1989

Rights

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Rights

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We live, even more thoroughly than did our eighteenth-century ancestors, in an age of rights. This is evident in domestic affairs, where women's rights, children's rights, "gay" rights, and animal rights all have their advocates, as do the rights of the unborn, which the "right to life" movement defends against those who proclaim the pregnant woman's "right to choose" to have an abortion. In international relations, "human rights" has become the watchword of private groups, governments, and supranational organizations, to the point where suspect regimes are occasionally warned that they must improve their "human rights record" if they hope to continue to receive foreign aid. And at the philosophical level, an imposing array of treatises – Dworkin's *Taking Rights Seriously*, Gewirth's *Reason and Morality*, Nozick's *Anarchy, State, and Utopia*, and Melden's *Rights and Persons* among them – testifies to the power of the concept of rights in moral and political philosophy, at least among theorists in the Anglo-American tradition.

Nor is this preoccupation with rights confined to the West, as it was in the eighteenth century. In the Soviet Union, the Preamble to the 1977 Constitution proclaims "a society of genuine democracy, whose political system ensures . . . the combination of real citizens' rights and liberties with their duties and responsibilities to society." Elsewhere, scholars who have claimed to discover the concept of human rights in traditional Islamic, African, Hindu, and Confucian thought have gone on to argue for syncretric conceptions of human rights – conceptions that would temper the "excessive individualism" of the Western notion by wedding it to the communitarian notions prevailing in one or another of these traditions. These mixed

I am grateful to Jack Donnelly, who may not agree with everything I say here, for unusually helpful comments on an earlier draft of this essay.

conceptions face problems of their own, like other "mixed marriages," but they speak clearly nonetheless for the significance of the concept of rights in political discourse throughout the world.[1]

This, of course, has not always been the case. Indeed, there are those who believe that the concept of rights was politically insignificant even in the West until the seventeenth century or, at the earliest, the late middle ages. Whether this is true will depend, as we shall see, on what we take the concept of rights to be. Words are often easier to trace than concepts, however, so I shall begin this brief history of the concept of rights with a glimpse at the etymology of the English word 'right.'

I

In English, 'right' is used in a number of ways to mean a number of things. We may turn to the *right*, for instance, even when that is not the *right* way to turn; the Pythagorean theorem deals with *right*-angled triangles; governments sometimes shift to the *right*; straightforward people come *right* to the point when they seek to *right* matters; and we occasionally find that what someone is doing is not *right*, morally speaking, even though she *has the right* to do it. 'Right' in this last sense – 'right' as a kind of property we can hold, stand on, or act within; as something we can exercise if we choose, perhaps by asserting it against others – is our concern here, for this is the sense that conveys the concept of rights.

Like its cognates in German (*recht*) and the other Teutonic languages, 'right' evolved from the Latin word *rectus* (straight).[2] In much the same way, its counterparts in French (*droit*), Italian (*diritto*), and Spanish (*derecho*) are corruptions of the low Latin *directum* (Miller 1980 [1903]: 48). *Rectus*, in turn, has been traced through the Greek *orektos* (stretched out, upright) to the Sanskrit *rju* or *riju* (straight or upright), which has been connected to *raja* (shining, radiant, a king) and the Latin *rex* (Miller 1980 [1903]: 40). The pattern, then, is for the notion of straightness to be extended from the physical realm to the moral – from *rectus* to rectitude, as it were. Something similar seems to have happened with 'wrong' and 'tort,' which derive respectively from the Old Norwegian word for curved or bent,

[1] For an insightful account and criticism of these arguments, and of the Soviet conception of rights, see Donnelly (1982, esp. pp. 306–13).

