

Human Dignity and the Foundations of Human Rights

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Introduction

THE EXPRESSION ‘HUMAN DIGNITY’ is nowadays commonly found in close proximity to that of ‘human rights’, not only in official legal and political documents but also in the discourse of political activists, lawyers, philosophers, and ordinary citizens. We can distinguish at least three functions that invocations of human dignity perform in connection with human rights. The first is simply to refer to the set, however composed, of genuine human rights. This usage is premised on the assumption—unfortunately, seldom defended or even explicitly identified as such—that human dignity and human rights either bear an identical sense or are extensionally equivalent in the standards that come under them. So, for example, some international lawyers interpret the Universal Declaration of Human Rights—which refers in its preamble to the ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family’—as asserting precisely such an intensional or extensional equivalence.² This seems to me the least interesting, and perhaps the least tenable, of the three deployments of human dignity.

In a second, and more interesting, usage, human dignity fixes the distinctive significance and content of human rights as compared with other ethical-political standards, including moral and legal rights that are not human rights. In this vein, Jürgen Habermas contends that the idea of human dignity is a ‘portal’ or ‘conceptual hinge’, one that discharges a ‘mediating function’ between a morality of duties that pervades all human life, on the one hand, and the limited schedule of enforceable legal rights properly enacted by a

¹ My thanks go to Robert George, Avishai Margalit, Peter Schaber and Effy Vayena for helpful comments on earlier drafts of this chapter.

² See, for example, J. Tobin, *The Right to Health in International Law* (Oxford, Oxford University Press, 2012), 56.

democratic constitutional state, on the other. So understood, human dignity is a threshold at which the operative grounding values—the morality of equal respect—give rise to the rights that individuals can claim in virtue of their status as citizens of a democratic state.³ Habermas's specification of the threshold constituted by human dignity—the enforceable legal rights properly claimable by democratic citizens—remains largely formal, offering little in the way of substantive criteria for determining the content of those rights. Perhaps the rights are to be agreed upon by democratic citizens through processes of collective deliberation.⁴ But this in turn leads to the familiar conundrum that at least some human rights are arguably conditions of democratic deliberation, in which case they have a status independent of the outcome of any deliberative process. Presumably, Habermas's elusive thesis of the 'co-originality' of human rights and democracy is in part addressed to this problem.⁵

A third deployment of the notion of human dignity goes deeper, treating it as a grounding value of human rights, perhaps even as their exclusive normative basis. Hence, the 1966 Covenants on Civil and Political Rights and on Economic, Social, and Cultural Rights both assert that the rights they enumerate 'derive from the inherent dignity of the human person', an assertion reiterated by the UN General Assembly in 1986 (GA Res. 41/120) and echoed by numerous international, regional, and domestic human rights instruments.⁶ It is this third, justificatory, deployment of the idea of human dignity that I wish to explore in this chapter.

Before doing so, however, it is worth dwelling on what the justificatory project, at the broadest level, involves. To begin with, what is to be justified are 'human rights', where these are understood to be individual moral rights possessed by all human beings simply in virtue of their humanity. We possess these rights not because of any personal achievement or social status, nor because they are conferred upon us by a positive legal order or social conventions, but simply in virtue of our standing as human beings. Second,

³ J. Habermas, 'The concept of human dignity and the realistic utopia of human rights', in his *The Crisis of the European Union: A Response* (Cambridge, Polity Press, 2012), 81–7.

⁴ Habermas, 'Concept of Human Dignity', 87.

⁵ J. Habermas, 'On the internal relation between the rule of law and democracy', in his *The Inclusion of the Other: Studies in Political Theory* (Cambridge, MA, MIT Press, 1998), 259–62. Beyond the reservations noted above, one can question Habermas's conception of human rights as inherently oriented towards legalization (or, a fortiori, constitutionalization), see, for example, Amartya Sen, 'Human rights and the limits of law', *Cardozo Law Review* 27 (2006), 2913–27, and J. Tasioulas, 'On the nature of human rights', in G. Ernst and J.-C. Heilinger (eds), *The Philosophy of Human Rights: Contemporary Controversies* (Walter de Gruyter, 2012), 17–59, 40–3.

⁶ Christopher McCrudden, 'Human dignity and the judicial interpretation of human rights', *European Journal of International Law* 19 (2008), 655–724.

the process of justification is primarily a matter of deploying ordinary moral reasoning, or natural reason in the terminology of an earlier tradition. Moreover, in common with most of the central figures in that tradition, I take it that the justification sought does not stop short of establishing the objective truth of certain positive propositions about human rights. These two features characterize what, at least until recently, was the orthodox understanding of human rights, an understanding that treats the concept of human rights as substantially equivalent to that of natural rights.

In the last decade, however, both limbs of the orthodox conception have come under sustained attack from proponents of political conceptions of human rights, most of whom take their cue from John Rawls's brief and scattered remarks on the subject in *The Law of Peoples*.⁷ These critics spurn orthodoxy because of its supposed blindness to the political functions that are integral to the contemporary concept of a human right. Typically, some version of one or both of the following two broad functions are invoked. Internally, respect for human rights is at least a necessary condition for the legitimacy of the state; unless a state complies with human rights, its laws will not bind its subjects. Externally, human rights operate as standards whose violation, if extensive and persistent, can trigger a defeasible case for some form of international intervention or other manifestation of concern. Some advocates of the political conception also follow Rawls in abandoning the second limb of the orthodox conception. They insist that in an ideologically pluralistic world, an adequate justification of human rights cannot appeal to any 'comprehensive doctrine', including the idea that there are objective moral truths, regarding which 'reasonable', or at least 'not fully unreasonable', societies are prone to disagree. Instead, human rights are to be justified by a special mode of 'public reason' that is discontinuous from ordinary, truth-oriented moral reasoning.

Having marked this disagreement between orthodox and political understandings of human rights, I now set it aside and proceed on an orthodox footing, taking human rights to be broadly equivalent to natural rights.⁸ In any case, none of the philosophers I shall discuss follows Rawls in abandoning the second tenet of the orthodox conception, which is the crucial one for our purposes.

⁷ John Rawls, *The Law of Peoples* (Cambridge, MA, Harvard University Press, 1999), 10, 27, 37, 42, 65, 68–9, 78–81.

⁸ I have made a case for orthodoxy about human rights elsewhere, including 'On the nature of human rights', 43–56, and 'Towards a philosophy of human rights', *Current Legal Problems* 1–30 (2012), 18–25.

Divine love and human interests

Is there anything more than a rhetorically induced feel-good factor to the familiar claim that human rights are grounded in human dignity? Is the latter notion doing any real work here, or is it just a placeholder for some justification that the speaker vaguely implies exists but has done absolutely nothing to specify? At the limit, is the appeal to human dignity in reality serving as a means of evading the question of foundations? One route into these questions is to see how much progress we can make towards justifying human rights without overt reliance on the notion of human dignity. Now, the idea of human dignity refers to some intrinsic value inhering in the status of being human, a value that is equally shared by all human beings but which somehow elevates them above all non-human animals. At this level of abstraction, one might wonder how human dignity could possibly fail to be a foundation of human rights. To get a clearer idea of how this might be thought to be so, let us consider two putatively alternative grounds for human rights: love and interests.

By love, I mean divine love. Of course, there exist theistic interpretations of human dignity that trace our special inherent worth to some salient respect in which human beings, unlike other creatures, bear the image of God: for example, in virtue of our capacity for abstract rational thought or self-determination. Such approaches struggle to embrace members of the species *Homo sapiens* who were born lacking these capacities or who have subsequently irretrievably lost them. But if human rights are rights possessed by all human beings, how can our Godlike status confer them upon those with severe mental disabilities or sufferers from advanced senile dementia? This line of thought has recently led Nicholas Wolterstorff to invoke God in a different way, one with its own distinct theological lineage. In his view, all human beings possess all human rights not because of some valuable quality inhering in each of those humans, not even one in virtue of which they resemble God, but because they are special objects of God's love. Moreover, since God loves each individual human being equally, even the most disabled human possesses exactly the same human rights as the most gifted members of the species.⁹

Even by Wolterstorff's own reckoning, and bracketing the contestable assumption of God's existence, this argument grounds very few human rights. So few, indeed, that there is a genuine question whether he is addressing the same subject matter as the mainstream human rights culture. And the problems run deeper still. If human beings are specially loved by God, one might

⁹ N. Wolterstorff, *Justice: Rights and Wrongs* (Princeton, NJ, Princeton University Press, 2008), 352–61.

plausibly suppose that this is in virtue of qualities they possess that render them, as opposed say to earthworms, fitting objects of such love. In the absence of these qualities, God's love would seem to be arbitrarily bestowed. But if humans possess such qualities, why do they not directly ground human rights without the mediation of God's love? Perhaps the answer is that these qualities are not sufficiently impressive, considered by themselves, to do so. But even if we are persuaded by this response, there is a further question about whether this is a justification of the right kind. Human rights are supposed to pay tribute to the value of each individual human being, but on this account they are ultimately ways of respecting God. Human beings are, in consequence, radically decentred within human rights morality: they are not the ultimate source of the moral concern it embodies. This is analogous to the way in which, according to Wolterstorff, eudaimonistic justifications of human rights, which appeal to the flourishing of those bearing the duties generated by rights, unacceptably downgrade the status of the right-holder as the source of human rights. The suspicion that things have gone awry here is heightened by Wolterstorff's key illustration of how love bestows special worth, which is that of an ordinary individual acquiring a higher social status as a result of being befriended by the monarch. Treating such an individual with special respect, however, is ultimately a way of honouring the monarch, not the person himself.

We turn now to the second justificatory pathway to human rights, the one that invokes universal human interests. The idea here is that there are certain interests, the fulfilment of which standardly improves the quality of a human's life. Human rights on this view do not merely characteristically protect human interests—such as our interests in not being tortured, in subsistence and education, in being able to practise one's religion or to have a family, and so on—they also owe their very existence to the way they serve these interests. The fact that human rights characteristically further and protect human interests is, therefore, not a brute coincidence; it is explained by the grounding role of such interests in arguments for human rights. This is not the place to offer anything like an adequate account of universal human interests; instead it is enough to notice three features. First, they are universal interests, possessed by all human beings simply as human beings (inhabiting, we might add, some broadly defined historical epoch). Second, they are objective in status: they are interests of human beings whether or not those human beings believe them to be interests of theirs or desire their fulfilment. Finally, there is a plurality of interests that can give rise to human rights. In grounding human rights, we can avail ourselves of diverse aspects of the human good, provided they are genuinely universal: interests in knowledge, friendship, play, achievement,

autonomy, and so on. Indeed, any given human right will typically be grounded in a cluster of affected interests.

Now, it is vitally important to appreciate that this interest-based approach does not simply identify human rights with universal interests. Not that such an identification would be utterly implausible. After all, it offers a benign way of explaining the endless proliferation of human rights claims. And it also provides one means of vindicating items in key human rights instruments that are often disparaged by sceptics, such as the controversial human right to 'highest attainable standard of physical and mental health'—for surely this is something in which we each have an interest.¹⁰ Nevertheless, reducing human rights to universal interests is a category error. Interests belong to the domain of prudence or well-being, which concerns what makes a life better for the person living it, whereas human rights are moral standards that impose duties on others, where the violation of the duty entails *wronging* someone in particular—the right-holder. Our interests, by contrast, can be impaired in all sorts of ways without any *moral* wrongdoing being in the offing, let alone a directed wrongdoing of this specific kind. Lawyers have long understood this, as the distinction between *damnum* and *injuria* attests.

A central question confronting the interest-based account of human rights is that of spelling out how we may advance from premises about universal human interests to conclusions about human rights. The correct, albeit highly schematic, answer is: only insofar as universal human interests, in the case of each human being and without the added support of others' interests, generate a duty to serve these interests in some way.¹¹ Hence, a human right exists when in the case of all people their personal interests suffice to impose duties upon others to serve their interests by securing the object of the right. The object may be as various as access to clean water, a fair trial, freedom from torture, or basic education, depending on the particular right in question. So, the vital consideration is the duty-generative capacity of individuals' interests. And duty here has to be understood in a quite specific sense. It is not just a reason, or even a moral reason, but a specific kind of moral reason. It is categorical, in that it applies to us independently of how we happen to be motivated. It is exclusionary in its force, in that it is not simply to be counted in favour of, or against, a certain action, but also neutralizes at least some countervailing reasons. And, finally, it is a reason whose transgression merits an array of moral responses, such as resentment on the part of the victim, guilt

¹⁰ Article 12 (1), International Covenant on Economic, Social and Cultural Rights (1966).

¹¹ For the leading exposition of the interest-based approach to moral rights generally, see Joseph Raz, *The Morality of Freedom* (Oxford, Oxford University Press, 1986), chapter 7.

on the part of the perpetrator, and blame or sometimes even punishment on the part of third parties.

Of course, the preceding response demands supplementation by a lot of substantive judgment in order to yield answers to specific practical problems. However, it is probably in vain that we hanker after some simple argumentative bridge, a comprehensive and readily applicable *ex ante* set of criteria, that enables us to cross the Rubicon from interests to duties that are the counterparts of rights. There is no prospect of any philosophical formula upstaging sound practical judgment attuned to the specificities of each case. Nevertheless, we can still acknowledge at least two thresholds that must be crossed in progressing from universal interests to human rights. I shall label them the thresholds of *possibility* and *burden*.

Passing the first threshold requires that it be possible to serve the putative right-holder's interest through the putative duty. The kind of impossibility that prevents an interest from generating a duty can vary from case to case. Sometimes it is logical: there can be no duty to provide everyone with an 'above average' standard of living. Sometimes it is a matter of scientific law: there can be no duty to enable men to give birth. And sometimes it is a matter of contingent empirical fact: given the scarcity of available resources, there can be no duty to provide everyone with the option of a Rodeo Drive lifestyle. Sometimes, more interestingly, the impossibility takes a more directly normative form, one whereby the relevant interest cannot be served specifically by means of the recognition of a *duty*. For example, a duty to love another romantically is arguably self-defeating, given that romantic love is the spontaneous outgrowth of another's feelings and desires. But even assuming that it is possible to serve an interest by means of a putative duty—as may be the case with the duty corresponding to the supposed right to 'the highest attainable standard of physical and mental health'—a second threshold must be negotiated. This registers the burdens that the duty would impose not only on the latter's putative bearers but also on our capacity to realize other values, including other rights. This is the main reason for scepticism about a human right to the highest attainable standard of health, at least on anything approximating a literal construal. Even if it is possible, given realistically available resources, to achieve the highest attainable standard of *health*—or, more modestly, of *health care*—in the case of all human beings, doing so would be so burdensome in relation to our capacity to realize other values, including other human rights, that individuals' interest cannot yield any such corresponding duty.

Of course, the idea of burden needs to be handled with great care. In particular, there is the delicate matter of distinguishing between the burdens that bear on the existence and content of a putative right, and those that at best

count against complying with an existing right when reaching an all-things-considered decision regarding what to do. Any account that does not treat every human right as absolute, hence as never justifiably overridden by other considerations, must make room for this distinction. So, for example, in judging whether there is a human right to antiretrovirals, one cannot simply take as given the price that pharmaceutical companies, motivated by profit-maximization and asserting rights conferred by patent laws, charge for such drugs. Those prices are the upshot of policies formed within a market system and an intellectual property regime that may themselves be morally deficient in salient respects. Nevertheless, even if HIV-sufferers do have a human right to antiretrovirals, their high market price may justify a poorer country in adopting a policy of not (fully) complying with that right, given the many other pressing claims on its severely limited resources. Here, the high market price justifies non-compliance with a genuine human right, rather than preventing the human right from coming into existence in the first place or diluting its content.

Much more needs to be said about the transition from interests to duties. It can be a complicated process partly because of its holistic character. We cannot satisfactorily establish the existence and content of any one human right without also considering the implications for the existence and content of other putative human rights. Moreover, it is unlikely that the process of delineating and assigning counterpart duties is ever entirely a matter of pure moral reasoning. In order for human rights to be effective, action-guiding standards, they will often require a more determinate specification than unaided moral reasoning can generate from its own resources.¹² Hence the need to some form of social fiat, such as convention or positive law, to supplement the deliverances of natural reason. However, if it can be successfully executed, the interest-based account of human rights promises to make sense of a phenomenon that eluded Wolterstorff: namely, the status of the right-holder as the ultimate source of the moral claim embodied in his right. The duties associated with rights are *directed*, they are *owed to* someone in particular: the right-holder. In consequence, if a duty that is a counterpart to a right is violated, the right-holder is the immediate victim, and hence is in a special position to complain, to feel resentment. And the reason for this is that the duty has its origins in his interests alone. Perfect duties, corresponding to rights, contrast with imperfect

¹² For the spectrum of questions that have to be addressed in a tolerably full specification of rights, see J. M. Finnis, *Natural Law and Natural Rights*, 2nd edn (Oxford, Oxford University Press, 2011), 218–19.

duties, such as the duty to be charitable, which are owed to no one in particular, and hence are not associated with rights.

Deontology and personhood

Are we now in sight of at least the rough outlines of a satisfactory account of the foundations of human rights, one that dispenses entirely with human dignity? We cannot safely conclude that we are until two powerful onslaughts from the partisans of dignity have been withstood. Call them the *deontological* and the *personhood* objections. I shall consider them as they emerge, respectively, out of important recent writings on human rights by Thomas Nagel and James Griffin.

The first objection contends that the grounding of human rights cannot be primarily in interests, because the moral logic of rights is radically distinct from that of interests. Regarding the latter, the utilitarian is correct: the aggregate fulfilment of interests is to be maximized across all persons. In this process of aggregation, some people's interests may have to be sacrificed in order to promote the fulfilment of others' interests. The logic of rights, however, erects powerful, if not always absolutely insurmountable, obstacles to such interpersonal trade-offs. Nagel calls this feature of rights their 'agent-relativity': '[Rights] prohibit us from *doing* certain things to anyone but do not require that we count it equally a reason for action that it will prevent those same sorts of things from *being done* to someone but not by oneself.'¹³ The right not to be murdered imposes a duty on each of us to refrain from murdering others. But this duty is not eliminated or overridden simply because murdering one innocent person is the only way of preventing the murder by someone else of two other innocents. Instead, it imposes on us duties *personally* to respect the life of each and every right-holder, so that compliance with the duty cannot be traded off in this way across persons. The agent-relativity of the duties imposed by rights finds its counterpart in the special status—'inviolability'—that such rights confer on their holders. It is this notion of status, which encapsulates the resistance of rights to trade-offs, that we can reasonably translate as human dignity. The inference that Nagel draws is that the primary basis of human rights is in our moral status, not our interests.

Nagel's argument evidently latches onto an important aspect of the logic of rights, one that interest-based theorists deny at their peril. However, Nagel

¹³ T. Nagel, 'Personal rights and public space', in his *Concealment and Exposure* (Oxford, Oxford University Press, 2002), 31–52, at 35.

gives this feature the label 'agent-relativity' partly because he repeatedly stresses a self-other asymmetry in its formulation: *I* may not torture one innocent in order to prevent two other innocents being tortured by *another*. But arguably the self-other asymmetry, even if it is morally salient, is not the crux of the matter. I also may not torture one innocent person even if, through some convoluted but highly predictable train of events, this would prevent *me*, at some later stage, torturing two others. I therefore prefer to speak of the resistance of rights to trade-offs within a simple aggregative calculus, rather than to their agent-relativity, as constituting the nub of the deontological objection.¹⁴

But what is the content of Nagel's alternative justification, according to which human rights are aspects of our status as members of the moral community? Nagel's reply, in effect, is that this status comes down to the fact that we possess certain rights, a fact that testifies to the fundamental, non-derivative standing of human rights in our moral thought. Human rights are grounded in our status as members of the moral community, but that very status is a matter of possessing certain rights. This circularity might be thought a steep price to pay in order to secure the resistance of human rights to trade-offs. Of course, there will be some points in our ethical thought at which we strike bedrock, leaving us only with an appeal to self-evidence, in the sense that properly understanding a certain principle provides sufficient warrant for believing it. So the appeal to underived moral norms is not in itself objectionable. But it does leave it rather mysterious why standard human rights protect some very important human interests; can this be a mere coincidence so far as the existence of the former is concerned? Moreover, such rights fundamentalism seems to short-circuit the potential for rational debate about which human rights exist, a debate conducted in significant part by reference to the moral significance of the interests served by putative rights.

The deontological objection, as we find it in Nagel, confronts us with a hard choice: either surrender the resistance to trade-offs characteristic of human rights or else accept them as fundamental moral standards for which a non-circular justification is unavailable. But, in the end, this is a false choice. We should not accept his premise that the moral logic appropriate to interests is exclusively one of aggregation. In the outline sketch of the interest-based account of human rights given above (see 'Divine love and human interests'), rights were not identified with interests, nor was there any hint that the reasoning advancing us from interests to duties can be subsumed under some

¹⁴ I leave unaddressed, in this connection, the extent to which this resistance to trade-offs is well captured by some version of the principle of double effect which accords moral significance to the distinction between what one intends in acting and what one accepts as a side effect of so acting.

overarching aggregative principle. More generally, there are many teleological approaches to ethics, going all the way back to Plato and Aristotle, that make considerations of human good central to the justification of moral standards without endorsing the kind of crude aggregative reasoning that Nagel describes. One way of putting this is to say that the moral significance of interests finds expression not just in reasons to *promote* the fulfilment of those interests but also to *respect* them. And respecting them crucially includes not directly acting against the duties such interests generate, even if doing so would promote overall compliance with the very same duties.¹⁵ However, this distinction needs to be handled with care, since nothing in the idea of promoting interests, as articulated so far, commits us to the thesis that a principle of maximizing overall utility is even *one* of the demands of morality. It may indeed be that such a principle is incoherent or otherwise unsustainable.¹⁶

And there are yet further difficulties with Nagel's status-based approach to human rights. Surely the whole of morality, so far as it concerns humans, reflects our status as members of the moral community. Subjecting people to punishment in the case of serious wrongdoing is one important way in which we pay tribute to their status as members of the moral community. Nevertheless, many of us baulk at the claim that offenders have a *right* to be punished. How, then, are we to differentiate rights from other elements of morality that are not rights-involving, such as demands of charity or ideals of moral perfection? The interest-based theorist has an answer to this question: the part of morality that concerns rights has a distinctive kind of justification; that is, the interests of the right-holder suffice, without the benefit of the additional weight of others' interests, to generate duties. How can Nagel differentiate the part of morality that concerns human rights from that which does not?

The start of one reply is to identify our moral status, or human dignity, with one particular value among others, but to deny that the realization of this value is something that generally enhances the quality of our lives. This is the account of human rights advocated by Amartya Sen, according to whom human rights are exclusively grounded in the value of freedom, but freedom in the relevant sense is not aptly characterized as one of our interests.¹⁷ This sort of view fits with, and helps make sense of, Nagel's tendency to focus on human rights that are not readily conceived as enhancing the quality of the

¹⁵ See also James Griffin, *On Human Rights* (Oxford, Oxford University Press, 2008), chapter 3, for a discussion of a teleological but non-consequentialist approach to human rights, and also the remarks in John Tasioulas, 'Taking rights out of human rights', *Ethics* 120 (2010), 647–78, at 675–8.

¹⁶ See, for example, J. M. Finnis, *Natural Law and Natural Rights*, 110–18, and D. Wiggins, *Ethics: Twelve Lectures on the Philosophy of Morality* (London, Penguin, 2006), chapter 8.

¹⁷ Amartya Sen, *The Idea of Justice* (Cambridge, MA, Harvard University Press, 2009), chapter 17.

right-holder's life, such as the right to consume pornography or publicly deny the Holocaust. In my view, which cannot be defended here, Sen's argument involves an implausible understanding of the value of freedom and its relation to well-being, and of how interests are served by rights on an interest-based account. Let me consider, instead, how the appeal to freedom might drive the second objection to the interest-based approach, which I call the *personhood* objection.

This objection can be seen as emerging from an alternative, personhood account of the foundations of human rights. On this view, whose leading contemporary exponent is James Griffin, human rights are grounded in the value of personhood or normative agency. Persons are normative agents, beings with the capacity to choose a conception of the good life from a range of valuable options (autonomy) and to pursue their choices free of interference (liberty). Personhood distinguishes us from non-human animals, hence it offers a salient and historically resonant interpretation of human dignity.¹⁸ The personhood account opposes the deontological view, because it conceives of personhood as an important set of interests; but it also opposes the interest-based view, because it allows only the values of personhood—autonomy and liberty—directly to ground human rights, but not other universal human interests such as achievement, enjoyment, knowledge, or the avoidance of pain.

One problem with the personhood view is that it issues in counter-intuitive and precarious justifications of paradigmatic human rights.¹⁹ For instance, Griffin contends that torture is a human rights violation because, and only because, of the way it attacks our capacity to 'decide for ourselves or to stick to our decision'.²⁰ Certainly, this is a major part of the story. But there are many other ways of undermining people's decision-making capacity, such as injecting them with mind-altering drugs. Part of what makes torture a graver human rights violation is that it achieves its purpose through the infliction of severe pain; and the avoidance of severe pain is another universal interest, along with the interest in freedom. The human right not to be tortured seems to draw its force from a number of interests that are threatened by torture, not just freedom. Another problem is that the personhood account, at least as developed by Griffin, is that it limits the subjects of human rights to 'the sub-class of human normative agents'.²¹ This disqualifies an alarming number of human beings from having any human rights—all those members of the species who

¹⁸ J. Griffin, *On Human Rights* (Oxford, Oxford University Press, 2008), 32–3, 36.

¹⁹ For a fuller discussion of many of the points made in the rest of this section, see John Tasioulas, 'Taking rights out of human rights', 658–68.

²⁰ J. Griffin, *On Human Rights*, 52.

²¹ J. Griffin, *On Human Rights*, 50.

are not, or are no longer, normative agents: not only foetuses but also newborn babies, infants, and those suffering from serious mental disabilities or in persistent vegetative states.²² Of course, Griffin allows that there are other moral norms that prohibit the maltreatment of human beings who are non-agents. By his reckoning, wantonly killing an infant or an Alzheimer's patient is murder, a wrong far graver than most human rights violations, even though in neither case is the killing a human rights violation. Yet it is that last point that is extremely difficult to swallow, since murder is a paradigmatic rights violation. To say, in response, that the murder of non-agents violates their rights, but is not a *human rights violation*, is to rely on what looks, from an orthodox point of view, like an artificial distinction between universal moral rights and human rights.

The interest-based account of human rights offers a way of overcoming both of these problems. Since a plurality of interests can underwrite human rights, there is no need to construct counter-intuitively roundabout justifications of rights that appeal exclusively to our interest in normative agency. And, for the same reason, we are better placed to ascribe human rights to human beings who do not have substantial (present) interests in autonomy and liberty: the interest of infants and Alzheimer's patients in avoiding painful and degrading treatment is enough to render their torture a human rights violation. However, we should do well to register a powerful motivation that leads Griffin to the personhood view. He believes that the contemporary discourse of human rights is in an intellectually debased condition, to such an extent that the phrase human right has become virtually criterionless. And he claims that the pluralistic, interest-based approach connives at this debasement, exacerbating the problem of indeterminacy by allowing a plurality of interests to factor into the grounding of human rights. The upshot, he contends, is that a pluralistic view fails to respect the difference between human rights and the elements of a good human life, depriving the language of human rights of its distinctive significance.²³

This personhood objection, however, is misplaced. Although I do not share Griffin's bleak assessment of contemporary human rights discourse, he is certainly justified in calling for greater intellectual discipline in arguments about the existence and content of human rights. But the interest-based account adequately meets the call; or, to put it more cautiously, it fares no worse than the personhood account in doing so. Pluralism does not license us to infer the existence of a human right to X wherever there is a universal

²² J. Griffin, *On Human Rights*, chapter 4.

²³ J. Griffin, *On Human Rights*, 55.

human interest in X. Instead, we have to ask whether for all human beings that interest generates a duty with the same content, and in asking that question we must, among other things, negotiate the two thresholds. It is the combination of universality and threshold requirements that instils the necessary intellectual discipline, not an *ex ante* restriction on the kinds of universal interests that may have a rights-generative role. Indeed, Griffin himself needs to appeal to a threshold at which personhood interests generate rights, since not everything that furthers a personhood interest—however great the cost—is something to which there is a right.²⁴ So, the pluralistic account respects the distinction between rights and their grounding interests in precisely the same way as the personhood account: by appealing to a threshold at which the relevant interests generate duties. If a workable threshold exists for the personhood account, there is no reason why it should not equally operate within a pluralistic account.

The need for human dignity

If the interest-based account of human rights withstands the deontological and agency objections, should we deny human dignity a place at the foundation of human rights? Should we go further and join its legion of critics, from Arthur Schopenhauer to Steven Pinker, who insist that human dignity either reduces to some other value—such as autonomy—or else operates as rhetorical camouflage for the speaker's unspoken moral prejudices, often religious in origin?

No; this is not where the path we have followed has led. The situation is considerably more nuanced. Deontological theorists who claim that an interest-independent conception dignity furnishes a complete grounding of human rights are mistaken. But those who argue that human dignity is really just one component of well-being among others—the interest in freedom or normative agency—also go astray. Instead, an alternative position to both views is preferable. There is a meaningful notion of human dignity, and it is the notion of an intrinsically valuable status rather than of one human interest among others. It does lie at the foundations of human rights, but only because it is foundational to interpersonal morality generally. But, contrary to both Nagel and Griffin, it does not exhaust the foundations of human rights. In other words, human dignity by itself cannot generate anything like the familiar schedule of human rights. Instead, it characteristically operates in intimate union with

²⁴ Griffin uses the notion of 'practicalities' to articulate the nature of this threshold, *On Human Rights*, 37.

universal interests in grounding human rights norms. The resultant view of the grounds of human rights is doubly pluralistic: it affirms both moral (equal human dignity) and prudential (universal human interests) elements among the grounds of human rights, and it embraces a plurality of universal human interests as potentially human rights-generative.

The idea of human dignity is the idea of an intrinsically valuable status that merits our respect, a status grounded in the fact of being a human being. What it is to be a human being, what is the ontological basis of this valuable status, is an inexhaustible topic. But in broad outline it is to belong to a species which is in turn characterized by the possession of a variety of features: a characteristic form of embodiment; a finite lifespan of a certain rough magnitude; capacities for physical growth and reproduction; psychological capacities, such as perception, self-consciousness, and memory; and, specifically rational capacities, such as the capacities for language-use, for registering a diverse range of normative considerations (including evaluative considerations, prudential, moral, aesthetic, and others besides), and for aligning one's judgments, emotions, and actions with those considerations.²⁵ Call this the human nature conception of human dignity, insofar as it grounds the value of human dignity in the characteristic elements that constitute human nature.

Some important consequences follow from this understanding of human dignity. First, human dignity inheres in a human being from the moment of their coming into existence as an individual human being until their death (and in some ways retains significance beyond their death), and this is so irrespective of the choices (e.g., to engage in wrong-doing, to neglect developing or exercising their capacities) or condition (e.g., embryonic, diseased, comatose) of the human being in question at any stage of their life. Second, since what matters is the possession of a human nature, the value of human dignity remains constant across different persons despite other ethically significant variations among them. A human being with impaired rational capacities shares in human dignity to the same extent as one with ordinary rational capacities; the same applies to those endowed with superior rational capacities, or who have developed them to a greater extent, as compared with others. Third, in the case of all human beings, their dignity confers on them a special

²⁵ For broadly similar views of human dignity, see P. Lee and R. P. George, 'The nature and basis of human dignity', *Ratio Juris* 21 (2008), 173–93, and J. M. Finnis, 'Equality and differences', *Solidarity: The Journal of Catholic Social Thought and Secular Ethics* 2 (2012). However, there are some important differences worth noting, especially with Lee and George, of which I here mention only two. First, I want to separate much more sharply than they do the attribution of human dignity and the attribution of human rights. Second, unlike them, I am not inclined to make possession of a rational nature a necessary condition for the capacity to have moral rights. A further apparent difference is noted in 'Invariant dignity, variable rights'.

value, and therefore justifies according them special consideration, as compared with all non-human animals. What practical implications this special value has, in concrete cases, is a matter for substantive argument. Fourth, human dignity consists in an equality of basic *moral* status among human beings. Affirming its existence does not, in itself, amount to any claim about social, political, or legal status.²⁶ In contrast to Jeremy Waldron's recent conjecture, human dignity so conceived is not principally a juridical notion that attributes to all human beings a 'high-ranking legal, political, and social status'.²⁷ Historically, defenders of human dignity, or the basic moral equality of humans, such as the Stoics, Locke, and Kant, have embraced profoundly egalitarian doctrines as to social, political, and legal status. These doctrines include the exclusion of women and those without property from political participation, and even some forms of slavery. But even if these egalitarian practices violate human dignity, it again takes a substantive argument to establish that this is so: the claim of human dignity—of basic moral equality among human beings—is not in its essence a claim about legal or political status.

Someone might object that this articulation of human dignity simply identifies another interest, our interest in having and maintaining a distinctively human nature. Hence, it does not take us beyond the orbit of a resolutely interest-based view. Although this objection may well deploy the idea of interest in a perfectly intelligible way, ultimately it misfires. This is because there is a categorical difference between asking what kind of nature a being possesses and consequently what kind of respect it merits, on the one hand, and what interests it has, on the other. Indeed, it is impossible to even make a start on answering the second question without having some independent grasp of the answer to the first. This distinction between nature/status and interests survives the realization that a fully adequate specification of the nature and value of human status must ultimately make reference to the array of goods that the exercise of their essential capacities enables human beings to realize, and vice versa. This substantive interdependence is perfectly consistent with the distinctness of the concepts involved.²⁸

²⁶ This distinction is marked by Rawls, who insists on the difference between 'equality as it is invoked in connection with the distribution of certain goods, some of which will almost certainly give higher status or prestige to those who are more favoured, and equality as it applies to the respect which is owed to persons irrespective of social position'. John Rawls, *A Theory of Justice* (Oxford, Oxford University Press, 1999), 447.

²⁷ Jeremy Waldron, *Dignity, Rank, and Rights*, ed. Meir Dan-Cohen (Oxford, Oxford University Press, 2012), 47.

²⁸ John Finnis has stressed both the link between capacities and goods and yet also the meaningfulness of the distinction between dignity and human interests in accounting for the basis of human rights:

Still, even though status is distinct from interests, we do not need to invoke human dignity as an extraneous add-on to the interest-based account of human rights that I sketched. Human dignity was already there in the interest-based account, staring us in the face, as it were, but not in the guise of one interest among others. There are at least two levels at which it figures. The first relates to the capacity of human beings to be right-holders. It is plausibly regarded as at least a necessary condition for any individual's capacity to have rights, leaving aside the case of non-artificial entities such as corporations, that their existence and well-being is of intrinsic and non-derivative value. Their existence and well-being must be of value in itself, and not simply in virtue of their causal consequences, and this intrinsic value must not be entirely dependent on the constitutive role that the putative right-holder plays in the existence or flourishing of some other individual.²⁹ Possessing the value of human dignity may be conceived as one way, if not the only way, of meeting this general condition for having the capacity to possess rights.

Human dignity, on this view, goes beyond merely endowing its possessors with moral considerability. Non-human animals and even plants or inanimate aspects of nature may be appropriate objects of moral concern despite lacking human dignity. Nor is human dignity helpfully interpreted as a condition for possessing any moral rights at all. To my mind, there is no compelling reason to deny that non-human animals possess the capacity to have some moral rights, a capacity that can be articulated in terms of their own species-specific dignity. Instead, human dignity encapsulates the distinctive moral standing of our fellow humans, a standing that differentiates them from non-human animals, thereby imparting a special moral significance to their existence and the fulfilment of their interests. It is a status that informs all human rights morality, but only because it is at the root of interpersonal morality in general. But it helps explain why human beings, in particular, have the capacity for rights.

There is a second, more complex, contribution that human dignity makes to the morality of human rights. It is essential to making sense of the idea that human rights are resistant to trade-offs, which is the feature of such rights emphasized by the deontologist. Human rights embody the idea that each human individual, considered in themselves, is an ultimate and distinctive object of

'Just as immaturity and impairment do not, in one's own existence, extinguish the radical capacities dynamically oriented towards self-development and healing, so they do not in the lives of other persons. There is the ontological unity of the human race, and radical equality of human persons which, taken with the truths about basic human goods, grounds the duties whose correlatives are human rights.' J. M. Finnis, 'Equality and differences', *Solidarity: The Journal of Catholic Social Thought and Secular Ethics* 2 (2012), 3.

²⁹ Joseph Raz, *The Morality of Freedom* (Oxford, Oxford University Press, 1983), 176–80.

moral concern. Insofar as it takes the form of respect for individuals' rights, associated with perfect duties that are *owed to* the right-holder, this concern surely tracks back to the fact that the individuals in question have interests. This was the key insight of the interest-based account of human and, more generally, moral rights. But people are not simply the 'locations' at which the satisfaction or frustration of free-floating interests happen to be instantiated. The individuals with these interests count in themselves, and not because the satisfaction or frustration of their interests is ultimately assimilated to some overarching aggregative concern. Their counting in this way is the starting-point in making sense of the resistance to trade-offs that status-based theorists wrongly suppose necessitates the abandonment of an interest-based approach to human rights.³⁰

It follows from this view that although human dignity is an indispensable basis for human rights—a condition for their possession and a ground, together with universal interests, of their attribution—its normative significance is not exhausted by human rights. It is a broader notion than human rights, with the result that human dignity may be at stake in contexts and in ways not adequately captured by the idea of human rights, and even when no human rights issue arises. That human dignity may be disrespected without any human rights violation having occurred is a phenomenon for which we need to make conceptual space. When neo-Nazis desecrate Jewish graves there is, among other things, an affront to the dignity of the deceased. The desecration expresses the Nazis' view that the deceased were not fellow human beings, or not fellow human beings who count equally with themselves. And yet, we can regard this as an attack on the human dignity of the deceased without supposing their rights have been violated, perhaps because we believe that only living beings can have interests and that rights are characteristically grounded in interests. Here, although considerations of dignity are present and generate duties, the link with interests, which is paradigmatically in place in the discourse of rights, has arguably been severed.³¹

³⁰ For example, J. M. Finnis, *Natural Law and Natural Rights*; Philippa Foot, 'Morality, action and outcome', in T. Honderich (ed.), *Morality and Objectivity* (London, Routledge, 1985); D. Wiggins, 'Solidarity and the root of the ethical', The Lindley Lecture (University of Kansas, 2008).

³¹ For a related discussion of dignity and treatment of human corpses, see M. Rosen, *Dignity: Its History and Meaning* (Cambridge, MA, Harvard University Press, 2012), chapter 3. However, I think that Rosen concludes too quickly that human dignity is not foundational for human rights. Partly this is because he considers it only as furnishing a comprehensive foundation, which it does not. But partly it is also because he sees dignity as giving rise principally to symbolic duties to act in certain ways that *express* respect, and correctly notices that most paradigmatic human rights violations are not fundamentally symbolic in character (see 157–8). But even if human dignity, by itself, mainly grounds prohibitions against symbolic wrongs, it does not follow that it has no important role to play, in tandem

Or, to take another example, a man whose beliefs and behaviour are impeccably liberal may be appalled to find himself upset that a black family has moved into his neighbourhood. This upset may be the product of the man's upbringing in a racist culture, an upbringing that has left a deep imprint on his psyche, one that he sincerely and vehemently condemns and disowns on those occasions when it rises to the surface of consciousness. But even if his upset manifests a failure on his part adequately to register the human dignity of his neighbours, again it does not automatically follow that he is violating their rights. This need not be, as in the previous case, because his upset does not threaten to impact detrimentally on their interests: perhaps it does, in that it causes him to be frosty or unhelpful in his dealings with them. Nonetheless, it might well be thought that there is no violation of a *duty* in this case. Recall the two thresholds that need to be crossed before any interest generates a right. One obstacle is the idea that our visceral emotional responses are not adequately subject to the control of our will. But even if it were psychologically possible to exert such control, the kind of mental self-policing that this requires is arguably excessively burdensome to generate an obligation to undertake it for the sake of the benefit to be secured to the putative right-holders. Here the affront to dignity is not a human rights violation because the link to duty is broken.

Invariant dignity, variable rights

I conclude by drawing out briefly some implications that the doubly pluralist account of the foundations of human rights has for their scope. Recall that Wolterstorff rejected dignitarian accounts of the foundations of human rights on the basis that they cannot confer human rights on those human beings who lack the valuable capacities that ground dignity. For Wolterstorff this is a fatal flaw, because he adopts a strict interpretation of the orthodox view of human rights described at the outset (see 'Divine love and human interests'). On this interpretation, all human beings must possess exactly the same set of human rights, irrespective of divergences in their capacities.³² Taking this uniformity constraint seriously leads Wolterstorff to endorse an ultra-minimalist

with interests, in justifying standard human rights. To this extent, Rosen's scepticism about the human rights-generative powers of dignity over-reaches.

³² Article 2 of the Universal Declaration of Human Rights may seem to reflect this strict interpretation in stating that 'Everyone is entitled to all the rights and freedom set forth in this Declaration', but this assumes that 'everyone' here means all members of the human species. However, the inadmissible bases of distinction set out in that article make no explicit reference to disabilities of any sort.

schedule of human rights, that is, one that excludes practically all the familiar socio-economic rights. Indeed, this minimalism is so severe that it falls foul of Wolterstorff's own desideratum on an adequate philosophical account of human rights: that it exhibit a significant degree of fidelity to widespread understandings of the sorts of rights that count as human rights.³³

Does the account of the foundations of human rights sketched in this chapter enable us to meet Wolterstorff's uniformity constraint while simultaneously respecting the fidelity desideratum? So much seems to be implied by two other defenders of the human nature view, Patrick Lee and Robert George, according to whom '[s]everely retarded human beings have the same nature and thus the same basic rights as other humans'.³⁴ Now, Wolterstorff rejects the human nature view on the basis that membership of a species with a certain nature is a property insufficiently 'impressive' to undergird the doctrine of human rights, since those who possess this nature include 'human beings who are seriously lacking in capacities on account of human nature being malformed in their case'.³⁵ But there is no question of deriving human rights from possession of a human nature alone. We also have to attribute to people a standard profile of universal human interests before we can derive human rights. Human dignity, I have argued, works in tandem with interests in generating human rights.

Can the appeal to dignity and a plurality of universal interests satisfy both Wolterstorff's uniformity criterion and his fidelity desideratum? The only way it has any hope of doing so is if the primary duties associated with human rights can take a conditional form. The human right to a fair wage for work done, for example, is a right that imposes a duty to pay others a fair wage on condition that the latter have actually undertaken some work. Likewise, the human right to a fair trial imposes a duty to try offenders fairly on condition that they face the prospect of public condemnation and punishment for supposed wrongdoing. Wolterstorff rejects such conditional specifications of human rights on the grounds that they would permit us to reinterpret any right as a human right. But I have argued against this claim elsewhere: human rights are incompatible with some, but not all, conditional specifications of their duties. In particular, the conditions specified in the duties must refer

³³ 'Should the schedule of natural human rights that one arrives at ... diverge markedly from standard lists of human rights, one would have reason to wonder whether one's endeavour was seriously flawed in some way'. Wolterstorff, *Justice: Rights and Wrongs*, 320.

³⁴ Lee and George, 'The nature and basis of human dignity', 176. Though perhaps the reference to 'basic' rights is salient. In personal correspondence, Robert P. George has indicated that his position allows for the possibility that some human beings do not possess all of the rights enumerated in the standard schedule of human rights.

³⁵ Wolterstorff, *Justice: Rights and Wrongs*, 352.

only to circumstances that are not unduly remote for all human beings given the socio-historical conditions in relation to which the content of the right has been framed.³⁶ The conditions of having carried out work or being liable to punishment are not remote in this way; the conditions of being a monarch or having authored a work of genius, by contrast, are remote.

However, even if we permit conditional specifications of human rights, steadfast adherence to the uniformity constraint would seemingly rule out many standard human rights. This is because the conditions specified in their primary duty could never realistically be fulfilled in the case of some human beings. For example, the duties associated with rights to education or to work may incorporate conditions, for example that a certain level of education is to be made available on condition that the right-holder is capable of benefiting from it, or that the right-holder is to be given the opportunity to carry out meaningful productive activity on condition they are willing and able to do so. But consider now a human being in a persistent, and irreversible, vegetative state. The likelihood that they will ever in their lifetime have the actual capacity to satisfy either condition is vanishingly small to non-existent. More radically, it seems far-fetched to attribute to such an individual the standard profile of universal human interests. At this point, we face two alternatives. One is to cleave to the uniformity constraint, and insist that it makes sense to attribute all standard human rights to someone in a persistent vegetative state, even though many if not most of these rights make reference to conditions that the putative right-holder is incapable of satisfying during their lifetime. But this view seems to deprive human rights of their practical significance, since many rights will make absolutely no practical difference to how we treat their holders in any circumstances reasonably accessible to us. To avoid this normative inertness, I prefer to embrace the other alternative, which abandons the uniformity criterion. On this view, it is not the case that each human being possesses all of the standard human rights. Instead, this is true only of 'ordinary' human beings, who form the central cases of human rights-holders. Other human beings, such as sufferers from advanced senile dementia or those in a persistent vegetative state, will enjoy some human rights (e.g., the right to life or the right not to be tortured) but not all (e.g., the right to work or the right to political participation).

On the resultant view, all human beings possess human dignity in equal measure. But which human rights they possess depends also on their interests

³⁶ John Tasioulas, 'On the nature of human rights', in G. Ernst and J-C. Heilinger (eds), *The Philosophy of Human Rights: Contemporary Controversies* (Berlin and Boston, Walter de Gruyter, 2012): 17–59, at 37–9.

and the threshold considerations whereby those interests generate duties. In the case of ordinary human beings, without impaired capacities, we can employ a standardized profile of human interests and generate the standard list of human rights. But some human beings are so impaired in their capacities to realize their human nature that it is implausible to attribute to them all these rights, either because they lack the relevant interests or because in their case the threshold conditions for the generation of a duty are not satisfied. They will have only a subset of the standard human rights. This position avoids ascribing human rights that are normatively idle, yet at the same time respects the idea that all human beings have an equal measure of human dignity. It can do so because it distinguishes human rights from human dignity, and treats the latter as only one element in the grounding of human rights.