

Rights as Fairness

James M. Donovan

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Limitations of a Moral-based Justification of Rights

Our society is in the midst of what William Edmundson (2004, p. 12) has described as the second great expansionary period of rights rhetoric, the beginning of which he dates at 1948 with the United Nation's framing of the *Universal Declaration of Human Rights*. As a consequence of that expansion we are awash with "rights talk" (Glendon 1991) in which speakers reflexively frame every action in terms of a personal right intended to trump any contrary demand to refrain. "The new rhetoric of rights," Glendon (1991, p. 171) observes, "is less about human dignity and freedom than about insistent, unending desires." Her concern is that without a principled limit to the kinds of actions or entities to which a cognizable right can be assigned—a limit that will nonetheless preserve the essential power of the idea of the right—the category will lose its original significance within political and social discourse other than as a tag to indicate when speaker believes an unimpeded liberty exists to indulge in the personally desired acts.

Identifying appropriate limits of rights claims requires specifying just what rights are. As opposed to the image of laws as a structureless shield or sword directing social interaction, or as things self-evidently found lying on the social terrain, the rebuttable presumption should be that the concept of rights themselves imposes at least some instruction on their valid extension, just by being the kinds of things that they are. The first step in that process is to look at the terms invoked for the justification of rights. Rights will partake of the qualities of the set to which they belong, and awareness of this membership should equip us at least with default expectations about their basic features.

Any final actual right may deviate from this initial stamp, but we would then know what requires special explanation, and what we can accept as following uncontroversially from its genesis.

A respected tradition places the ground for rights in morality, contrasting it with other rights granted by the State. When used in this sense, it is helpful to denominate the former as *human rights*, and the latter *civil rights*. The possession of civil rights can be understood not as a matter of moral justice, but of positively enacted law which may or may not echo preexisting human rights. By contrast human rights belong not to citizens of any particular State but to persons by virtue of their humanity. The need for this category of supranational moral rights, while long in the background of political philosophy, was driven home by the Nazi genocide during World War II, a bleak chapter of human history that led to the drafting of the UN *Declaration*.

The claim of a moral foundation for rights is essentially negative, telling us what human rights are not (positive enactments) without conveying a great deal of positive information about what rights may be. As views of the moral differ (a utilitarian, for example, would disagree with natural lawyer), nothing immediately follows from the simple assertion that fundamental rights are required by morality. What little we can discern, however, tells us that regarding rights as a species of the moral presents difficulties beginning with whether rights are absolute. An absolute right is one that cannot be violated or infringed without committing an evil or immoral act.

Despite a recurring denial that moral human rights are necessarily or even ordinarily absolute (e.g., Gewirth 1981 [“It is a widely held opinion that there are no absolute rights”]; Lyons 1982[“Rights are not necessarily ‘absolute’”]), the same post-

Nazi history that called into being the category of human rights out of the shadow of predecessor “natural rights” also favors viewing those rights as absolute. Human rights—as conceived in pronouncements such as the *Declaration* and subsequent charters and treaties—are designed primarily as shields limiting interference by the State.¹ If the right is not absolute, then the alternative is that it must yield to contrary demands when certain threshold conditions have been satisfied, making it what Gregory Vlastos (1962) called a “prima-facie right” rather than an absolute right. Meeting legally established threshold conditions is what distinguishes the mere infringement of a right with its violation (Thomson 1977), and are recognized by the UN *Declaration* as a legitimate limitation on rights.²

Because these limits are prescribed by law, it shall be the State which ordinarily sets those threshold conditions.³ For example, while there may be a basic human right of free speech, states are allowed to impose reasonable “time, place and manner” regulations (Young v. American Mini Theatres, Inc., 427 U.S. 50 [1976]). If a right can be infringed according to criteria established by law, then because law is created by the State—the

¹ The claim that rights are primarily protections against the state—as is the case in the modern formulation of human rights—will be controversial to some, especially social contractarians. Social contract theorists following in the steps of Hobbes and Locke view rights as protections against other people, some rights being transferred to the state in order to more efficiently protect against encroachment by those aggressing others. The two positions converge in the political context of democracies. Within democracies, rights are protections against the tyrannies of the majority (a contractarian view), which is coeval with the state.

² UN Declaration on Human Rights, Art. 29(2): “In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”

³ Clapham (2007, pp. 99-100) describes the “three-stage process to determine whether the interference with a human right represents a legitimate limitation on the right concerned”:

- Is there a legitimate aim to the interference?
- Is the interference prescribed by a clear and accessible law?
- Is the interference proportionate to the identified legitimate aim and necessary in a democratic society?

All steps are susceptible to manipulation by a cynical State.

same State the right is intended to provide a shield against—then this right amounts to very little in just those circumstances when it is most needed. To a large extent the atrocities committed by the Nazis followed exactly this excruciatingly legal process.

The beginning position for a moral basis for human rights, therefore, appears to favor their general recognition as absolute, given that their primary function is to preserve fundamental guarantees to each person and not merely to assure that those guarantees will only be violated according to State-determined due process. Ronald Dworkin (1977, p. 269), therefore, can conclude that “if someone has a right to something, then it is wrong for the government to deny it to him even though it would be in the general interest to do so.” Supranational moral rights are absolute rights if they are to be rights worth having.

As already admitted, however, this conclusion contradicts the consensus of political philosophy, and for good reason. Contrary to the initial argument that rights will ordinarily be absolute, any careful examination of the operation of rights will find the reverse, that rights can be absolute only under special circumstances and cannot be part of the default meaning for something to be a “right.”

The first obstacle is the problem of *seriality*. The central claim of a right is that the person holding the right is free to exercise that right without interference from others, including the State.⁴ Many prototypical rights are of the kind that cannot be exercised

⁴ The complete universe of rights may include more than this—for example, the offered description highlights the negative nature of rights as being a freedom from interference; when fully cataloged the list of rights may also include positive rights, or rights that impose a duty upon others to make realization of the right possible. But most people would find curious any claim that, whatever else they may also be, rights did not include a healthy number of negative rights—indeed, most of the rights familiar to Americans through its Constitution and amendments are of this nature.

simultaneously without contradicting this standard. Unregulated exercise of these rights will amount to an interference, the very thing the right is intended to protect against.

For example, my right to free speech presupposes the possibility of an audience for what I have to say. The freedom to speak to an empty room is no freedom at all. Similarly my right to free speech is diminished if everyone is allowed to speak at the same time, since that cacophony means no one is listening to what I am saying. The requirement that we speak in turn means that some will have to delay their exercise of the right to free speech, at least long enough in order to assure the meaningfulness of that right for everyone. Under the generous condition of universal rights, therefore, some limits must still be imposed as to their exercise if they are to remain meaningful as opposed to merely formal.

Even when rights can be exercised at the same time, additional obstacles arise due to their *conflict*. Can your right to own property give you exclusive control of the only water source, or would this count as an interference in my right to life? Perhaps to avoid this conflict there need to be limits placed on the kinds of things that can be “owned.” Similarly, does your right to security give you a right to infringe or violate my right against torture? Apparently so:

Even if the prohibition of torture remains a cornerstone of human rights, it seems that we still have some way to go before everyone has shaken off the nagging doubt that, some of the time, for some people, the right not to be tortured has to give way to the rights of others to be protected from future violence. (Clapham 2007, p. 92).⁵

⁵ If popular sentiment is any indication, this outcome seems quite far off indeed. For example there is this letter to the local newspaper:

I know of only three types of people who would agree it is not acceptable to use torture to gain information to save American lives. The three are: the irrational, the liberals and the terrorists. Really, the first two are synonymous, and maybe all three are.
Jim Threlkeld, “Thoughts on Torture” [Letter to editor], *Athens Banner-Herald*, April 27, 2008, p. D1.

The problem of conflict of rights is made all the more intractable in that rights practice has ruled out some potential solution strategies: “Today all governments accept (most of the time) that there should be no prioritization among different types of rights” (p. 119). Out of bounds, then, are approaches that would attempt to avoid the difficulty by stating that some rights trump other rights, as does the current U.S. president when he vetoed limitations against torture saying that “We have no higher responsibility than stopping terrorist attacks.” *Bush on Veto of Intelligence Bill*, New York Times, March 8, 2008, at nytimes.com.

The moral idea of rights seems to contain logically incompatible conclusions. On the one hand, to solve the historical problem that called them into being in the modern age they must be absolute, yet even the most ordinary exercise of basic rights shows that they must be infringed on a routine basis. What conclusion are we to draw? Before venturing an opinion, we can perhaps get some sense as to the depth of the problem by looking at some specific versions of the moral justification of human rights.

Beyond the appeal to historical exigencies such as Nazi atrocities, specific attempts to establish a foundation for moral rights outside State action have enjoyed a long tradition. Andrew Chapman draws upon one such vein when he finds the basis for rights in neither mere legality nor formal morality, but instead in the emotional impetus urging the claims. Writing as well-informed practitioner (he served for many years as the representative of Amnesty International to the United Nations), Chapman (2007, p. 9) suggests that “the real seeds of the human rights movement [is] a feeling of sympathy for the distress of others, coupled with a sense of injustice when governments resort to measures which invade the perceived natural rights of the individual.”

He perhaps relies upon postmodern philosopher Richard Rorty for this description, who, believing that “foundationalist projects are outmoded,” argues that “the emergence of the human rights culture seems to owe nothing to increased moral knowledge, and everything to hearing sad and sentimental stories” (Rorty 1998, p. 172). Contrary to the argument of the present essay, Rorty asserts that “the work of changing moral intuitions”—toward the end of expanding recognition and respect for fundamental human rights—“is being done by manipulating our feelings rather than by increasing our knowledge” about the what rights “are” in the foundationalist sense. We should therefore “concentrate our energies on manipulating sentiments, on sentimental education” to better increase everyone’s openness to human rights claims (p. 176).

There is much that could be said in refutation of Rorty’s position, not least being his erroneous use of anthropology to argue essential premises to his argument, such as the “extraordinary malleability” of humankind and against the hypothesis of a “universal human nature.” Anthropology in fact arose to combat those very myths. More immediately, the problem with Rorty’s basing rights in sentimentality is that it prioritizes the third-party perspective: we accept human rights because of our sympathies in seeing horrid things done to other citizens. Even if we grant that sympathy and sentimentality account for the way we extend human rights to someone else, those sources cannot explain why we can assert them for ourselves. Applying those rights to oneself, therefore, is left either unexplained or viewed as a peripheral, residual extension. At the very least, a different motivation is required for self-assertions, although once armed with that alternative we will probably have no need for the sympathy-based interpretation at all.

A related argument for the moral foundation of human rights regards them as sequelae of the dignity of the human condition. Dignity is, according to the UN *Declaration's* Preamble, "inherent" in "all members of the human family." "Equal and inalienable rights" follow from this inherent dignity (*International Covenant on Civil and Political Rights*, 1966). Inherent human dignity received special elaboration among philosophers with Kant's demand that the human being be treated as an end, and not as a means.

Problems beset this version of moral rights as well. First, the standard formulation, such as that in the ICCPR, is that dignity is something possessed by human beings. But this is perhaps to count "dignity" twice. In an important sense dignity is part of what it means to be "human" as opposed to merely *Homo sapiens*. To be "human," as the term is most widely used (and in the way that makes sense of its opposite, "inhuman"), is to act in a manner that results from socialization in a culture: "Philosophies of human nature reflect beliefs about what people are like *after* they have moved through a lengthy socialization process." (Wrightsmann 1992, p. 46). An organism left to develop in isolation might survive but would never be quite human, regardless of its genotype.⁶ The socialization necessary to become human entails the same respect out of which is formed the concept of dignity. One creates humans out of *Homos* by extended treatment with respect and dignity, meaning that the claim to be human (i.e., a socialized

⁶An early articulation of this position is to be found in Aristotle's *Politics*:
an individual *incapable* of membership of a *polis* is not, strictly speaking, a human being, but rather a (non-human) animal, while one who is self-sufficient apart from the *polis* is superhuman, or, as Aristotle puts it, a god.... [One] cannot be a human being except in the context of a *polis*. (Taylor 1995, p. 239)

Homo sapiens) includes the subsidiary claim to be worthy of respect, which is the definition of “dignity.”

In addition to the sense that “dignity” is an included element of what it means to be human, the justification of human rights seeks also to assert that dignity is something that humans “have” over and above their humanness, at the same time that they are “dignity,” another way of saying “human.” When “human” and “dignity” are essentially the same term, then the justification becomes little more than a tautology: humans deserve human rights because they are human. As a result, this rationale for the rights that humans are said to possess falls short of its expected persuasiveness. What was originally intended as an argument has, in the end, dissolved into a simple analytic assertion.

Even if the argument is deemed meaningful, basing the claim for rights in human dignity presents a second difficulty. The thesis may simply be too strong. If rights are the political recognition of inherent human dignity, then Kant was correct to find their violation inexcusable. What possible reasons could justify injury and debasement to anyone’s inherent human dignity? None, according to Kant. Yet, we have already seen that rights of their nature require some flexibility as to their reach, exercise and substance due to problems of seriality and conflict. Appeal to human dignity, therefore, appears to support something more absolute than rights, or at best only a smaller subset of rights than most are presently prepared to recognize as the full catalog of protected human rights. We need a justification of human rights that will allow for their inevitable infringement without that constituting an unjust denial.

The list of problems accrue when looking at rights from a moral foundation. Given that the shortcomings come from so many different sources, while all pointing in the same direction, we must consider the possibility that moral justification for human rights fails to achieve the hoped for result. This paper looks anew at the problem of providing a philosophically secure foundation for human rights.

An Alternative Basis to Justify Rights

The problems outlined earlier suggest that the attempt to ground the concept of rights in moral ideas have problems both generic and specific. Any moral justification of rights will have to get around the question of absoluteness, or find some reason to claim that someone's moral rights are not worth respecting. Specific formulations of moral arguments, such as those looking at sympathy, sentimentality, and inherent human dignity, are problematic for additional reasons. These difficulties open the door to alternative ways to justify rights, ones what will avoid these problems while protecting the core idea that rights were created to promote.

Clues to an alternative justification can be found in the phrases commonly used to speak about the legitimacy of rights. President Woodrow Wilson (1918), when laying out his famous "Fourteen Points" toward forming the League of Nations—the organizational predecessor of the United Nations—described a need "to create a world dedicated to justice and fair dealing." More recently, Clapham (2007, p. 143) insists that "These discussions [among moral philosophers] usually come close to admitting that there is something 'sacred' about each individual human being, and that despite the existence of obvious inequalities at birth, justice and fairness demand that we design a system to give

everyone equal access to opportunities.” The instances of the pairing of justice and fairness as a justification for rights can be easily expanded.

While related, justice and fairness are not synonyms. Among the world’s cultures the distinct domains of the concepts are widely recognized. As Max Gluckman (1955) found, justice is often what we wish for our enemies, while fairness is what we hope for ourselves. In this basic sense justice refers to the even-handed application of general rules, while fairness attends to the specific facts of a particular conflict. The tension between the two can be plainly illustrated in the disagreement about the correct outcome in Fuller’s (1949) hypothetical of “The Case of the Speluncean Explorers.” Should the trapped cave explorers be convicted of murder after cannibalizing their companion in order to survive, or should the extreme circumstances of the act serve as an excuse? Justice argues for the strict application of the formal rule against the willful taking of another’s life; fairness advocates a more lenient judgment due to the special circumstances in which the defendants found themselves.

