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# Rights Thinking

EVAN SIMPSON

Judgments about right are normally circumscribed and balanced by other considerations but it is possible to imagine 'rights thinking' as occurring without any such admixture. This *pure* rights thinking is characterized by several distinctive features. First, resentment, respect, and other passions of rectitude overrule sympathetic feelings of concern and compassion, love and affection. One responds simply as justice demands, never allowing extraneous factors to interfere with satisfaction of this moral ideal. Second, when claims of rights collide with personal attachments or calculations of benefit, the right systematically prevails. For example, rights thinking resists assertions presented to justify breaking promises to friends for their supposed greater good. Third, although rights entail obligations to their holders, responsibilities to others extend no further than these entailments within pure rights thinking. No general obligation of benevolence is recognized, for example, since no one in particular has a right to one's benevolence. Hence, fourth, as well as entailing moral protections for their holders and defining centres of independent agency, the perception of rights also promotes one's fundamental separateness from others.

Taking rights thinking seriously as a feasible mode of practical reasoning leaves open the possibility of alternative forms associated with an ethics of care or considerations of well-being. The possibility of pure alternatives of these types has several interesting and sometimes provocative implications that I wish to defend during the course of this discussion. First, the independence of these ways of thinking suggests that there is no general answer to the question whether respect or compassion, rights or goods, duty or virtue, self or other should prevail in oral deliberation. It is philosophically futile to attempt to assign priority of place to one or another. Second, theories of justice, utility, and community cannot successfully establish any such priority, although they may play other valuable roles. They may serve, for instance, to articulate practices of thinking and to influence the identification of thresholds where one form of thinking takes over from another. Third, by exploring rights thinking as a practice that does not require the support of a philosophical theory, it is possible to gain a clearer

view of the place of rights within moral reasoning generally. In particular, it is possible to describe a hybrid way of thinking that accommodates rights, utility, and concern in relationships without diminishing their distinctiveness by supposing that one must be the foundation for the others. The approach thus helps to mark the limits of the usefulness of rights thinking while defending it from some of the unfavourable philosophical attention that it has received from proponents of community and utility. Because their critiques help to describe rights thinking in greater detail, the criticisms provide a useful place to begin. By the end, I hope to have confirmed the place of rights thinking among moral practices, in part by displaying its little-noted coherence with communitarian and utilitarian concerns, in part by describing the ways in which it is usually restricted by complementary forms of thinking. In the process I will also be able to indicate how the modern dominance of rights thinking is linked to recognizing familiar general rights and why extending rights beyond individuals to groups and non-human things is possible but also problematic. The conclusion is a kind of moral pragmatism for which forms of moral thinking should not rely upon or lead to *a priori* claims.

### **1. Three Forms of Moral Thinking**

Differences between rights thinking and other forms of moral reasoning have not received much sustained philosophical attention, but they are often recognized. For example, Carol Gilligan's distinction between a justice perspective and a care perspective in moral thinking is widely accepted in spite of doubts about some of the uses to which she puts it. The former perspective exemplifies rights thinking, viewing persons as primarily independent rather than responsive agents through rules that assume separation between human beings. The care perspective, by contrast, is communal, stressing connection, concern for relationships and their responsibilities. Thus, confronting a druggist who insists upon his right to make a profit even at the cost of another's suffering, Gilligan's Amy 'considers the problem to arise not from the druggist's assertion of rights but from his failure of response'. She sees 'a world of relationships ... where an awareness of the connection between people gives rise to a recognition of responsibility for one another'.<sup>1</sup>

<sup>1</sup> Carol Gilligan, *In a Different Voice* (Cambridge, MA: Harvard University Press, 1982), pp. 28–35.

Distinguishing between the perspectives of rights and justice, care and community does not entail that individuals will display only one of them. Pure rights thinkers are absolutists for whom an established right always trumps other considerations, but most people are sensitive to a diversity of circumstances in which rights may sometime be allowed to prevail over tender responsibilities, sometimes not. Even for those who think mainly in terms of rights there may be occasions on which concern for others takes precedence. However, this point has a weaker and stronger form. The weaker, to which I will return in discussing hybrid thinking, reflects an established priority of rights thinking over other forms, given which considerations of right easily prevail over other moral claims in most circumstances. By contrast, Gilligan's examples of the contrasting orientations are meant to express the *logical* primacy of separation and of connection respectively.<sup>2</sup> Here, sharper differences remain. The justice orientation is expressed in assertions of rights that raise the question how independent individuals ever establish connections, relationships of trust, etc. From that perspective the answer is easy and direct: one sees relationships in terms of contractual connection rather than original attachment. The viewpoint thus accounts for relationships without departing from pure rights thinking. From the care perspective, however, the rights view distorts important human realities by seeing connection as derivative from self-interest and personal choice.<sup>3</sup>

Another supposed deficiency of rights thinking is evident from the care perspective. When we try to say what we mean by 'rights' we will soon start talking about obligations, explaining that for one to have a right is for others to have an obligation to observe it. However, as I have already tried to indicate, the converse relation does not necessarily hold: there may be obligations for which there is no correlative right. An imperfect obligation, such as the duty of charity, identifies no individual as having a claim upon our assistance. Simple as this concept may be, pure rights thinkers find it difficult to understand. Since they see obligations as deriving from rights, there is no easy way for them to accommodate the imperfect obligations that must have some other origin. From their perspective, these seem not to be genuine obligations at all but rather

<sup>2</sup> Gilligan, pp. 38, 57.

<sup>3</sup> The sharpness of rights thinking is also expressed in a 'logic of fairness' (Gilligan, p. 32) according to which having a right appears to *entail* that it is to be honoured whatever the circumstances. The softer view that it does not follow logically from having a right that the object of the right must be accorded is expressed by Judith Jarvis Thompson, *The Realm of Rights* (Cambridge, MA: Harvard University Press, 1990), p. 120.

reflections of a kindly nature.<sup>4</sup> From the care perspective they are central to morality.

Criticism also comes from another quarter. David Lyons notes, 'a utilitarian might reject the pattern of thinking that is entailed by talks of rights ... and maintain that we would be better off not to think in these terms'.<sup>5</sup> Consider his example of Mary, who rents a house, including a garage whose private driveway only she is authorized to use. Let us suppose that a neighbour sometimes parks there in the morning without her permission, denying Mary access and thus violating her rights. She may resent this. Let us further suppose, though, that Mary is in no way inconvenienced, that the neighbour knows that she never uses the drive until the afternoon, and that she knows that they share this knowledge. A utilitarian thinker will question whether there is any good reason for Mary's resentment at an act that does her no harm. Her attitude seems irrational, bearing out suspicion that rights provide excuses for creating situations that are worse rather than better, as when Mary refuses use of her driveway.

Of course, it is possible to describe Mary's rights as consistent with the primacy of utilitarian thinking, thereby identifying an acceptable basis for her resentment. If utility justifies social practices and institutions, including those characteristics of owning and renting property together with the rights involved, then as one who defends the institution on the grounds of its social usefulness, Mary can reasonably press the right it gives her, even if it means inconveniencing her neighbour at no benefit to anyone. Rights thinking is thus assimilated to pure utilitarian thinking. However, this combination is philosophically unstable. It requires saying that rights that have a basis in their utility cannot be overridden by utility, contrary to the utilitarian form of thinking in which the basic object of practical judgment is to make things better. Of course, this criticism invites engagement with a now complex and subtle theoretical debate about rights and utility, but the ongoing character of the debate makes it clear that rights thinking will remain a questionable practice from the standpoint of utility.

However, utilitarian thinking is also questionable from contrary perspectives. The pure utilitarian thinker is a calculating individ-

<sup>4</sup> Cf. Onora O'Neill, *Constructions of Reason: Explorations of Kant's Practical Philosophy* (Cambridge University Press, 1989), pp. 191–192. The difficulty for rights thinkers is evident in Robert Nozick's *Anarchy, State and Utopia* (New York: Basic Books, 1974), where in place of a duty of charity there is only the right to help the needy.

<sup>5</sup> David Lyons, 'Utility and Rights', in J. Waldron, ed., *Theories of Rights* (Oxford University Press, 1989), p. 127.

ual who is liable to a dubious elitism. The obvious examples belong to public rather than private life. Utilitarians who do not take rights as seriously as Mary does are sometimes found among officials who reflect that on certain occasions they can benefit the public by transgressing the law that binds others. Even if the law is justified by the useful opportunities it creates or by the social evils it deters, utilitarian thinking does not support a fully general obligation to adhere to it.<sup>6</sup> This is an obvious fault, though, only if it is supposed that the rule of rights always prevails against utility. Since difficult choices will probably always arise in public life, grey areas confront moral and political judgment. A plausible way of coping with them is through hybrid thinking that recognizes certain thresholds. In contrast to pure thinking of any type, such hybrid thinking accommodates a variety of considerations depending upon the particular circumstances. This element of casuistry rules out a fully general explanation of how thresholds and circumstances combine to warrant judgments, but illustrations can be given as we progress. It is clear, moreover, that hybrid thinking does not insist that rights rest upon utilities after the fashion of rule-utilitarianism. In general, hybrid thinking makes no attempt to settle the question of primacy by identifying the basis of moral thinking in rights, utility, or concern for others. Rather, in accommodating several forms of thinking, it supposes that they are appropriate in different situations.

Hybrid thinking is thus also to be distinguished from a theory that says that one should make the consequences of one's actions as good as possible while locating adherence to rights as itself among the goods. Such a theory, by grafting a principle of right onto the utilitarian perspective in this way, creates the attractive possibility of representing consequentialism as itself a version of the rights perspective.<sup>7</sup> Since rightness includes abiding by rules, putting public benefit over the rule of law might then be rejected and resentment like Mary's justified. However, assimilating moral perspectives in this way is again problematical. If justice is a good then either other greater goods can override it or they cannot. In the former instances the conflict between justice and utility reappears; in the latter we are returned to pure rights thinking. There is thus ample reason to question the stability of any such conjunction of principles and the theories they constitute. In any event, I suggest that theories arise in support of the different answers to practical questions given in alternative forms of thinking. They do

<sup>6</sup> Cf. Lyons, p. 133.

<sup>7</sup> Thus Jonathan Dancy, 'Caring About Justice'. *Philosophy* 67 (1992), 447–466, pp. 454–455.

not replace those forms, bring them basically into question, or convincingly separate grey areas into black and white. On the contrary, the principles that define moral theories are deficient in rules for determining when crucial thresholds are crossed: it is a matter of judgment whether particular circumstances call for rights to be upheld, for expediency to rule, or for personal relationships to be protected.

Historical reflection suggests that the development of a moral theory affects practices of moral thinking and the location of the thresholds where they are invoked. