That* is the public interest. But if the homophobe is himself also homosexual, to publicize that further fact is protected neither

by the outer's freedom of expression nor the public's right to information. On the contrary, it is an outrageous infringement of the homophobe's right to privacy.²⁷ It is not that a person's sex life is never of public interest,²⁸ but that usually it is not.²⁹

We are easily confused on these matters because, with human rights, we have been content merely to know their name. But we have also to know their content. And to know their content, we have to know their existence conditions.

14

Do Human Rights Require Democracy?

14.1 TWO PLAUSIBLE LINES OF THOUGHT

Can only a democratic government respect the full range of our human rights? Seventeenth- and eighteenth-century writers generally thought not; they believed that the monarchies of their day could respect them. The power of monarchies then, and even more so in the Middle Ages, did not reach nearly as far into the countryside, or into as many pockets of human life, as do modern governments. Sometimes a monarch lacked control over parts of the countryside. Sometimes a monarch understood that if he tried to take too much power, coalitions would form capable of resisting him.

But nearly everyone accepts that human rights protect our dignity as human persons, on some interpretation of that widely invoked idea, and the heart, though perhaps not the whole body, of our dignity is our autonomy and liberty. Does one not, therefore, have a right to an effective say in decisions that importantly affect one? And, at least in modern conditions of highly pervasive government, do not most decisions of government importantly affect one? If so, and if only a democracy ensures an effective say, then do not human rights require democracy? The United Nations thinks so. The Universal Declaration of Human Rights (1948), Article 21, asserts:

Everyone has the right to take part in the government of his country, directly or through freely chosen representatives ... The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.¹

And many contemporary writers agree; they say, variously, that there is a right 'to participate in the government and ... to control the nation's public acts',² 'to democratic participation',³ 'to democratic institutions',⁴ 'to a voice in public affairs and to exercise control over government'.⁵ If there is such a human right, then of course human rights require democracy.

14.2 AUTONOMY AND LIBERTY

Many human rights are necessary conditions both of normative agency and of democracy: freedom of expression, of assembly, the right to privacy, to information, and so on. But this shows that democracy requires certain human rights, and we are wondering about the converse. The human rights that are most likely to serve as the moral grounds for democracy are not those, but the two abstract rights at the centre of normative agency: autonomy and liberty. Autonomy is self-legislation, deciding one's own goals in life, choosing one's own conception of a worthwhile life; liberty is being free to pursue that conception.

In deciding whether human rights require democracy, one must keep in mind just how much ground the rights to autonomy and liberty cover. It may seem obvious that rights to the necessary conditions of normative agency could not possibly support a right to democratic participation. Can one not be a normative agent in far less than ideal political conditions—even, say, in a tyranny? But, as we just saw, autonomy requires rights to privacy, assembly, information, free expression, and so on; to be assured of them requires in turn very many elements of a liberal society. And liberty, as we saw earlier,⁶ requires freedom to pursue one's own conception of a worthwhile life, and that in turn requires a society that promotes a decent array of options, and certainly does not unnecessarily limit them, which in turn requires a society that does not undermine various kinds of liberty and prosperity.

14.3 DEMOCRACY

The term 'democracy' has been, and is still, used promiscuously: for example, of certain Communist dictatorships. For our purposes, we must narrow the extension. I shall not try to define 'democracy' in terms of necessary and sufficient conditions; I do not think that one can. Instead, I shall appeal to some paradigms—the democracies of Western Europe, North America, India, the Antipodes, and a few other places—and note some of their characteristic features.

One can start with an apparently factual explanation of democracy. It is one possible answer to the question, Who rules? One person rules (a

monarchy). The rich rule (a plutocracy). The people rule (a democracy). And so on. But the idea of 'ruling' involves semantic standards, standards that, when sufficiently spelt out, become evaluative. It is not just a matter of the people's having a say, because a say can be ignored. It is not just a matter of the say's being effective, because an effect can be partial; the rich could have two votes and the rest only one, resulting in a hybrid plutocracy-democracy. For a government to be democratic, all must have an equal say. But many a past government widely accepted as 'democratic' excluded huge proportions of their adult population from the franchise: slaves (even freed slaves), the propertyless, the original natives, and women. Robert Dahl writes that in some governments considered democratic, 'a substantial number of free *men*—on some estimates about 40 percent—were denied the vote'.⁷ These exclusions were supported by largely factual beliefs: that certain races were of lower intelligence, that they were child-like, that women were not interested in politics, that they were already adequately represented by their husbands, and so on. Once the falsity or irrelevance of these beliefs was recognized, these excluded groups had to be admitted into the class of 'people' referred to in the defining formula 'the people rule'. *All* the people must have a say, without further restriction, except perhaps to sane adults and to exclude certain special groups (peers in Britain, convicts in the United States). How big a say? It is commonly thought that, when populations are large, representative democracy works better than direct democracy. But if the people chose a representative form of government for themselves in the past, and if the people in the present are content with it, then the say that one has in the decisions that importantly affect one, though in contrast to direct democracy considerably limited, is none the less to some extent fair. In contrast, if the people had not chosen the representative form of government that they find themselves living under and think that direct democracy would serve them better, then we should be reluctant to call the government 'democratic'. And what matters to being a 'democracy' is not only how one has a say, but also about what. The people must control the agenda; they must themselves decide what is important enough to have to be decided by them. And they must decide the content of all laws. Admittedly, the legislative and judicial functions are not always easy to keep apart; sometimes a small group of judges may, in effect, make law. But if this judicial role becomes common, and if the people or their representatives do not ultimately control the appointment of judges, then we should withdraw, or qualify, the description 'democratic'.

By now evaluative elements have emerged. A democracy is a form of government in which the people rule; only the people decide, with each person having a fair say—that is, equal in accordance with freely accepted decision procedures and with control over what is important enough to be decided by them. So I conclude that fairness must appear in an adequate account of what ‘democracy’ means, in the sense we want to understand.

Let me pursue this thought a little further. ‘Democracy’ is not to be equated with majority rule. Majority rule is merely a decision procedure—a fairly crude one at that, and not at all deep evaluatively. There are other decision procedures that are also democratic, and perhaps better. For example, one might aim at consensus, arrived at through discussion and a series of compromises.⁸ Or one might sometimes be able to devise a tolerably reliable measure of how important a certain proposal is to the different parties involved, and so be able to use weighted votes. In a democracy the choice of a decision procedure will, of course, be influenced by the size of the group. But the choice should be based largely on which procedure is fairest in the circumstances. And many countries have adopted a mixed system of simple majority for some issues and a qualified majority for others, a decision also based on fairness. So are the attempts to solve the still largely unsolved problem of the tyranny of the majority, which is at its worst when the majority and the minority are fixed, hostile communities. The minority might then have almost no effective say in political decisions. The closer the minority is, in effect, to being disenfranchised, the further away the system of government is to being democratic. It is widely, but I think wrongly, thought that having a bill of rights solves this problem. Of course, whether it does depends upon the scope of human rights. I have already argued that the domain of human rights and the domain of justice appreciably overlap, but are not congruent.⁹ On the personhood account, human rights protect only one’s status as a normative agent. The minority, therefore, could not by right be allowed to sink below the minimum acceptable level of welfare, where that is understood as the level needed for normative agency; but the society could be, none the less, and in these cases often is, structured in a way that unjustly directs the lion’s share of the wealth to an already well-off majority. A society with democratic aspirations might, for that reason, limit the operation of majority rule in various ways—say, by reserving a certain number of seats in the legislature for members of the minority. The society could again be considered ‘democratic’ if its various changes

to the political structure gave the members of the minority a sufficiently fair say.

These thoughts are also useful in showing us something about what it is for a government to be legitimate.¹⁰ Governments come in many kinds and sizes: governments of a town, a state or district or department, a sovereign country, a college or a university, and so on. My primary interest here is in the government of a sovereign country. And the word 'government' sometimes refers to the particular group of persons who hold the major political offices, and at other times to the political institutions themselves, the form or structure of government.¹¹ The notion of 'legitimacy' that I am looking at here applies to 'government' in both senses. Particular office-holders constituting a government in the first sense may fail the test of legitimacy because they abuse the political institutions that they are supposed to uphold. Or the political institutions themselves may be so unjust that they fail the test of legitimacy no matter who holds the offices. So, as a first attempt, we might say that 'legitimacy', in the sense in which we are interested, has to do with whether the government, in either sense, is morally justified to exercise power over those subject to it. But the group exercising the power might be so ruthless that rebellion would turn out to be so bloody as to be morally unjustifiable. We should, none the less, want to insist that, though in these special circumstances rebellion would not be morally justified, the government is still illegitimate. There must be certain kinds of evils that alone are sufficient to deny a government its legitimacy: for instance, substantial injustice or substantial failure to perform the important duties and functions of government, such as security, public order, and the promotion of prosperity. The qualifier 'substantial' is essential. All governments have shortcomings; all of them do things that are morally objectionable. What matters for legitimacy cannot be whether each exercise of the government's power is morally impeccable, but whether its exercise of power, in general, and making due allowances, is justified.

A government's respecting (where that includes protecting) its citizens' human rights is often taken to constitute the necessary and sufficient condition of legitimacy. But a government must do much more than respect human rights in order to be legitimate. A democratic government, for instance, has also to give all of its citizens a fair say in order to be either democratic or legitimate. It must also meet minimum standards of justice in the distribution of wealth—minimum though still above the minimum standard of welfare

that human rights demand. For instance, if a government unjustly directed most wealth to the privileged majority, while keeping the poor minority *just* above the minimum level required by human rights, it would still be likely to lose its legitimacy.

14.4 DO HUMAN RIGHTS REQUIRE DEMOCRACY?

We might expect a strong form of requirement here: for example, that a right to democratic participation is already contained in the content of the basic, universal human rights already on our list, that the former is implied by the latter without further premisses—say, without empirical information about a particular time or place. When we look more closely, though, the gap between autonomy and democratic participation seems sizeable. Think of the distance between deciding one's own conception of a worthwhile life, on the one hand, and jointly making laws for everyone, on the other. Perhaps this considerable gap could be closed in the following way. Autonomy is self-legislation, and public legislation can stymie one's following one's self-legislation. Indeed, one's society might prohibit the very life that one decides is most worth living. So, in order to be a successful self-legislator, one must, at the least, also be a public legislator.

But that does not follow. There is the familiar point that to have one vote among millions does practically nothing to protect one's being able to pursue one's chosen ends. And public legislation could frustrate self-legislation only if they both sought to legislate in the same domain. If public legislation stayed out of the domain of one's pursuit of one's own personal goals, there would be no conflict. It is the human right to liberty, not to autonomy, that is the more relevant to democratic participation. Each of us has a domain of personhood over which, with rare exceptions, society may not exercise control. But democratic participation does not seem to be a necessary condition of liberty, either. One vote among millions will not protect one's actions from being stymied by public legislation. It may be that a democracy is more likely than any other form of government to respect the domain of personhood; but to appeal to that fact is to introduce a further, and a non-universal and empirical, premiss, which we are now trying to do without.

I can discover no inferential route from human rights to democracy without adding some non-universal empirical premisses. So let us change our question. Human rights may require democracy in a weaker sense of

'require'. Is it empirically possible for there to be a society of human beings that both does not violate human rights and is not democratic? If so, is it also empirically possible for a society in typical modern conditions of highly pervasive government, large population, advanced technology, concentration of coercive power at the centre, ethnic diversity, educated citizenry, the sort of social cohesion necessary for a tolerably successful democracy, and so on, to respect all human rights, yet not be democratic? The answer to the first question, I shall propose, is Yes, and to the second, No.

As to the first question, I said earlier that one does not have liberty unless one is free to live the continually evolving life that comes as one's values mature and unless one's society provides a reasonable array of options, given the level of its economic and technical development.¹² One is free only if one could also have lived any sort of life chosen from the morally permitted and feasible range. Nor is it enough if one could have lived any sort of life in the morally permitted and feasible range though only by chance—say, the government has not yet clamped down, but might do so at any moment. We need some sort of assurance that the lives in the relevant range are actually permitted to us. Without such assurance most persons would be inhibited to the point of self-censorship. Would it be enough for such assurance that we had a monarch whose control of the inaccessible countryside, where we live, was tenuous indeed? In these conditions, let us say, we are able to live any life in the relevant range, and are assured of that fact because of the natural limits to the monarch's power. I think that, in those conditions, we could say that we have liberty (though we might not be able to say that our right to liberty was *respected* by the monarch). Would it be enough, then, if we were ruled by a trusted benevolent dictator who respected our human rights? It is true that dictatorships are, on the whole, much less stable than democracies; but let us suppose that a rebellion against this particular dictator would be most unlikely to succeed. There would remain, of course, uncertainties about what would succeed this dictator. But a democracy too can be overthrown, and no matter what succeeds it, we might still have been at liberty before the change. It will also be extremely rare for there to be a person in one's society whom all the people could reasonably trust enough to feel secure in their rights. But it is possible, especially in a small society. Perhaps in ancient Athens or in modern Monaco the people could know a potential dictator well enough to be able reasonably to gain the necessary confidence. They need not even have chosen the dictator; they could just have found themselves subject to his authority. If all of this is true, then human rights do

not *require* democracy, in this sense: it is possible, in certain realistic, perhaps even actual historic, though not necessarily common, conditions, for there to be forms of government that do not violate any human right but are not democratic.

One can see why. Human rights and democracy have grown up to meet quite different needs. Human rights grew up to protect what we see as constituting human dignity: the life, autonomy, and liberty of the individual. Democratic institutions grew up in our need for a decision procedure for groups—a procedure that is stable, manages transfer of power well, appropriate to a society whose members are more or less equal in power or worth, reconciles losers in social decisions to the basic structures of the society, and tends to promote the commonweal—that is, order, justice, security, and prosperity. Much more comes into democracy, both into the idea itself and into its major duties and functions, than can be got out of human rights. It is unsurprising that fairness should enter into what can count as a democracy, and also that the promotion of a large variety of social ends should enter into its major duties and functions. One cannot derive a requirement of fair political procedures from human rights alone, though one may be able to derive it from morality as a whole.

My use of the word ‘fair’ here needs more explanation. ‘Fair’ and its related notion ‘equal’ qualify many different kinds of thing, some involving respect for human rights and some, in fact many, not. So I have to identify the kind of fairness that concerns democracy but is not the concern of, nor can be derived from, human rights. If a society recognizes and 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, so equal in these rights. Their denial of them would be unfair. Another kind of fairness that is the concern of human rights is a fair trial; though some forms of justice fall outside the domain of human rights, procedural justice in courts is one that does not. But, as I have argued earlier, there are also forms of fairness, and of justice, that are not the concern of human rights: for example, the unfairness of free-riding and of cheating at games.¹³ Another example, I want to propose now, is the form of fairness central to democracy: a fair say in political decision. A fair say is a say for everyone who meets fair criteria of membership, a say about what subjects are to be decided by the people, a say through a social decision procedure (majority rule, or a modification of it, or something else altogether) that is as fair as we can reasonably make it or at least fair enough for us to be willing to go along with it. My point here is that

the form of fairness relevant to democracy, a fair say, cannot be derived from the various forms of fairness that are encompassed by human rights.

Might there be, none the less, a weaker human right: a right not to democratic participation but merely to political participation, where that is understood as a say about politics that rulers will listen to? It would be something close to what John Rawls meant by a 'consultation hierarchy'.¹⁴ But we must know not just the name of the supposed right—a right to political participation—but also its content. As we saw, its content cannot just be to have a political say—merely freedom of speech—because a say can be ignored. It cannot be merely to have a ruler who listens with understanding and sympathy. Such a ruler could still be a well-meaning catastrophe. Why should there be a human right to that? To get a plausible content for a human right, the ruler would have to make some form of fair assessment of each individual's desires and to combine in some sort of fair way the individual views into a social view and in some way be guided to action by the result. Anything less than this, and we lack a plausible content for a human right. My objection is not that the right to political participation might not actually protect something valuable; no human right, even the stronger right to democratic participation, need actually protect what it declares should be protected. My objection is that, even if it is fully complied with, the supposed right to political participation need not protect anything valuable. A biased ruler who listens sympathetically to all expressions of opinion but simply cannot see the point of many of them fully respects the supposed right. But a true human right must be in some way grounded in our human dignity—the dignity due to our personhood—and an entitlement merely to be listened to by a ruler who may be dismissive of one's views is hard to see in that light.

Nor can one derive satisfactory standards for the legitimacy of governments from human rights. It is often said, quite to the contrary, that the main function of human rights is to test legitimacy.¹⁵ But if a government seriously fails to discharge its most important duties, if it fails to bring about certain forms of distributive justice or to meet certain of the demands of retributive justice or to promote the general prosperity, it can lose its legitimacy. Yet all of these functions can fall outside the demands of human rights. For example, human rights require only that everyone be at least at the minimum acceptable level of welfare, which is the level necessary for life as a normative agent, whereas a government's duties to promote prosperity, though not endless, certainly extend well above this minimum. Because human rights do

not demand an equal voice in social decisions, they fall short of demanding democracy. Because they do not demand certain highly important forms of justice and the promotion of general prosperity, they fall short of being the test of legitimacy. I have not strictly defined ‘political legitimacy’, the requirements of which can vary in stringency. I have, however, stated a few necessary conditions for it that nearly all of us accept. And they are not necessary conditions of respecting human rights.

My conclusions here depend upon my belief that human rights do not encompass certain requirements of justice, fairness, and well-being. Though many persons believe that justice and fairness, at least, fall within the domain of human rights, few persons regard the promotion of prosperity above the minimum as a demand of human rights. So it is worth noting that even if human rights were to encompass all of justice and fairness, they still would not constitute the test of legitimacy.

My conclusion leaves the lively possibility that, though human rights in particular do not require democracy, morality as a whole does—especially forms of respect for persons not already included in human rights. And though human rights do not require democracy in the first conditions I described earlier, they might require it in the second conditions. Some human rights are not basic, but arise by applying basic rights to particular circumstances.

14.5 IN MODERN CONDITIONS?

What about our actual situation? Though there is no basic universal human right to democratic participation, might there be a derived right to it in modern conditions? By ‘modern conditions’ I mean the conditions I listed earlier; I do not mean any kind of society to be met with in modern times—for instance, an Islamic theocracy populated by adherents.

Would we, if governed by a benevolent dictator in typical modern conditions, have the assurance that liberty requires? I think not. We could not have the depth of acquaintance with the dictator that we might have in a small society, and without deep acquaintance we should lack the necessary rational assurance of the dictator’s benevolence or understanding. We might in time, it is true, learn more about the dictator’s character, but we should still not know, even roughly, when the dictator will die and what will follow. That, in itself, could inhibit certain of our choices in life. We might, in such

conditions, have a span of time in the middle of a dictator's rule during which we had such rational assurance, but there would also be times before and after when we did not. And the two limitations that could reassure the people in an early monarchy about their monarch's power—that it was neither ubiquitous nor irresistible—does not hold true of a modern government's power.

Most of the other non-democratic forms of government are also likely, in typical modern conditions, to violate the same human rights. If the few rule (oligarchy) or the rich (plutocracy), and even if the government eventually proves benevolent and competent, the citizens are unlikely initially to have the assurance that liberty needs. They are also highly likely not to know what will succeed their current form of government, with the inhibiting effects of this uncertainty.

This is true of most non-democratic forms of government. But of absolutely all? What about a modern aristocracy of the talents, composed of the best available judges, philosophers, economists, and public servants that the society has to offer? We must keep in mind that we are now thinking of a citizenry educated and cohesive enough to be able to form a democracy.

A society of this sort, having just come under the rule of such an aristocracy of the talents, would still have to wait to see what its political complexion turned out to be—much as the citizens of the United States would have to wait a while to gauge the orientation of a newly constituted Supreme Court. It would be highly likely that the persons chosen for this aristocracy of the talents would be Establishment figures with a track record for soundness, and that they would tend to be rather old and rather conventional. And if this aristocracy were self-perpetuating, a conservative majority would be likely to produce as its successor an even greater conservative majority. And an aged aristocracy is likely to be in some respects out of harmony with the younger generation. For example, if the society faced our own current problems, the young and the old might well differ over pornography, or same-sex marriage, or adoption of children by homosexuals—each being a case in which human rights are highly likely to be at stake.

Of course, this line of thought shows only that an aristocracy of the talents would have a tendency, of some not yet determined strength, to violate certain human rights. And I am asking whether it is empirically possible for a society in typical modern conditions to respect all human rights yet not be democratic. The answer to that question must be, Yes. The members chosen for the new aristocracy may have reputations that are so reassuring that the

citizens are not inhibited to live as they choose. And the new aristocracy may contain a mixture of conservative and liberal, old and young, thus avoiding any serious intergenerational conflict of values. Such a happy outcome may not be at all likely, but surely it is empirically possible.

This answer strongly suggests, though, that there is another question that is more important for us to attend to. We live not just in modern conditions but also in the real world, subject to all the vagaries of human nature and the nature of human societies. We should be concerned, therefore, not only with the possible but also with the probable. We should be duly sceptical about the judgement and benevolence of both governors and governed. We should be worried by the concentration at the centre of coercive power and of information, especially secret information the source of which, we may be told, cannot be revealed without compromising it. We should not be willing to rely on good luck. For instance, we should want not to have to depend upon our governors' turning out actually to *be* benevolent; we should want to constrain them in ways that would be most likely to lead them, whatever their inclination, to *act* benevolently. And we should look largely to political institutions to achieve that.

So we should also want to ask: What form of government is most likely to respect human rights? At first sight, this seems *not* to be our question. Even if a democracy is the most likely to respect human rights, that leaves it possible that other forms of government could also respect them, in which case human rights would not *require* democracy. But it is no easy or quick matter for a society to establish a form of government. And once it has established a form of government, it is not easy to change it. Any group establishing a form of government must be concerned with the long run, and the long run will bring governors of very different moral and intellectual endowments. What is more, the obligations arising from human rights are not fully discharged just by one's not oneself violating them. I have discussed this earlier.¹⁶ The obligation (of a strength still to be determined) extends to some persons' having somehow (who and how still to be determined) to promulgate human rights, enforce them, protect others from their violation, and, if not yet done, create the institutions that will aid in this. So the obligation that human rights lay upon us is to do what is most likely to minimize their violation—for example, to choose the form of government that is most likely to bring about this result. And minimize not just the government's violation of its citizens' rights, but also one citizen's violation of another's rights.

Would the form of government, then, have to be democratic? Well, what are the most effective ways to constrain governors to act for the common good? We should want to constrain any tendency they had not only to act solely out of self-interest or sectional interest but also to lose sight of or to discount the common good—for example, through the infamously dangerous pursuit of what they saw as an altogether higher goal than the common good. We should want them to know about, and take seriously, the aims of other generations or groups than their own. In both cases, the threat of being thrown out in the next election would be a powerful incentive. Some economists have shown a striking correlation between democratic government and avoidance of famine.¹⁷ India, under a democratic government since Independence, has had no serious famines; China, under Mao, had a devastating and entirely unnecessary famine in the course of the upheavals of the Cultural Revolution. The problem in virtually all famines is not lack of enough food to go around, but the lack of power or entitlement of the vulnerable to get some of it to go to them. The most effective protection of the human rights to life and to minimum material provision, it would seem, is democratic participation in social decision; it seems to be the surest way to force our governors to heed our interests.

At this point I shall stop trying to answer our question. The answer involves highly complex, empirical matters about individual and group psychology and about the behaviour of political institutions, about which philosophers have no special expertise. At any rate, I do not. And as there are many forms of democratic government,¹⁸ our present question subsumes the immensely complicated question: What form of *democratic* government is most likely to respect human rights? But as important as these empirical issues are, my primary interest lies elsewhere. I am inclined to think, despite my inexpertise, that, in modern conditions, human rights do indeed require democracy. That is why I think the United Nations was justified in declaring a human right to democratic participation. However, that right, I want to say, is not a fundamental, universal one. It is, at best, a derived one, arising from the application of fundamental human rights to particular conditions. There are two kinds of derived rights: rights derived solely from fundamental ones, thus retaining universality, and rights derived by applying universal rights to particular conditions, not therefore universal. The human right to democratic participation, I want to say, is an applied right. The United Nations rightly ignores these nice distinctions of kinds of rights. Their job is to promulgate rights, not taxonomize them. These distinctions are of concern, though, to

anyone trying to understand the path from the grounds of human rights in general to a particular putative human right—that is, to anyone trying to understand what really are human rights.

So, the answer to our original question, Do human rights require democracy?, is, I should say: Yes and No, depending upon circumstances.

15

Group Rights

15.1 THREE GENERATIONS OF RIGHTS

Writers sometimes refer to different generations of rights. The first generation consists of the classic liberty rights of the seventeenth and eighteenth centuries—freedom of expression, of assembly, of worship, and the like. The second generation is made up of the welfare rights widely supposed to be of the mid-twentieth century though actually first asserted in the late Middle Ages—positive rights to aid, in contrast, it is thought, to the purely negative rights of the first generation. The third generation, the rights of our time, of the last twenty-five years or so, consists of ‘solidarity’ rights, including, most prominently, group rights.¹ A people, a nation, a race, an ethnic or cultural or linguistic or religious group, are now often said to have rights. Group rights—at least the most interesting form of them, and the form in which I am interested—are supposed not to be reducible to the individual rights of their members. They are supposed to be rights that certain groups have simply in virtue of being those groups.

Why, then, discuss this sort of group rights if my subject is individual human rights? For one thing, it is hard to see how group rights and human rights are related. Despite what is claimed for them, are group rights, or many of them, reducible to human rights? To the extent that group rights seem to have the status of rights, is it because they are reducible to human rights? I think so. The fairly recent appearance of group rights is part of a widespread modern movement to make the discourse of rights do most of the important work in ethics, which it neither was designed to do nor, to my mind, should now be made to do.

15.2 NO QUICK WAY OF DISMISSING GROUP RIGHTS

It is not that there is a simple flaw in the very idea of a group right, although some think that there is. They think that only persons (or agents) can have

rights (I am not talking about human rights here, but rights in general), and that this fact alone rules out animals, trees, and most human groups from bearing rights. For instance, some say that one can have rights only if one can also have duties,² because they think that the ability to bear rights is necessarily part of a package that includes the capacity to discharge duties. Others say that most rights should themselves be seen as packages, that many of them can be analysed into, among other things, liberties and powers³ (Hohfeldian components). Therefore, both groups conclude, only persons can bear rights, because only persons can have duties or exercise liberties or powers. The word 'person', they concede, must be understood here to include 'artificial persons'—for example, legal persons such as corporations, schools, and clubs. These legal persons are person-like in the necessary sense, because they too can decide, act, accept responsibility for their actions, have duties, make amends, and so on.

Groups, then, are said to be person-like only if they have the kind of fairly complex internal organization that allows them to decide, act, and so on. Corporations, schools, and clubs can have it. Parliament has it, which is why it made sense for the English Declaration of Rights of 1689 to assert the rights of Parliament against the Crown. But it is striking that nowadays many groups for which group rights are often claimed lack it.⁴ Recent Hispanic immigrants to the United States, blacks, women, and the elderly all lack the requisite internal organization. It is true that occasionally a non-agent-like group acts collectively. A mob might spontaneously collect in the streets and, united by strong common grievance, act as one and, say, storm the Bastille or the Winter Palace. It is doubtful, though, that having this sort of ephemeral unity would be enough, on this conception, to have rights, but recent Hispanic immigrants, blacks, women, and the elderly lack even ephemeral unity. So they clearly do not (or do not as such) have rights. Or so this attack on group rights goes.

It is an attack which, to repeat, seems to me to fail. Many people have already extended the use of the word 'rights' beyond persons—for instance, to foetuses, animals, and eco-systems. They have already abandoned the requirement that rights-holders be agents. And why not? The use of words changes. The question is whether this change gives us a more helpful moral vocabulary. And the answer to that question cannot be quick. We have to look at what sort of case there is for introducing group rights, and whether it yields a tolerably clear and useful term.

There is a further point. Agency does not seem crucial to a group's having rights. Agency is indeed a necessary condition of being a holder of individual human rights. I would myself put it still more strongly: the defence of agency is what individual human rights are meant for. But what is crucial to a group's having rights is a different feature of human rights: that the right-holder have the kind of weighty interest that attracts the protection of rights. As we shall see shortly, that is the form taken by the strongest arguments for group rights, and the groups concerned in these arguments—peoples, nations (as in 'the Navaho nation'), ethnic and cultural groups—need not, and often do not, have anything approaching agency.

15.3 A CASE FOR GROUP RIGHTS: THE GOOD-BASED ARGUMENT

What seems to me the best case for *individual* human rights takes this form: it finds a class of goods (in the case of human rights, the goods comprising normative agency) with the sort of importance that attracts the protection afforded by rights. One case for group rights mimics this case for rights of individuals; it claims to find goods that can be attributed only to certain groups, then tries to show that this new kind of good attracts the protection of a new kind of right: namely, a group right.

If this form of argument is successfully to yield rights not reducible to rights of individuals, then we need group goods of a quite special kind. They cannot, for instance, be merely what economists call *public goods*. The term 'public good' lacks sharp boundaries, but three important features that contribute to a good's being 'public' are that it is non-excludable (i.e. it cannot be designed so that it benefits some people but not others), non-rivalrous (i.e. its enjoyment by some does not compete with its enjoyment by others), and jointly produced (or, at least, produced by many). Clean air and effective defence are standard examples. Although the entities to which we should most naturally attribute clean air and effective defence are fairly large groups, the values involved in public goods are individual in both their enjoyment and conception. The benefits of clean air and secure defence are enjoyed by each member of the group individually. And to the extent that public goods support rights, they seem to support only familiar individual rights—in the case of clean air, a right to basic health; in the case of secure defence, a right to security of person or to liberty.

Are there group goods of the special kind we need? Consider this example. Some dinner parties are good because they generate an atmosphere of conviviality.⁵ Conviviality seems to be public, not just in the sense of non-excludable, non-rivalrous, and jointly produced, but in a more thoroughgoing way. Conviviality is a property of the party, not of each individual guest. That a group is involved is part of the very concept of conviviality: Jack enjoys himself partly because Jill is enjoying herself, and Jill is enjoying herself partly because Jack—or some other guest—is enjoying himself, and so on.⁶ Conviviality is enjoyment together and interactively. Admittedly, the word ‘conviviality’ is not always used in this narrow sense, but there is such a phenomenon of joint and interactive enjoyment, and ‘convivial’ is a good way to describe it. And that a group is involved is also part of the felt character of conviviality: one is partly—though not necessarily especially consciously—enjoying others enjoying themselves.⁷ We must concede, of course, that the only experiences that constitute this enjoyment take place entirely inside the minds of individuals.⁸ But we might still think that the other features of conviviality already noted are enough to mark it off as different from mere public goods. One might put it like this. An account that reduced the value of conviviality to the values of the individual experiences of enjoyment of which, admittedly, it is composed

... would be an unsatisfactory account since, as we have seen, each of these experiences refers beyond itself to the wider group ... An account, then, of the value of these things that was sensitive to what it was like to enjoy them would have to focus on their communal character.⁹

And ‘no account of their *worth* to anyone can be given except by concentrating on everyone together’.¹⁰

It does not matter that our example, the conviviality of a party, is of negligible ethical interest. There are heavyweight group goods that are thought also to have this special character: for example, fraternity, solidarity, mutual tolerance, and the value of a society with a common culture.¹¹

The next step in the argument is an inference from these special group goods to group rights. In much recent writing¹² the inference is made using a particularly influential account of a right, which we owe to Joseph Raz and have met earlier.¹³ Let me quickly remind you. To say that a person has a right, his account goes, is to say that, other things being equal, an aspect of that person’s well-being is a sufficient reason for holding some other person, or persons, to be under a duty. Given that definition, it seems clear that I, as

only one person, do not have a right to, say, fraternity, because the benefit to me alone is insufficient to justify holding the rest of you to be under the considerable burden of a duty to produce a fraternal society.¹⁴ One might, then, add the individual benefit to me to the individual benefit to you, and so on, until, if we eventually include enough individuals, our reason for imposing the duty on others becomes sufficient.¹⁵

I shall come back to Raz's account of rights shortly. For now, I want to make only two comments.

First, there does not seem to be any general inference from a group good of the special type so far isolated to a right to it. For instance, it is thoroughly counter-intuitive to think that from the claim *conviviality is a good of a party*, we can infer *a party has a right to conviviality*. That is not because of the lightweight nature of the example; we do not think so in the case of the heavyweight examples either. From the claim *fraternity is a good of a community*, we cannot infer *a community has a right to fraternity*. Fraternity, solidarity, and tolerance are highly desirable qualities in a society, and we members of it should, no doubt, be willing to work hard to bring them about. But what seems deeply counter-intuitive is to think that they are a society's by right. What we need is not just a good that is special in some way or other, but one that is special in a particular way: that it is the sort of good that attracts the protection of a right.¹⁶

My second comment is this. What is special about these supposedly strong group goods is merely that their description refers to several individuals together as interacting parts of a functioning whole. It is not that their value cannot be reduced to individual values. The value of conviviality resides in the enjoyment that each individual experiences singly. The specialness in these goods is something conceptual. The point seems to be that we do not properly describe conviviality without introducing how the enjoyment of one person works to enhance the enjoyment of another, and so on. That, it is said, is an important part of what conviviality is. Similarly, we do not properly describe fraternity without acknowledging that Jack's benevolent concern for Jill is strengthened by his recognition of Jill's benevolent concern for him, and so on through much of the group.

That conceptual point seems to me correct. But exactly the same is true of many individual goods and of the individual rights to which they give rise. Autonomy and liberty are two of the classic goods of first-generation rights. Part of what is meant by autonomy is not being dominated or controlled by others; much of what we mean by liberty is not being blocked by others.