



**‘Simply in Virtue of Being Human’:
the Whos and Whys of Human Rights (2008)**

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‘Simply in Virtue of Being Human’: the Whos and Whys of Human Rights

JOHN GARDNER *

According to James Griffin, human rights are rights that humans have ‘simply in virtue of being human’.¹ This analysis of the concept of a human right strikes me as helpful and credible. Of course it raises deep questions. What is a right? What is a human? Griffin has much of importance to say about these questions. But whether he analyses the concept of a right and that of a human correctly will not be my main concern here. My main concern will be whether he brings these two concepts together correctly in his analysis of the concept of a human right.

1. Three propositions about human rights

Griffin’s analysis of the concept of a human right can be broken down into three propositions, which I will express cumulatively.

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¹ ‘Discrepancies between the Best Philosophical Account of Human Rights and the International Law of Human Rights’, *Proceedings of the Aristotelian Society* 101 (2001), 1 at 2. Similar formulations are widespread in the literature. See, for example, Alan Gewirth in his *Human Rights* (Chicago 1982), 41; James Nickel, ‘Human Rights’ in L. Becker and C. Becker (eds), *Encyclopedia of Ethics* (New York 1992), 561; Peter Jones, ‘Human Rights’ in E Craig (ed), *The Routledge Encyclopedia of Philosophy* (London 2006), retrieved 14 June 2007, from <http://www.rep.routledge.com/article/S105>

The first two are unquestionably true. It is only when one reaches the third that reasonable doubts begin to surface.

The first proposition to which Griffin is committed by his analysis seems so obvious that it scarcely need be stated:

(1) A human right is a right.

A trivial truth, one might think. And yet I have heard people try to cast doubt on it. How? They say that human rights are not really rights because it is not the case that wherever people have human rights they can obtain a remedy for their violation. I find it hard to repeat this objection with a straight face. If it is not the case that wherever people have human rights they can obtain a remedy for their violation, then it is not the case that wherever people have rights they can obtain a remedy for their violation. This follows because, as (1) says, human rights are rights. But are they – the objector persists – *really* rights? One would have thought that human rights are really rights if and only if they are rights. In which case, yes, human rights are really rights. But some people seem to use the word ‘really’ to mean something more. What more do they mean? Perhaps they just mean ‘rights for the violation of which the right-holder has a remedy.’ Or perhaps they mean ‘rights that are respected’, or ‘rights that are institutionalised in law’, or ‘rights from which the right-holder obtains some further benefit’, or ‘rights over the violation of which the right-holder exerts some control’ or The possible meanings of ‘really’ in this context are endless. But all this is irrelevant to the truth of (1), which only says that human rights are rights, not that they are rights endowed with some extra property that might be obscurely designated by the word ‘really’.

Griffin’s second proposition about human rights is, it seems to me, on equally solid ground. He claims:

(2) A human right is a right that humans have.

Expressed in this way, (2) entails (1). I could also have expressed it so that it leaves the truth of (1) open. But since (1) is trivially true, that would hardly be worth the verbal convolutions involved. So let's just consider whatever it is that (2) adds to (1). There is a reading of (2) such that what (2) adds to (1) does admittedly draw one into a live controversy. For (2) may be interpreted to mean:

(2A) There are human rights and humans have them.

This transforms (2) into an existential claim, which can readily be doubted by arguing that there are no human rights. The category 'human right', the argument goes, is like the category 'unicorn'. There is such a thing as a unicorn, in the sense that there are conceptual criteria by which some creature may be judged to be, or not to be, a unicorn. But there is no such thing as a unicorn, in the sense that there are no creatures in the world that meet the conceptual criteria in question. Asked of a living creature, the question 'is that a unicorn?' is always perfectly intelligible, but the answer is always 'no'. Could the same be true of human rights?² Perhaps the comical objection to (1) that I sketched above was a muddled attempt to argue in this way. Perhaps 'human rights are not really rights' was a muddled way of saying 'if any human rights existed they would be rights, but none exist.' This position is certainly arguable. What I say in later sections below may even help to lend backhanded support to it. But that doesn't affect the truth of (2) as Griffin means it. For Griffin is not making an existential claim in (2). He only means

(2B) Such human rights as may exist are rights that humans have.

² See J.W. Harris on 'Human Rights and Mythical Beasts', *Law Quarterly Review* 120 (2004), 428.

Maybe there are no human rights – in the way that there are no unicorns – but this is irrelevant to the truth of (2B), and hence irrelevant to the truth of (2) as Griffin intends it. Like (1), (2) sets out a conceptual criterion. It does not assert that there is any right in the world that meets the criterion it sets out.

But in fact there are numerous rights in the world that do meet the criterion set out in (2). For that criterion can be met by almost all rights. True, it cannot be met by those rights (if any) that only non-human animals have. Nor can it be met by those rights (if any) that only artificial persons such as corporations have. Nor can it be met by those rights (if any) that are possessed only by collectivities such as families and tribes.³ For these right-holders are not humans and so these rights are not rights that humans have. But the criterion in (2) can be met by any other right you care to mention. My neighbours have, for example, a right of way across my back garden. Since they have this right and since they are human, their right of way is a right that humans have. So their right of way meets the conceptual criteria set out in (1) and (2). But theirs is not a human right on any credible view of the matter. It is not credible to claim that all rights that humans have are human rights. This incredible view is what Griffin avoids by adding a third criterion:

(3) A human right (if any exist) is a right that humans have simply in virtue of being human.

Again, to avoid verbal convolution, I have expressed (3) in a way that entails (2) and hence (1). I have also added ‘if any exist’ to pre-empt the distracting existential interpretation of (2) discussed above. However, our concern now is with the extra conceptual criterion that (3) adds to (2): the criterion that Griffin expresses in the words ‘simply in virtue of being human’.

³ The right to national self-determination is a good candidate.

It is thanks to this third criterion that my neighbours' right of way does not count, on Griffin's analysis, as a human right. My neighbours do not have this private right of way simply in virtue of being human. They have it in virtue of a much more byzantine set of facts. The corporation that built these two neighbouring houses first sold mine with the reservation of a right of way for the benefit of the property next door, and then sold the property next door complete with the benefit of the right of way that it had reserved. This shows that one need not be human to have a right of way across a neighbour's garden: my neighbours' right of way was originally the right of a corporation, not the right of a human being. Nor need one have a right of way across a neighbour's garden to be human: I am human but I have never had a right of way across a neighbour's garden. On two scores, then, my neighbours' right of way fails to qualify as a human right according to Griffin's third criterion. It does not accrue to my neighbours *in virtue* of their being human: they need not be human to have it. And it certainly does not accrue to them *simply* in virtue of their being human: they also need not have it to be human. Being human is neither a necessary nor a sufficient condition of anyone's having a right of way (or even this particular right of way) across a neighbour's garden. Whereas, for example, there is arguably a right to education that does meet Griffin's third criterion. Arguably, and certainly according to some international declarations and conventions, being human is a necessary and sufficient condition of having the right to education. So on Griffin's analysis the right to education would count as a human right, whereas my neighbours' right of way across my garden would not.

As a way of narrowing down which rights of humans are human rights, this may seem too brutal. It means that the right not to be tortured may not be a human right. It is certainly true that all humans have this right, but arguably not only humans have it. If non-human animals have any rights at all, they have the right not to be tortured. Likewise, the proposed account

seems to prevent the right of accused persons to a fair trial from counting as a human right. For while all humans have this right, so do many artificial persons such as corporations. Aren't we at risk of whittling the list of human rights down too far by insisting that humanity be both a necessary *and* a sufficient condition of the possession of a human right? Wouldn't sufficiency suffice? Indeed isn't this possibly what Griffin had in mind when he said 'simply in virtue of being human'? The expression seems tantalisingly vague. It could be variously understood to mean 'if one is human' or 'only if one is human' or 'if and only if one is human' or indeed 'if or only if one is human'. There is also the possibility that the condition is supposed to be *defeasibly* necessary or *defeasibly* sufficient, such that having human rights goes with being human barring special circumstances. Perhaps Griffin decided to remain vague on all of this to reflect the relative vagueness of the concept of a human right. That strikes me as a good idea. We should want our analysis of any concept to illuminate, rather than to suppress, its various indeterminacies at the margin.⁴

2. Conditions and reasons

But another ambiguity in Griffin's expression 'simply in virtue of being human' is more troublesome and cannot so easily be overlooked. In drawing the contrast between my neighbours' right of way and the human right to education I translated 'simply in virtue of being human' to refer to a condition under which the right is held. I rendered Griffin's proposition (3) as

(3A) A human right (if any exist) is a right that a right-holder has on condition that the right-holder is human.

⁴ Although Griffin himself does not seem to agree: 'First Steps in an Account of Human Rights', *European Journal of Philosophy* 9 (2001) 306 at 306-7.

Yet I could also have interpreted 'simply in virtue of being human' along quite different lines. I could have interpreted these words to refer to the reasons for which, rather than the conditions under which, the rights in question are held by humans. On this interpretation (3) comes to mean

(3B) A human right (if any exist) is a right that a right-holder has for the reason that the right-holder is human.

Just as I expressed (3A) to leave open whether the condition is a necessary condition, a sufficient condition, a defeasible condition etc., so I have expressed (3B) to leave open whether the reason is the only reason for the right to be held, one reason among others, a reason that overrides all countervailing reasons, etc. Both (3A) and (3B), in other words, are intentionally (and symmetrically) vague. For simplicity (and without prejudice) I will work for the time being with the strictest possible readings of (3A) and (3B). I will read (3A) to mean that being human is a condition for holding a human right that is both necessary and sufficient, and not defeasible. And I will read (3B) to mean, in the same vein, that being human is all that counts in justifying one's having a human right. According to (3B), so construed, one has a human right for this reason alone and irrespective of any possible supporting or countervailing reasons.

How close to each other are (3A) and (3B), so construed? At first sight, not very close. To know whether a certain right that one has is a human right, according to (3A), one needs to know who else has the right. If the answer is that all and only human beings have the right, then according to (3A), it is a human right. According to (3B), however, what matters is not who else has the right. What matters is the justification of the right. In working out whether a certain right that one has is a human right, one needs to investigate the case for one's having it.

Yet there is a great temptation to collapse (3A) and (3B). Why? We can see the answer most clearly if we narrow our

attention down to rights that have not (or not yet) been institutionalised. Institutionalised rights, such as legal rights, come in strange shapes and sizes that sometimes defy justification. They are human creations and they therefore tend to bear the scars of human error. But rights that have not been institutionalised – what I will call ‘plain moral rights’ – are different. By their nature they have exactly the size and shape that they are justified in having. The whos and whats and whens and wheres and hows of a plain moral right are fully determined by the whys. If, for example, the plain moral right to freedom of expression is justified by the contribution that freedom of expression makes to the protection of democratic institutions then (*ceteris paribus*) those who do not live in democracies do not have the plain moral right to freedom of expression. And if the plain moral right not to be discriminated against on racial grounds is justified by the need to mitigate the consequences of a history of oppression by one racial group of another then (*ceteris paribus*) nobody has the plain moral right not to be discriminated against on racial grounds where there is no such history. By the same token, if a plain moral right (you name it!) is justified by the fact that those who have it are human then (*ceteris paribus*) all and only humans have that plain moral right. Now suppose that the fact of being human is the only reason that counts. Now there is no *ceteris* to be *paribus*. So now, if a plain moral right (you name it!) is justified by the fact that those who have it are human then all and only humans have that right. So inasmuch as human rights are plain moral rights, (3B) entails (3A). If human rights share the distinctive justification set out in (3B), then they cannot but also share the distinctive constituency of right-holders identified in (3A). The reason entails the condition.

But does the converse hold? Does the condition entail the reason? Here is one simple thought that suggests otherwise. It is possible to agree about who has a certain plain moral right (and about other aspects of the right’s shape and size) while disagreeing about the right’s justification. Otherwise it would be

impossible to have disagreements about why a certain plain moral right is held by those who (admittedly) hold it. Yet such debates are very common. Disagreements about the right to life of foetuses, for example, are not always disagreements about whether foetuses have the right to life. Many are internecine disagreements about *why* foetuses have the right to life, conducted among those who agree (either believe or accept) that they do. Sometimes these disagreements pay off in different views about which foetuses have the right and which do not. But on other occasions the disagreements have no such pay-offs. So, for example, one side in the debate may argue that at a certain stage in their development (say, when they become sentient) foetuses become human, and at that stage they acquire the right to life for the reason that they are human and no other reason. The other side may argue that foetuses are human from conception, but do not acquire the right to life until they reach sentience. When they acquire the right to life they acquire it because now they are *both* human *and* sentient. Notice that there is no disagreement here about which foetuses have the right to life. But there is plenty of disagreement about the reasons. We may readily imagine this dispute afflicting a panel of judges who are being asked to institutionalise the plain moral right to life in the law for the very first time. The moral disagreements, we may imagine, are not only disagreements between the judges who concur in the majority verdict and those who dissent. Disagreements may well emerge among the majority too. They may well agree on what right they are institutionalising in the law (the right to life) and who has it (everyone has it after a certain agreed stage of foetal development) but they don't agree very much on why.

This example, however, does not seem to help in driving a wedge between (3A) and (3B). True, our imaginary judges agree, of any given foetus, whether it has the right to life. But they always disagree about the *heading* under which that foetus has the right to life. For one judge, the fact that the foetus is human (of

which he regards sentience as a necessary condition) is both necessary and sufficient for the foetus to have the right. For the other judge, the foetus' being human is only necessary, not sufficient for it to have the right. It must also be sentient (which is for her an independent condition) before it has the right. So to the extent that they disagree about the justification of the right, these imaginary judges also seem to disagree to the same extent, and in the same way, about the conditions for holding the right. Isn't this inevitable? When thinking about the size and shape of a plain moral right there are, of course, many levels of abstraction at which one can identify the constituency of those who hold it. At the lowest level of abstraction, one can identify the right-holders ostensively ('him, and her, and him, and that one there and ...'). One can also rise to a tautologically high level of abstraction ('all and only those who qualify for having the right have the right'). But the methodologically correct level of abstraction, surely, is always in between the two. It is the level at which the right-holding constituency is identified by all and only its *rationaly salient* features. And at this level of abstraction a difference of opinion about the justification of the right (i.e. about the reasons for having it) also necessarily shows up as a difference of opinion about the conditions for having it (i.e. about the rationally salient features of those who have it). For the rationally salient conditions are precisely those that are reasons. It is the fact that they are reasons that makes them rationally salient. It follows that any difference of opinion about the justification of a right cannot but show up in a difference of opinion about the conditions for its being held, when correctly expressed.

This argument is sound as far as it goes. But it does not go as far as it needs to. It ignores the justificatory importance of what H.L.A. Hart and others have called 'content-independent'

considerations.⁵ Content-independent considerations invoked in justification of a right are reasons for the right to be held that are not displayed in the content of the right. They make a difference to the conditions under which the right is held but the difference they make is not transparent: one cannot see the reason in the condition, nor the condition in the reason. We have already met an important example of a content-independent consideration without realising it. It is not merely an everyday experience that people agree about who has which rights while disagreeing about why. This can also be part of the value, and hence part of the justification, for people having rights in the first place. Convergence around rights-assignments allows us to get beyond our disagreements about the (other) values by which those rights-assignments are justified. That is because rights are particularly suited to serving, in a way that Joseph Raz explains, as intermediate steps in arguments about how their holders are to be treated.⁶ Relative to some more ultimate judgments of value, the assignment of a right is a conclusion. But relative to the determination of how a right holder is to be treated in a particular case, the same assignment serves as a new premiss. By agreeing on this new premiss (viz. that the right is held) even when we disagree about some of the more ultimate premisses (viz. the further reasons why the right is held) we can make progress with the argument. And this progress can be a valuable thing that can help to justify the right's being assigned. I will call this the 'convergence consideration'.

Naturally, the justificatory force of the convergence consideration varies. There are two main variables. First, how important is it to secure convergence in the argument? This

⁵ Hart, 'Legal and Moral Obligation' in A.I. Melden (ed), *Essays in Moral Philosophy* (Seattle 1958), 82 at 102; J. Raz, 'Legal Rights' *Oxford Journal of Legal Studies* 4 (1984), 1 at 6ff.

⁶ Raz, 'On the Nature of Rights', *Mind* 93 (1984), 194 at 208-9.

matters more in some contexts than in others. It matters more that the judges in an appeal court converge around some of their argumentative premisses than that, say, the voters in a general election do. For the latter leave only their verdicts to posterity, whereas the former also leave their arguments, which will often be re-used by later courts. Second, how much disagreement about more ultimate values is there to overcome? The answer varies from time to time, from place to place, and from issue to issue. Monocultural societies may have fewer disagreements about values to overcome than more culturally diverse ones. This is one reason why the possession of rights tends to assume extra importance in more culturally diverse societies. Lacking convergence around first premisses in many political arguments, culturally diverse societies tend to have a greater need for convergence around intermediate premisses. The rise of rights as the *lingua franca* of political argument in modern western countries is often thought to reflect, or to constitute, the triumph of an individualistic worldview. No doubt there is some truth in that thought. But the rise of rights as a *lingua franca* of political argument is also owed, quite independently, to the cultural diversification of modern western countries. Agreement over rights enables people to bury at least some of their deeper differences. That convergence consideration – to repeat – is part of the justification for there being rights-holders. It makes a content-independent contribution to the justification for having rights because one cannot work out from the convergence consideration alone how it will affect the content of whatever rights it helps to justify, nor can one work out from the content of those rights alone that the convergence consideration helped to justify them. The convergence consideration helps to justify whatever rights – rights with whatever content – happen to be such that the relevant constituency can converge on them.

So the convergence consideration not only points in the direction of our having rights; it points in the direction of our having rights that have content around which people can

converge, rights which are approximately consistent with different views concerning the further considerations that justify the right. Return to the example of the right to life of a foetus. In English law (to simplify somewhat) 24 weeks from conception is treated as the moment at which the foetus acquires a right to life. From that moment on the foetus enjoys many of the life-protections of a born human being. People sometimes ask: What's so magical about 24 weeks? Presumably what *really* matters – what the law is really getting at – is the foetus's viability, or its ability to feel pain, or some similar capacity that has rational salience and hence is capable of bearing on the justification and scope of the right to life. 24 weeks is merely an arbitrary line that has been drawn as a kind of proxy for whatever it is that really matters in foetal development. Or is it? We should resist the diminishing tone of the word 'merely'. 24 weeks is an arbitrary line in the sense that it arbitrates among various competing views about what (else) is rationally salient in foetal development. But this very fact – the fact that 24 weeks is a condition of the right to life on which people of various otherwise different outlooks can converge – is capable of turning 24 weeks into a rationally salient condition. So contrary to what we thought, a difference of opinion about the justification of a right need not yield a difference of opinion about the rationally salient conditions for the right's being held. One and the same right, with one and the same content, can be justified by several different arguments. All that it takes is a measure of compromise for the sake of curtailing wasteful disagreement. It follows that (3A) does not entail (3B). It is perfectly possible that being human is a condition for holding certain rights without being even part of the justification for those rights to be held.

I can foresee two main worries about the importance that I am attaching to this convergence consideration. First, one may think that, although it is admittedly a consideration, it is the wrong kind of consideration to play a role in the justification of rights. Why? Because rights surely have to be justified by the

interests of their holders. The convergence consideration does not meet this condition. Right-holders may sometimes have an interest in the curtailment of disagreement about their rights. But they do not always have. Sometimes it would be better for them to keep the disagreement going. The value of curtailment of disagreement often lies elsewhere: for example, in making sure that appeal courts leave a legacy of argumentative premisses that can be re-used by later courts. This is a public interest, not an interest of the right-holder. Isn't it inimical to the nature of rights that such a public interest, not an interest of the right-holder in particular, should contribute to their shape and size? Raz has explored this question in detail and I will not repeat his labours here.⁷ Suffice it to repeat his thesis, which I endorse: rights are justified by those interests of right-holders that are served by their possession of a right, combined with the interests of others that are served *by* serving the interests of right-holders through their possession of a right. The convergence consideration readily meets this condition. The fact that rights are intermediate steps in arguments about how to treat people makes assignments of rights particularly apt to curtail disagreements. So the public interest in question is not an interest that just happens to coincide with the right-holder's own interest in having rights. It is an interest *in* the right-holder's having rights. To put it the other way round, the rights we are discussing are justified by the interest of right-holders in having them, combined with the public interest in curtailment of disagreement that is served by the right-holders having them. And since (analytically) any right-holder has an interest in having whatever rights she has, the rights we are discussing are justified by the interests of right-holders combined with the disagreement-curtailing interests of the public that are served by serving the interests of right-holders. The convergence consideration belongs to the justification of rights.

⁷ In 'Rights and Individual Well-Being', *Ratio Juris* 5 (1992), 127.

The second worry is more pertinent to our present inquiry. When I started asking about the relationship between (3A) and (3B), I suggested that we might begin by narrowing our attention down to ‘plain moral rights’: rights that have not been institutionalised. The case I made for bracketing institutionalised rights was that they come in strange shapes and sizes that sometimes defy justification. So, as applied to institutionalised rights, (3A) obviously does not entail (3B). The interesting question that I wanted to tackle was whether (3A) nevertheless entails (3B) *as applied to plain moral rights*. But you may think that I illicitly abandoned this focus on plain moral rights as the discussion wore on. For my main example was of imaginary judges in an appeal court facing the question: How should we institutionalise the right to life? It was because the disagreement was in an institutional setting that the pressure to curtail disagreement arose, and hence the convergence consideration loomed large. Take away the institutional setting and the convergence consideration loses its justificatory force. In which case I have still said nothing to show that any content-independent considerations can bear on the shape and size of plain moral rights. So I have done nothing to show that (3A) does not entail (3B) when applied to plain moral rights.

This worry is misplaced. There are some content-independent considerations relevant to the justification of rights that bear only on the justification of institutionalised rights, because they reflect the value of the institutions concerned (mainly but not only in their role as authorities). But the convergence consideration is not one of these. Like some other content-independent considerations, it bears on the justification of plain moral rights as well as the justification of institutionalised rights. Rights, including plain moral rights, are intermediate steps in arguments about how to treat people. The value of making progress in such arguments is not limited to institutional settings. The reason why I set aside institutionalised rights, such as legal rights, was simply that they sometimes defy justification. They

are rights created by people, and like anything created by people they are sometimes created badly, and emerge misshapen. Plain moral rights, by contrast, are not created by people and hence cannot be created badly or emerge misshapen. As I put it before, they have exactly the size and shape that they are justified in having. But rights that are justified in a partly content-independent way are also among those that have exactly the size and shape that they are justified in having. It is merely that at least part of their justification – part of what makes them justified – is content-independent. A right that defies justification also defies content-independent justification. A right that is capable of content-independent justification is capable of justification.

You may think that, in the case of rights partly justified by the convergence consideration, there is a complication: the right must be created by people because it is *ex hypothesi* created by agreement among people. So it must be vulnerable to human error. It cannot be a plain moral right. It is true that some rights are created by agreement. But I never suggested that rights partly justified by the convergence consideration are rights created by agreement among people. Rather, they are the rights that people are justified in agreeing on. Thanks to the convergence consideration, people are justified in agreeing that such-and-such a right exists and has such-and-such a shape and size. Whether they do so agree is beside the point. If they should agree but they don't, that only goes to show that, like the rest of us, they are capable of errors in recognising people's plain moral rights. And this is exactly how institutionalised rights come to be misshapen. So the judges in our imaginary court are indeed arguing about how to institutionalise the right to life. But I was not interested in the right that in the end they do institutionalise, which may be badly distorted. I was interested in the right that they should institutionalise. My claim was that, at a certain point, what right they should institutionalise depends on what right they should agree to in order to curtail their wasteful disagreements.

‘At a certain point’ is important. In our right-to-life example, I was assuming that most of the justificatory work was to be done by content-dependent considerations. I was assuming that the judges who disagreed at the margins about where to draw the line were all disagreeing about how to resolve what would otherwise be a moral indeterminacy (generated in turn by indeterminacy in the concept of a human being). The problem was merely how to resolve the inevitable conflicts and tensions among the morally acceptable (but not morally dictated) stances that are made possible by this indeterminacy. I was not suggesting that the value of curtailing disagreement would be enough to justify settling for an otherwise unacceptable moral view. So if it turns out to be true, as some believe, that apart from the convergence consideration the only rationally salient moment in the development of a foetus (or the only one significant enough to count in the shaping of the right to life) is the moment of conception, then the convergence consideration plainly could not justify triggering the foetus’s right to life at 24 weeks. The convergence consideration can yield a moral right other than one with a morally acceptable shape. It would be better to have no agreement than immoral agreement. This is enough to show that what I have been talking about throughout is the plain moral right to life: the right that people should agree to, not the right that they do agree to.

3. *Universality and human rights*

It was Griffin who gave us (3). But does he mean (3A) or (3B) or both? The answer seems to be: both. Griffin says that the fact of being human is a *ground* for having human rights.⁸ A ground is a condition that is also a reason, and one that is a condition because

⁸ See his ‘First Steps’, above note 4, 311.

it is a reason. So Griffin apparently thinks that one's humanity is a condition for one's having a human right because it is a reason for one's having that right. In fact he seems to go further. He seems to assume that one's humanity cannot be a condition for one's having a human right *unless* it is also a reason for one's having it, and that its force as a condition (necessary, sufficient, defeasible, etc.) is inherited from its force as a reason (the only reason, reason enough, an overridable reason, etc.). On this view, if all humans are to have human rights, their humanity by itself must make enough of a case for them to have human rights. The sufficiency of the condition depends on the sufficiency of the reason. I will call this the 'universality out, universality in' thesis, or UoUi for short. Only by putting in a universal justification (one that relies exclusively on universal truths about human beings) does one get out a universal right (one that applies to all human beings).

It is true that Griffin quickly softens his account of what justifies human rights to include some non-universal truths about human beings under the heading of 'practicalities'.⁹ But to the extent that he does so, he also softens the conditions for human rights to qualify as human rights so that their application may, within narrow limits, be less than perfectly universal. Thanks to these 'practical' variations in their rationales, human rights may vary in the scope of their protection over time and place, and hence inevitably from one human being to another. In holding that these non-universal reasons yield matching non-universal conditions, Griffin rigorously upholds UoUi. The universality (or non-universality) of human rights continues to track the universality (or non-universality) of their justifications.

Under the heading of practicalities, says Griffin, we have to think about matters such as these:

⁹ Ibid, 315-6.

to be effective the line [dividing compliance from violation] has to be clear and so not take too many complicated bends; given our proneness to stretch a point, we should probably have to leave a generous safety margin.¹⁰

The need for efficacy and the need to protect against slippery slopes are content-independent considerations. This makes it extremely awkward to think of them, as Griffin does, as figuring among the ‘grounds’ of human rights. They are admittedly reasons why our human rights should be as they are: with relatively sharp edges and relatively generous safety margins. They are considerations that figure in the justification of human rights. But being content-independent, these considerations do not show up in the content of the right that they help to justify. The need to avoid the slippery slopes of politics justifies my having a right to fair trial with a relatively generous safety margin. But it doesn't justify my having a right to no slippery slopes, or a right to a fair trial without slippery slopes, or any other right with a mention of slippery slopes among the conditions of its existence. So the ‘no slippery slopes’ consideration is not aptly regarded as a *ground* for anyone to hold a human right, even though it is admittedly a reason for some people to hold a human right that they might otherwise not hold (because, say, they are human only in a limited sense).

But I will not pursue this point here. Instead let me raise a different puzzle. Since Griffin explicitly recognises the importance of content-independent considerations in justifying human rights (under the heading of ‘practicalities’), why does he nail his colours to the mast of thesis UoUi? The existence of content-independent considerations licenses him, as we saw, to abandon UoUi - to stick with (3A) while abandoning (3B). It licenses him to say that human rights have a universal application (to all of humanity) but *not* because they have a universal

¹⁰ Ibid, 316.

justification (in the fact of humanity). Rather, they could apply to all of humanity because they have various convergent morally acceptable justifications that vary from human being to human being, and indeed from case to case, but all of which can be marshalled in support of much the same right, which thereby ends up (taking account of the convergence consideration) having universal application to all humans.

There are two possible explanations for Griffin's sticking with UoUi in spite of this escape route. One – which strikes me as unlikely – is that he does not notice the escape route. The second is that he doesn't want to escape. He is independently attracted to (3B), not merely backed into it as a way of explaining (3A). Perhaps, indeed, Griffin is attracted to (3A) only because it is an implication of (3B)? If so his logic is impeccable. Only his moral sensibilities are at fault.

Why? Some may think that the appeal of deriving (3A) from (3B) should be doubted for a very simple reason. Humanity by itself cannot justify human rights because it cannot justify anything. It is just a biological classification and it needs a further principle or value to make it relevant to any kind of moral argument, including a moral argument in defence of human rights. So until we find the relevant principle or value we have no offered a complete statement of (3B) and the apparent symmetry with (3A) is an illusion. Those who take this line have grievously misunderstood the nature of human beings.¹¹ There is much more to a study of human nature than a study of human biology, and among the other aspects of human nature that a full study would include are several aspects that have built-in moral implications. Human beings, for a start, are rational animals and being rational already makes them answerable to reasons, which brings with it various constraints on how they are to be addressed

¹¹ I have said a bit more on this topic in 'Nearly Natural Law', forthcoming in *The American Journal of Jurisprudence*.

and treated. Griffin appreciates this and rightly reflects it in his formulations. He uses the word 'personhood' to designate our humanity, partly to anticipate and exclude a wooden view of the human as a biological classification without built-in moral significance. For example:

[T]hat human rights are grounded in personhood imposes an obvious constraint on their content: they are rights not to anything that promotes human good or *flourishing* but merely to what is needed for human *status*.¹²

To spell the point out: there is a gap between treating me as a human being is to be treated, and making sure that my life as a human being goes well. Yet 'treat me as all human beings should be treated' does not yield, in application, an empty set of treatments. There are treatments on the list, and some treatments, in particular, are ruled out as inhuman.

So far so good. The problems begin when Griffin stakes his claim that 'out of the notion of personhood we can generate most of the conventional list of human rights.'¹³ For many rights on the conventional list seem to go beyond what reliance on our humanity alone could justify. How does our humanity, as such, support our having a right to free speech, a right to a fair trial, or a right to respect for family life? If the only way to justify these rights as belonging among our human rights is by relying on the fact of our humanity, then the inevitable conclusion, it seems to me, is that these rights do not belong on the list of human rights, because the fact of our humanity is incapable of justifying them.

A right to fair trial, for example, can exist only where there are offences that can be tried, and courts to try them, and an institutional structure to support these courts and make them fair.

¹² 'First Steps', above note 4, 312.

¹³ Ibid, 311.

One may say that there should be courts everywhere. Nevertheless there are ways to treat human beings properly as human beings even in places where courts are lacking. Is it to be suggested that people on polar expeditions, people marooned at sea, and others caught away from civilisation are and always have been incapable of treating each others as human beings should be treated? Is it a credible claim that in civilisations without legal systems or similar institutional arrangements for dealing with disputes, the status of the population as human beings was threatened? This is the implication of claiming that a right to fair trial can be justified by reliance on our humanity alone.¹⁴

Or consider the right to respect for family life, understood as a right to respect for any family life one has or sets out to obtain. Can't this be justified by pointing to the fact of our humanity? I will set aside, for reasons already mentioned, the fact that not only humans but also some other animals have a family life. Let me focus instead on the fact that not all humans have a family life, nor do all humans set out to obtain one. This in itself does not mean that the right to respect for family life cannot be justified by relying on the fact of being human. For perhaps the people who lack a family life and never set out to obtain one are humanly deprived. It is not merely that they are not flourishing but that their human status is challenged. This is the premiss one needs to connect the fact of being human to the content of the right. One needs to argue that there is some lack of humanness in a supposedly human life if it does not include a family life. This strikes me as an improbable view. It seems to me that, while every human life includes some sacrifices of human potential – it is an aspect of the human condition that one cannot

¹⁴ I owe this example to John Tasioulas, 'The Moral Reality of Human Rights' in T. Pogge (ed.), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (Oxford 2007). Tasioulas draws the conclusion, which I do not, that human rights are not universal rights.

have it all – the life of a monk or a dedicated career person or a person who simply prefers the company of friends is not peculiarly impoverished. Just as those with a family life have access to some goods that are denied to others, so those others have some goods that are inaccessible to those with a family life, and as between these deprivations it strikes me there is no general feature of humanity such that, just *qua* human, one should prefer to have one's family life respected than to have respect shown for one's fishing life or one's professional life or one's gossiping life or one's clubbing life. And one's human status is not denied by denial of any of these.

You may say that I am presupposing very uncharitable interpretations of the right to fair trial and the right to respect for family life. Surely they are better understood as rights that one's trial be fair if one has a trial, or that one's family life be respected if one has a family life? In which case the existence of people who cannot be tried (because there are no courts) or people whose family lives cannot be respected (because they have no families) is no threat to the universality of these rights? I agree. But my point was not that these rights cannot be interpreted as universal, i.e. as held identically by all human beings. My point was that they cannot be justified by pointing to the humanity of human beings alone. Their justifications must include special arguments for trials and for families that go beyond any plausible account of what it takes to be human and to be treated as human. They must explain why trials (as opposed to more informal ways of dealing with disputes) or family lives (as opposed to more solitary modes of existence) are picked out in the content of the right, and they cannot plausibly do this without adding extra values or principles beyond those which are built into the very idea of a human being. Griffin's own account shows this up very clearly. In order to yield 'most of the conventional list of human rights' he has to build into the very idea of a human being something very close to a complete ideal of human flourishing as personal autonomy, such that on his account most people at most

times and most places not only were not treated as human beings (did not have their human status respected), but also could not conceivably have been so treated (since the cultural conditions for them to live autonomously were lacking).

My point is that any defender of UoUi is faced with a dilemma. On the one hand she can reduce the list of human rights to a very short list of rights that are plausibly held to be justified by our humanity and nothing but. On the other hand she can extend the list to take in a wider range of possible human rights, something much closer to the conventional list, but only by fattening up the idea of what it means to be human so that it becomes implausible as a universal picture. What I am suggesting is that this dilemma is unnecessary and should be avoided. One can avoid it by abandoning UoUi. Why does everyone have the right to respect for family life? The reasons vary quite a lot from time to time, from place to place, and from human being to human being. In some times and some places the strongest consideration is the role of the family as an economic unit. In other times and other places the strongest consideration is the role of the family in people's self-identifications. In yet other places what matters most is the imperative to procreate for the sake of rebuilding a post-war population. These considerations often overlap and support the same right to respect for family life. But inevitably they sometimes come apart and tend to justify divergent rights at the margins. One of them tends to support the maintenance of a system of arranged marriages while another tends to support its destabilisation. One of them tends to support recognition of homosexual unions as family unions while another does not. And so on. These conflicts between different supporting considerations tend to induce doubts about whether the right to respect for family life can really count as a human right. Don't they leave different humans with different rights? The role of content-independent considerations in patching over the divergences means that this is not inevitable. Universal rights – rights held by all humans – do not require universal

justifications that apply in the same way to all human beings. For the future of the human rights movement, that is just as well. For if universal justifications were required there would be very few human rights. The right to freedom of expression, the right to vote, the right to move freely within one's country, the right not to suffer racial or sexual discrimination, and many more, would have to be removed from the list.

4. *The dignity of the human*

It may be thought that the above remarks sever the frequently-advertised connection between respecting human rights and respecting human dignity. But that is a mistake. To respect human dignity is simply to treat human beings as human beings, to treat them in ways consistent with their humanity. If one violates someone's human rights, then one admittedly fails this test. Human rights violations are always attacks on human dignity. Many people draw the conclusion from this that human rights must be justified in terms of human dignity, that the constituents of human dignity must first be independently specified in order to determine what qualifies as a human right. If I am right, this is a partly back-to-front picture. While there are some independent constituents of human dignity that help to justify at least some human rights, one's dignity as a human being is also *constituted* by one's possession of human rights. The list of human rights must first be drawn up, if need be using other arguments, before we have a complete picture of what qualifies as an assault on human dignity. I have suggested that this fact, in itself, is no threat to the universality of human rights.