[2] The sources for this etymology of 'right' are: Miller (1980 [1903]: 35–48); Salmond (1907: 463–73); Skeat (1978: 519); and *Webster's* (1950).

wrangr, and the Latin word for twisted, *tortus* (Salmond 1907: 465). The moral use of these notions is old enough, in fact, for Hesiod to have called on rulers who "twist the courses of justice aslant" to "straighten" their decisions (1968: 250–64).[3]

But this still leaves us short of an account of how 'right' came to be used to mean a kind of personal possession, something one can "have." In this case the answer lies in an extension of the term from one moral sense to another – from *objective* to *subjective* right, to use the distinction familiar to Continental jurists. By analogy with the physical sense, the primary moral sense of 'right' was a standard or measure for conduct. Something was right – morally straight or true – if it met the standard of rectitude, or rightness. The conjunction of 'right' with a preposition in Old English underscores this point.[4] If something was done "with right," "by right," or even "in right," then it was rightfully done, or done in accordance with the standard of right conduct. From here, the next step was to recognize that actions taken "with right" or "by right" are taken *as a matter of right*. The transition is from the belief that I may do something because it *is right*, in other words, to the belief that I may do something because I *have a right* to do it. Once this transition is achieved, 'right' can mean not only a standard, but also a justifiable claim to act in a certain way – a claim that becomes a kind of standard itself. Thus the concept of *rights* joins the concept of *the right*.

But when and where and why did this happen? When, that is, did subjective right emerge as a concept distinct from objective right? To answer these questions, we shall have to look beyond the English 'right' to its conceptual antecedents.

II

There are two schools of thought, loosely speaking, on the origins of the concept of rights. One view, perhaps the dominant one, holds that the concern for rights is characteristic of political and legal thought only in the modern era, so the concept itself must be either modern or, at the earliest, late medieval in origin. As John Finnis puts it (1980: 206–7), there is a "watershed" in the history of 'right' and its classical antecedent *ius*, a watershed that occurs somewhere between Thomas Aquinas in the thirteenth century and Francisco

[3] Jones (1956: 125) describes Hesiod's views in this way: "It [*dike*] is straight or right as opposed to what is wrested, wrung, or wrong . . . It is set up against any perverse twisting . . . of something essentially plain, direct, and simple. Personified, this 'straightness' is placed among the gods as the daughter of Zeus and Themis."

[4] See the examples under 'right,' definition 7, in the *Oxford English Dictionary*.

Suarez in the early years of the seventeenth.[5] For Aquinas, Finnis notes, *ius* "primarily means 'the fair' or 'the what's fair' "; but for Suarez (*De legibus*, I, ii, 5), *ius* is "a kind of moral power [*facultas*] which every man has, either over his own property or with respect to that which is due to him." In *De jure belli ac pacis* (I, I, iv; 1925: 35), furthermore, Hugo Grotius defines *ius* much as Suarez did, thus strengthening the impression that *ius* was somehow transformed in the late medieval or early modern period from a standard or law defining just or right relationships to a faculty or power belonging to the beneficiary of the relationship – to the one who "has" the right.

Finnis is fairly cautious here, for some 340 years separate Aquinas and Suarez. Michel Villey is bolder. Villey (1969) argues forcefully that *le droit subjectif* – "une qualité du sujet, une de ses facultés, plus précisément une franchise, une liberté, une possibilité d'agir" (p. 146) – is the work of William of Ockham. Although he does not insist that Ockham was the first to use *ius* in the subjective sense, Villey does claim that Ockham provided the first clear and complete definition of the new concept in his *Opus nonaginta dierum* (*c.* 1330), where he deployed it on behalf of his fellow Franciscans in their controversy with Pope John XXII.

Boldness comes at a price, however, and others have disputed Villey's claims for Ockham.[6] Richard Tuck maintains, for instance, that the concept emerged not with Ockham, but in the century before him as the result of an assimilation of *ius* and *dominium* by the later Glossators, particularly Accursius and his followers. According to Tuck, "already by the fourteenth century it was possible to argue that to have a right was to be the lord or *dominus* of one's relevant moral world, to possess *dominium*, that is to say *property*" (1979: 3; Tuck's emphasis). In fact, Tuck says (ibid.: 22–3), even Ockham's opponent, John XXII, employed *ius* in this sense in his bull *Quia vir reprobus* (1329) – the very work that Ockham sought to refute.

Tuck (1979: 13–15) detects intimations of this conception of a right among the twelfth-century Glossators as well; but because they thought of rights as passive rather than active claims, he argues, they could not conceive of rights as a kind of property. As Brian Tierney sees it (1983: 435), though, Tuck is doubly wrong here: wrong, firstly, because he mistakes active rights for passive ones; and wrong,

[5] For a similar view, see Golding (1978: 46–9).

[6] Perhaps I should say Villey's claim *against* Ockham, for Villey seems to deplore the results of this "moment copernicien de l'histoire de la science du droit . . ." (1969: 177).

secondly, because the active–passive distinction makes no difference in this context anyhow. This being so, it seems that references to rights – "either as rights to do something or as rights to enforce claims against others – are commonly encountered in twelfth century juridical works." What seems a watershed to Finnis is, for Tierney, no more than a gentle slope – a slope that begins *before* Aquinas, not after him.

Despite their differences, all these scholars, save perhaps Tierney, believe that the concept of rights is not to be found before the high or the late middle ages, not even in Roman law. But there is another school of thought on the matter, one represented most recently by Alan Gewirth. Gewirth acknowledges that there is little in the way of direct appeals to the concept of rights or of substantial attempts to analyze it before the modern period, but this means only that it is "important to distinguish between having or using a concept and the clear or explicit recognition and elucidation of it . . . Thus persons might have and use the concept of a right without explicitly having a single word for it" (1978: 99). With this in mind, Gewirth proceeds to uncover the concept of rights in feudal thought, Roman law, Greek philosophy, the Old Testament, and even primitive societies. The word may not be present, in his view, but the concept surely is.

This is in many ways a plausible view. It does seem, after all, that wherever there are rules recognizing and governing the private ownership of property, as there were as long ago as the Code of Hammurabi, the concept of rights must also be present. To talk of "mine" and "thine," that is, is to talk of rights, even if only implicitly. In other contexts, too, it seems that the Greeks and Romans, who certainly lacked a specific word for rights, still found ways to talk about them.[7] The Roman law of persons, with its attempt to delineate the ways in which a person could move from one status level to another, seems to reflect a concern for what we now call legal and political rights, for instance.[8] Thus the Roman citizen enjoyed not only an opportunity to participate in politics

[7] See the entries under *dikaios* in Liddell and Scott (1968), for instance, and those under *ius*, especially definitions 10–13, in the *Oxford Latin Dictionary*. Note especially Liddell and Scott's reference to Aristotle's *Politics* (1287b12), *o spoudaios archein dikaios* – a phrase Sinclair and Saunders (1981: 227) translate "if . . . a sound man has a right to rule," and Barker (1971: 147) renders "If the good man has a just title to authority."

[8] According to Nicholas (1962: 60–1), the Roman law of persons was "concerned with the different categories of 'status' – in the modern sense of a condition in which a man's rights and duties differ from the normal, that difference not having been created simply, or at all, by his own consent."

that was denied to others, but a legal standing superior to others as well – to freedman, to resident alien, and especially to slave, who had no legal standing at all.[9] Among the citizenry, furthermore, other distinctions denoted differences in what we regard as rights. Thus the only person who was legally in his own power (*sui iuris*) was the head of the family, the *paterfamilias*; everyone else was, in the eyes of the law, *alieni iuris*, in the power of another (Nicholas 1962: 68). And even the *paterfamilias* could suffer *capitis deminutio*, deterioration of status, whether it be *capitis deminutio minima* – loss of family rights; *capitis deminutio media* – loss of citizenship and family rights; or *capitis deminutio maxima* – loss of liberty, citizenship, and family rights: i.e., enslavement (Nicholas 1962: 96).

Which of these positions regarding the origin of the concept of rights is correct? I doubt that straightforward etymological or conceptual digging will answer this question once and for all, for the answer ultimately depends upon what we are willing to count as "having" a particular concept. If one is willing to look primarily for the idea or the notion, however it may be expressed, then one can confidently say that the concept of rights is virtually as old as civilization itself. The concept may have been embedded in or scattered among a variety of words – in *auctoritas*, *potestas*, *dominium*, *iurisdictio*, *proprietas*, and *libertas* as well as *ius*, to take the Roman example – but it was there all the same.[10]

If one insists that the form of expression is crucial, however, so that a concept cannot be said to exist unless there is a word or phrase that distinguishes it from other concepts, then one would have to say that the concept of rights has its origin in the middle ages. Certainly the Romans could use *auctoritas*, *potestas*, *libertas*, and other words in circumstances where we now use 'rights,' but that itself tells *against* the claim, on this view, that they possessed the concept of rights. They had a number of related concepts, that is, but they were not

[9] "At Rome and with regard to Romans," Wirszubski (1960: 4) says,

> full *libertas* is coterminous with *civitas*. A Roman's *libertas* and his *civitas* both denote the same thing, only that each does it from a different point of view and with emphasis on a different aspect: *libertas* signifies in the first place the status of an individual as such, whereas *civitas* denotes primarily the status of an individual in relation to the community. Only a Roman citizen enjoys all the rights, personal and political, that constitute libertas.

[10] On the relation of these words, and others, to the concept of rights, see Miller (1980 [1903]: 58–131), who defines a legal right as "a claim, a power, a faculty, a liberty, an authority, a privilege, a prerogative, a capacity to act or to possess dominion, empire, power, authority, immunity, status, or some interest put forward actively if necessary in the form of a case or action at law, and recognized by the State in accordance with right, law, and justice" (p. 131). On *libertas* in particular, see Wirszubski (1960, *passim*).

able to distinguish, as we are, the concept of rights from these others. Even the words with the greatest claim – *dikaios* for the Greeks and *ius* for the Romans – betray the absence of the concept because in the classical period both words mean right primarily in the objective sense. Where we say, "I have a right to this book," for instance, they usually said, "It is right that I have this book" – related notions, to be sure, but more than merely a difference in the order of the words. As long as there was no way of distinguishing the subjective sense of right from the objective, then, the concept of rights could not truly be said to exist.

This, I think, is the sounder of the two positions on the origin of the concept. We can say that intimations, anticipations, or glimpses of the concept are as old as legal and political thinking, certainly, but we must acknowledge that these are *our* glimpses; for what seems to anticipate or intimate the concept of rights can seem so only to those who already have the concept. Other concepts, narrower concepts – older members of the same family, so to speak – are easy to find in ancient thought, but the concept of rights itself is not fully present until sometime in the later middle ages. After that, emphasis shifts from the notion of *right* as a standard for conduct to the notion of *rights* as possessions, a kind of personal property. By the seventeenth century, Grotius could begin *De jure belli ac pacis* by distinguishing *ius* as "a moral quality of a person, making it possible to have or to do something lawfully" (I, I, iv) from *ius* "as nothing else than what is just" (I, I, iii; 1925: 34–5). And by the middle of that century, Hobbes could, and characteristically did, go even further (*Leviathan*, chapter 14):

> For though they that speak of this subject, use to confound *ius*, and *lex*, *right* and *law*: yet they ought to be distinguished; because RIGHT, consisteth in liberty to do, or to forbear: whereas LAW determineth, and bindeth to one of them: so that law, and right, differ as much, as obligation, and liberty; which in one and the same matter are inconsistent.

III

Here, with Hobbes, we have the subjective sense of right distinguished so sharply from the objective that they are actually opposed to one another. We also have the concept of rights at the center of political theory for the first time, not only with Grotius and Hobbes, but with Suarez, Spinoza, and, at the end of the century, Locke. It is, moreover, *natural* rights that play so prominent a part in the political

thought of the seventeenth and eighteenth centuries. It almost had to be.

If the concept of rights did not emerge fully fledged in the classical period or the early middle ages, it is probably because concepts rooted in status considerations of one sort or another informed thought in those periods. To say *then* that one was a citizen or a lord was to say, in our terms, that one held certain rights (and was subject to certain obligations) by virtue of one's position or role in society. But because the status concepts were fully effective – because they did the work the concept of rights now does – they precluded any appeal to rights as such. To say, in these circumstances, "I am a citizen, therefore I have rights," would have been as pointless as it now is to say, "I am a carpenter, therefore I have tools."

For the concept of rights to appear and gain purchase, the status concepts had to lose their grip; and in order for this to happen, the idea that human beings are fundamentally alike had to displace the belief that differences in nationality, culture, or rank were rooted in natural differences between people. This idea of human equality is an old one – one historian traces it to "the Hebrew account which describes Adam, whose name means 'humanity,' as being created in the 'image of God' " (Pagels 1979: 4) – and there were occasional breakthroughs, such as the "startling" change from "Aristotle's view of the natural inequality of human nature" to the "theory of the natural equality of human nature" in Cicero and Seneca (Carlyle and Carlyle 1950: 8). The idea also found powerful expression in a cosmopolitan philosophy, Stoicism, and a religion, Christianity, that emphasized both the individual and the universal. Yet the idea of natural equality played relatively little part in social and political thought until the later middle ages, perhaps because neither Stoicism nor Christianity invested life on earth with much significance.[11] When it did come into prominence, however, the concept of rights came with it.

What happened, briefly, is that the growing conviction of the

[11] According to Lewis (1974, vol. I: 196), "These two sets of ideas, the Christian and the Stoic, were to become the chief bases of that sense of human dignity in which every individualistic trend in Western political thought is finally rooted." But she also observes that

> ecclesiastical thought also conveyed ideas which may seem to us incompatible with its profound ideas of the equality and freedom of human souls. The early church had made peace with Roman absolutism and with the great inequalities and injustices of Roman society; it was prepared to accept the stratification of the feudal age and the irresponsibility of medieval kings. For Christ's kingdom was not of this world. Ibid.

natural equality of mankind undermined the stratification of society and the status concepts that helped to justify it. Various forms of status were subordinated, at least in theory, to only one, humanity, and in this shift from the particular to the universal the erosion of status concepts gradually made room for the concept of rights.[12] Indeed, once all supposedly superficial differences were stripped away, as they were in *Leviathan*, it was easy – natural, as it were – to move from the notion that all men are naturally equal to the notion that all men have natural rights. As rank and hierarchy fade from the objective order, the objective order itself becomes subjective, at least to the point where the equality ordained by the perceived order of things bestows rights upon everyone. It then seems more straightforward to say "I have a right to this" than "it is right that I have this."

This is how Locke can draw natural rights out of natural law. For we are by nature free and equal, as he says in the *Second Treatise*, "there being nothing more evident, than that Creatures of the same species and rank promiscuously born to all the same advantages of Nature, and the use of the same faculties, should also be equal one amongst another without Subordination or Subjection" (1965, vol. II, § 4: 309). We are free and equal, furthermore, because God, whose property we are, has made us so, and "there cannot be supposed any such *Subordination* among us, that may Authorize us to destroy one another, as if we were made for one anothers uses, as the inferior ranks of Creatures are for ours" (vol. II, § 5: 311; Locke's emphasis). In order, therefore, "that all men may be restrained from invading others Rights . . . and the Law of Nature be observed, . . . the *Execution* of the Law of Nature is in that State [of nature], put into every Mans hands, whereby every one has a right to punish the transgressors of that Law to such a Degree, as may hinder its Violation" (vol. II, § 7: 312; Locke's emphasis).

Reasoning of this sort was neither original with Locke nor confined to works of high abstraction. As Alasdair MacIntyre points out (1973: 153, 158), a Leveller polemicist, Richard Overton, advanced a similar argument in 1646 in *An Arrow Against All Tyrants*. Overton's words, indeed, speak even more plainly than Locke's to

[12] According to Ritchie (1952: 6), the Protestant Reformation was the leading factor in this shift: "The theory of natural rights is simply the logical outgrowth of the Protestant revolt against the authority of tradition, the logical outgrowth of the Protestant appeal to private judgment, *i.e.*, to the reason and conscience of the individual." Others, of course, would award the praise or blame to social and economic factors.

the relationship between rights and the "principles of nature" (Aylmer 1975: 68–9):

> To every Individuall in nature, is given an individuall property by nature, not to be invaded or usurped by any: for every one as he is himselfe, so he hath a self propriety, else could he not be himselfe, and on this no second may presume to deprive any of, without manifest violation and affront to the very principles of nature, and of the Rules of equity and justice between man and man: mine and thine cannot be, except this be: No man hath power over my rights and liberties, and I over no mans . . . For by naturall birth, all men are equally and alike borne to like propriety, liberty and freedome, and as we are delivered of God by the hand of nature into this world, every one with a naturall, innate freedome and propriety . . . even so are we to live, every one equally and alike to enjoy his birthright and priviledge: even all whereof God by nature hath made him free.

The product of this way of thinking is the Age of Rights, exemplified most dramatically in the United States' *Declaration of Independence* (1776) and the French *Declaration of the Rights of Man and of Citizens* (1789). Man, the individual, shorn of status, role, and often cultural identity, becomes the center of the moral and political world, and the chief task of government, in the eyes of many in the West, is to secure his inalienable rights. It was, as Thomas Paine wrote in 1792, the dawn of a new and glorious era: "Government founded on a *moral theory, on a system of universal peace, on the indefeasible hereditary Rights of Man*, is now revolving from west to east by a stronger impulse than the government of the sword revolved from east to west. It interests not particular individuals, but nations in its progress, and promises a new era to the human race" (1967: 404; Paine's emphasis).

IV

By the beginning of the nineteenth century the concept of rights was firmly entrenched in Western legal and political thought. Since then, there have been few attempts to displace, reconceive, or abandon it, but a number of attempts to redefine the role it plays in political life and thought – attempts that were themselves under way as Paine wrote *Rights of Man*.

Two of the early critics of rights theories, Burke and Bentham, started from much the same point – condemnation of the French revolutionaries' appeal to natural rights. For both, the danger of the natural rights approach was its tendency to substitute abstract rhetoric for sensible, practical thinking. "*Natural rights* is simple

nonsense," according to Bentham's judgement on the French *Declaration of Rights*, and "natural and imprescriptible rights, rhetorical nonsense, – nonsense upon stilts" (1970: 32; Bentham's emphasis). Rights are conventional, not natural, on Bentham's view, and if we enjoy them at all it is only because we are subject to a legal system; for to have a right is merely to be the beneficiary of a relationship sanctioned by law. Because there are no rights without law and government, law and government cannot possibly be justified by an appeal to rights. Instead, we should look directly to utility, understood most simply in terms of the "two sovereign masters" under which nature has placed us: pain and pleasure (Bentham 1961: 1).

For Burke, the French appeal to natural rights was dangerous not because it was nonsensical but because it was blind to circumstance and tradition. There *are* natural rights, he acknowledges, abstract rights that do not depend for their existence on government: "but their abstract perfection is their practical defect" (1979: 150). To his mind, the French were elevating a fiction, Man, to the status of a god, and proclaiming a new religion, the Rights of Man, in his name. What they and their sympathizers in other countries should be concerned with, Burke argues, is men as they are, in all their variety and particularity, whether they be French, English, or Chinese, peasants, merchants, or craftsmen, nobles or commoners, masters or apprentices. For "I may assume that the awful Author of our being is the Author of our place in the order of existence, – and that, having disposed and marshalled us by a divine tactic . . . He has in and by that disposition virtually subjected us to act the part which belongs to the place assigned us" ("Appeal from the New to the Old Whigs," 1967: 54). We have rights, then, and they are a kind of property, but the kind that attaches to whatever station in life we may happen to occupy. Those who set the individual against others – those who talk of rights *against* society and government – understand neither rights nor the order of things.

This tendency of the natural rights theorists to abstract man from his social and historical context is a common ground of criticism in the nineteenth century, one that unites writers as different from Burke, and each other, as Hegel, Marx, and T.H. Green. For Marx,

> None of these so-called rights of man goes beyond the egoistic man, beyond man as a member of civil society, as man separated from life in the community and withdrawn into himself, into his private interest and his private arbitrary will. These rights are far from conceiving man

> as a species-being. They see, rather, the life of the species itself, society, as a frame external to individuals, as a limitation of their original independence. "On the Jewish Question," 1983: 109

Rather than retreat with Burke toward status concepts and a notion of an objective order, however, Marx looked forward, late in his life, to the transcendence of the rights of man in "a higher phase of communist society," for "only then can the narrow horizon of bourgeois right be crossed in its entirety and society inscribe on its banners: From each according to his ability, to each according to his needs!" ("Critique of the Gotha Programme," 1983: 541). Once that horizon is crossed, presumably, human potential will flower forth and the concept of rights, now rendered useless, will wither and die.[13]

For Green, the liberal, the criticism of the asocial and ahistorical views of the natural rights theorists leads to an attempt at accommodation. Rights are not valuable in themselves, he says, but only insofar as they serve to promote the "moral vocation" or "moral personality" of the individual. As it happens, Green believes that rights are necessary to the pursuit of this vocation, much as Mill believes that liberty is necessary to the well-being of the individual, so rights prove to be very valuable indeed. "There ought to be rights," in short, "because the moral personality, – the capacity on the part of an individual for making a common good his own – ought to be developed; and it is developed through these rights; i.e. *through the recognition by members of a society* of powers in each other contributory to a common good, and the regulation of those powers through that recognition" (1967: 45; emphasis added).

Green's attempt at accommodation, then, is an attempt to tie the rights of the individual to the good of the society to which he belongs. On this view, our rights are not merely rights *against* others; they are also rights *to* the positive aid of others, aid we need in order to develop our powers so that we may contribute to the common good. This is a long way, in less than a century, from Paine's notion of "the indefeasible hereditary Rights of Man," but it was a journey many made in the nineteenth century. In theory, at least, the abstract Man of the Age of Rights had become, once again, a social creature. As D.G. Ritchie (1952: 102) put it in 1894, "The person with rights and duties is the product of a society, and the rights of the individual must therefore be judged from the point of view of a society as a whole, and not the society from the point of view of the individual."

[13] On Marx's views on rights, see Dunn (1979: 38) and Donnelly (1985: 41–43).

V

Where do we stand now, one hundred years after Green and Ritchie, with regard to the concept of rights? It is so widespread and so firmly rooted in our habits of thought that it is all but impossible to conceive of doing without it.[14] Yet it is also difficult to conceive of what we are going to do with it. Almost everyone invokes the concept, but its place in political thought is every bit as much a matter of contention as it was in the last century. Nor is there significant agreement on how rights are to be grounded – in utility? in fundamental rights? in the necessary requirements of rational action? in human needs? – or whether they can be grounded at all. In these respects, we seem still to be stuck in the nineteenth century.

There are, however, two developments worthy of note in the twentieth century. First, philosophers and legal scholars have devoted considerable attention to the analysis of the concept itself, one result of which is an abundance, perhaps a superabundance, of often disputed distinctions: active and passive rights, positive and negative rights, welfare and option rights, special and general rights, etc. By general consent, the most impressive of these was set out in 1919 in Wesley Hohfeld's *Fundamental Legal Conceptions*. As a legal scholar, Hohfeld's concern was that rights and their correlative concept, duties, were too broadly and indiscriminately construed. According to his analysis, this masks four distinct and fundamental relations under law: *rights* (i.e., *rights in the strict sense*) and their correlative, *duties*; *privileges* and *no-rights*; *powers* and *liabilities*; and *immunities* and *disabilities* (1964: 36).

From the standpoint of social and political philosophy, the principal value of Hohfeld's categories seems to lie in the distinction between *rights* – also called *claims* or *claim-rights* – and *privileges* – now better known as *liberties* or *liberty-rights*.[15] On Hohfeld's distinction, claim-rights entail a correlative duty on the part of at least one other person, but liberty-rights do not. The difference may be brought out by a pair of familiar examples. If Jones borrows $10 from Smith, Smith then has a *claim-right* to the return of the money, and Jones has a duty to repay her; but if Jones and Smith see a $10 bill in the street with no one but the two of them in sight, then each has a *liberty-right* to the money even though neither has a duty, *ceteris paribus*, to let the

[14] Feinberg's (1980) "thought experiment" is instructive in this regard.

[15] For helpful discussions of Hohfeld and other developments in the analysis of rights, see Feinberg (1973, chap. 4) and the introduction to Waldron (1984).

other have it. By distinguishing rights from liberties in this way, Hohfeld stresses the relational aspect of rights. Where the rights theorists of the seventeenth and eighteenth centuries tended to regard a right as a faculty or possession, that is, Hohfeld encourages us to conceive of a right as a kind of standing, a relationship between one person, the right-holder, and others. It may not have been his intention, but in this sense Hohfeld's analysis of rights reinforces the efforts of the nineteeth-century writers who sought to endow rights with a social dimension.

Much the same could be said for the second notable development this century in the concept of rights – the popularity of the notion of *human rights* among philosophers, political figures, and common people throughout much of the world. *Human rights* is the direct descendant of *natural rights*, of course, and not, therefore, an entirely new notion. But the shift from "natural" to "human" rights betokens a significant change of emphasis. As the passages quoted earlier from Locke and Overton suggest, arguments from natural rights typically proceeded from the idea of self-possession, from a property in oneself that must be defended against others; with *human rights*, however, arguments usually rest on some conception of a human or (perhaps more precisely) a person as a being with needs and interests that must be met if he or she is to live a fully human life. Thus the *rights against* others of the natural rights theorists tend to become the *claims upon* others of the human rights theorists.

This different emphasis is manifest in the *Universal Declaration of Human Rights*, adopted by the United Nations in 1948. There, alongside such familiar proclamations as Article Three – "Everyone has the right to life, liberty, and security of person" – we find such novel assertions as the right to marry and found a family, the right to rest and leisure, the right to an adequate standard of living, and the right to participate in the cultural life of the community (Melden 1970: 143–9). Whether these really are or ought to be regarded as rights, human or otherwise, is open to dispute; but the important point here is that these putative rights are put forward as important elements or vital ingredients in a fully realized human life. In that sense, the popularity of the appeal to human rights reveals a concern, not for what we are, but for what we can and presumably should be.

This concern is displayed also in the efforts to secure rights for more specific groups of human beings – women's rights, "gay" rights, the rights of national or cultural minorities, etc. In each of these cases, the core argument is that the members of the relevant

group suffer because they are neither accorded the same respect nor afforded the same opportunities as other persons. They are prevented from realizing their capacities, in other words, and denied the consideration to which human beings are entitled – to be treated with full respect for their dignity as persons.

Perhaps this is why we live, once again, in an age of rights. No other concept at present captures so well the idea that every person, regardless of his or her place in society, is worthy of respect as a person. Certainly the concept of human dignity, despite the power of *dignitas* as a status concept in ancient Rome (Wirszubski 1960: 12–13), now lacks the conceptual force of an appeal to rights. With the field left to rights, it begins to seem, as Joel Feinberg (1980: 151) puts it, that "respect for persons . . . may simply be respect for their rights, so there cannot be the one without the other; and what is called 'human dignity' may simply be the recognizable capacity to assert claims. To respect a person, then, or to think of him as possessed of human dignity, simply *is* to think of him as a potential maker of claims."

Concepts are like human beings in this respect: they flourish when they have work to do. So long as we continue to think of men and women as "potential makers of claims," then, the concept of rights will not lack for employment; and the more work we find for the concept of rights to do, the more likely we are to think of men and women as "potential makers of claims" who are worthy of respect as persons.

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