The divide between justice and fairness is far from irreconcilable. John Rawls (2001) famously makes fairness the standard to find justice. But two points offer themselves as potentially of interest to the present discussion. First, because justice and fairness are offered so frequently as tandem bases for human rights, much of the broad work of the idea of “rights” can be expected to be accomplished by either. And second, while justice is a prototypically moral concept, fairness has its primary origins elsewhere, in notions of equity, which is most directly tied to pragmatic economic experience. Taken together, we can conclude that if morality is a problematic foundation for rights, then the associated term of fairness is not only an obvious alternative to consider, one similar

enough to the original moral justice to defend a broadly similar version of rights, but also sufficiently different to avoid the more troubling implications of the moral-based perspective.

What is Fairness?

The suggestion proposed here is that fairness, rather than being a fundamentally moral concept—although after it has arisen, it can be employed in moral thinking—has its roots in market economics. “Fair” in this view refers to the primary experience of entitlement and desert from ownership and exchange. This is the innate sense of knowing how much of my grain to give you in exchange for some of your cattle. At some point we will agree on a given amount as being acceptable to us both—otherwise one or the other will walk away and find a new trading partner. That price we describe as being a “fair” one, one that benefits both bargainers. Underlying the process is an understanding that the grain is “mine” and the cattle is “yours,” and that neither of us can take what belongs to the other without his agreement. Without those boundaries, there does not exist sufficient distinction between us to make an exchange possible. Once acquired in this core sense, the rudimentary ideas of entitlement and desert built out of tangible property for exchange—of recognizing what is mine, and that I control its disposition, and can command a fair price to surrender that control—can be analogically extended to other kinds of property such as the body and then to exercises of the body like speech. From economic activities arise the building blocks for human rights, an altogether distinct lineage that offered by moral theories of justice and objective right.

Before attempting to defend this position, it may be helpful to see what would be gained by the move were it successful. First, moving rights from moral justice into the

category of economic fairness avoids the problem of presumptive absoluteness. As discussed earlier, rights that inhere to persons as a matter of morality cannot be infringed without a moral injustice to the person. Attempts to avoid this implication—such as allowing infringement only with State-regulated thresholds—undermine the protections that rights are meant to assure. Because fairness is a comparative concept from the outset, it is possible that my right to X can be infringed without that constituting a wrong to me because someone else’s claim is greater than my own. For example, you are ordinarily under no obligation to trade your cattle with me if you can get a better deal with some other farmer. Your looking for a better deal frustrates my control over my grain in that I cannot dispose of it as I’d wish, but that frustration is not unfair to me. The same economic experience that opens the door to the idea of rights also teaches that rights can be frustrated without that being a wrong to me, a distinct advantage over the lesson from moral rights. The same reasoning still allows for the possibility that some rights will be functionally absolute simply because no one else can assert a stronger claim, or, to continue in the market image, pay a high enough price to make it a fair exchange to surrender my control, or my right.⁷

⁷ Consider the problem of torture. Under the current rights regime, there is a conflict between a presumptively absolute right against torture, as well as a popular perception that torture can be justified in the “ticking bomb” scenario. The conflict is unresolvable as rights are currently understood: my right not to be tortured cannot be trumped by what Gewirth (1981) recognizes as the absolute right of all innocent persons “not to be made the intended victims of a homicidal project.” The justificatory “trick” is not the argument that I should be tortured, but that torturing me is the *right* thing to do, or at least not a wrong committed against me.

This impasse is avoided under the fairness view of rights. As in the original setup of the scenario, I have a right against torture, and innocents have a right not to be killed, with the same question being whether you can torture me in hope of extracting information that will save those lives. Here, however, my right against torture is not formally absolute, but only practically so, in that the debt that accrues to me for the torture is so high as to be ordinarily unpayable. As Michael Davis (1986) argues, economic models allow us to understand the prices people put on their actions. Suppose that the recognized punishment for torture is death for the torturer. If in the “ticking bomb” scenario this may be deemed an affordable price, then you may torture me, so long as you realize that this will mean your own death afterwards.

Second, grounding rights in fairness mitigates the expansion problem that concerns Glendon and others. As current rights rhetoric has demonstrated, when rights are based on morality there is little that prevents any simple desire from being framed as a personal right. This is especially true when rights are justified in terms of human dignity. When rights are justified in terms of status alone, and that status is as expansive and ill-defined as that of “human,” then little argument can be made in the way of saying that you do not have the asserted right. Practical considerations may be put forward to argue that fulfilling the right is not possible at the current time, but that does not address the validity of the initial claim. We each may have a sense of where we would draw the line ourselves, but that does not offer a compelling reason to others who, with equal good faith, wish to draw that line elsewhere. Consequently, the catalog of asserted rights balloons, compelling an unprincipled prioritization of rights claims that belie the underlying moral basis for the alleged rights themselves.

Alternatively, fairness-based rights, as an extension of desert rather than status, will be seen as something that the possessor has earned or is owed for reasons other than simple existence. The grain is mine to control because I, at least, went to the trouble to harvest it and bring it to market. Even without pushing too far, under this model it becomes more difficult to assert the rights of nonsentient organisms and inanimate objects, as these cannot have a subjective sense of being owed something because of something it has done to deserve the right.

The search heretofore has been for a way to endorse torture with impunity for the torturer. The fairness model precludes that result, but does allow the saving of the innocent lives so long as the torturer is willing to pay the (ordinarily unaffordable) price. The choice will be his.

Even if we do not wish to require a subjectivity element to be due a right, thereby allowing for the possibility of fetuses or comatose persons to have rights—there still remains a sense that the rights holder must have done the kinds of things that others would recognize as incurring an obligation in them. An economic exchange, which forms the metaphor for rights, is a consensual arrangement between two parties, and therefore we can imagine that rights that take this interaction as its starting point will reject the idea that they can be asserted unilaterally.

Other limits to expansionist claims are possible, with varying impacts upon the current terrain of currently recognized rights. The important point here is that claims can be limited in a way that is principled rather than ad hoc, as is presently the situation within the moral framework.

Justifying the Fairness Foundation for Rights

With some awareness of the potential benefits that would accrue to a shift from moral foundations to an economic-based fairness model, the work to see if the change can be defended seems warranted.

The basis of the model is that the concept of rights builds upon a prior idea of mine-ness out of which grows an entitled control. The suite of human rights becomes, in this light, derivative of a primitive concept of property as well as of particular individuality. The powers associated with the idea of property ownership then transfer to the self of the individual because, in an important sense, we “own” ourselves and therefore expect the same powers of ownership and control over ourselves that we experience with external physical property, especially fair exchange in the marketplace.

A complicated legal notion, property, especially private property involves a set of “rules governing access to and control of material resources that [is] organized around the idea that resources are on the whole separate objects each assigned [or at least potentially assignable] and therefore belonging to some particular individual” (Waldron 1988). Ownership of property, according to Waldron, “is a term peculiar to systems of private property. The owner of a resource is simply the individual whose determination as to the use of the resource is taken as final in a system of this kind.” The argument here is that once possessed of the idea of “ownership,” that concept which originally applied to “resources” becomes easily assigned to the self, with the result that I come to the idea that I own myself and as such my “determination as to the use” of that self should be “taken as final.” Thus is the idea of the “right” born out of a prior experience with property ownership. Interactions with others are built upon this analogy, such that, just as I am willing to alter my claims to property when confronted with an equitable or fair offer, my choices as to my uses of myself become subject to the same type of thinking.

Among philosophers especially relevant to explaining the emergence of these ideas of property is John Locke. The problem that concerned Locke was the transmutation of an object held commonly into one owned by a specific individual. Locke solved this problem with a value-added theory of property:

Though the earth and all inferior creatures be common to all men, yet every man has a property in his own person; this nobody has any right to but himself. The labour of his body and the work of his hands we may say are properly his. Whatsoever, then, he removes out of the state that nature hath provided and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature placed it in, it hath by this labour something annexed to it that excludes the common right of other men. For this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where

there is enough and as good left in common for others. (Locke 1966, §27, p. 15)

If one accepts Locke's initial premise—that “every man has a property in his own person”—then his theory constitutes some kind of property creation by “infection”: my property claim over my own body extends to an object in the public commons when I mix the products of my body (labor) with the object. Much depends therefore upon this unsupported premise. For a defense of the ownership of one's own body, we must turn to Hegel.

Hegel goes further than Locke in underscoring the socially seminal role of property in general, and private property particularly.

A person, in distinguishing himself from himself, relates himself to *another person*, and indeed it is only as owners of property that they two have existence [*Dasein*] for each other. Their identity *in themselves* acquires existence [*Existenz*] through the transference of the property of the one to the other by common will and with due respect of the rights of both—that is, by *contract*.” (Hegel 1991 §40, p. 70)

Writing later than Locke, Hegel advances a theory of possession much like his. While “*physical seizure* is the most complete mode of taking possession,” I also take possession when “I *give form* to something,” as this “combines the subjective and the objective” (§§55-56, pp. 84-85). Hegel claims that this manner of taking possession extends even to the person himself. Ownership of one's self is an accomplishment: “it is only through the *development* [*Ausbildung*] of his own body and spirit, *essentially* by means of *his self-consciousness comprehending itself as free*, that he takes possession of himself and becomes his own property as distinct from that of others” (§57, p. 86).

Hegel comes very close to the position advanced here (although it is not clear that he would appreciate being categorized as a nonmoral theory). Property shapes our

relationships with others to such an extent that our exchange of property with one another forms the basis of our self-consciousness of ourselves as separate persons deserving of respect, which takes the form of contract making and keeping. Our toil—the value-added theory of Locke—creates property not only out of the public commons but also out of our own selves. Owning ourselves, we are entitled to control that property, and are limited by only those actions that would destroy our identity which allows us to engage in the exchange in the first place. Those goods Hegel considers inalienable: “my personality in general, my universal freedom of will, ethical life, and religion” (§66, p. 95).

From this property we learn the prototypical categories of mutual respect and fair dealing, from which can spring a full flowering of the modern human rights idea. But because this idea is generated from the “bottom up,” as it were, from our real experience with property ownership and economic exchange, rather than “top down” from idealized moral principles or justice and abstract right, many of the problems associated with the latter are avoided while obtaining most of the same benefits.

Conclusion

Edmundson characterizes the historical emergence of the idea of human rights out of the conceptual divergence between objective and subjective right, which he places in the Middle Ages. Objective right recognizes the justice of a given state of affairs.

“Suppose I take St. Francis’ sandals without his permission. ‘Thou shalt not steal’—I have violated objective right, I have transgressed God’s commandment. But where does St. Francis come into the picture? We want to add, ‘St. Francis has a right to his sandals’” (Edmundson 2004, p. 9). He considers the appearance of this psychological foregrounding of the right-holder as a necessary precondition to saying that the idea of

rights has appeared in a given society. Human rights would therefore not be a universal in the sense required by the moral picture, but are rather contingent on a particular relationship of persons within the culture. If we are to believe Hegel, it is the experience of private property that creates that image.

As an empirical matter, this model suggests that the idea of universal human rights will be most prevalent in contexts where private property ideologies predominate, and where the individual has emerged out of the social background as an entity of subjective awareness—again according to Hegel, a necessarily simultaneous happening. This in fact appears to be the case: human rights are often accused of being a “Western” idea, as opposed to more communitarian Asian cultural models that have not prioritized ownership by individuals to the same extent. Heretofore this divide has been a fact retrospectively accounted for with varying success; the present model, however, predicts the uneven distribution of human rights discourse in a way that does not disparage late-comers as being in some way morally retarded.

This has not been a simplistic claim that rights are economic claims, but only that the idea of a right follows from ways of thinking engrained by experience with economic exchanges. Transplanted from the material world of exchange to the ethical realm, one arrives at the basic idea of the “right.” The thesis that rights are an extension of the economics-based ideas of fairness, rather than the morally-grounded intuitions of justice, seems both well-founded and productive.

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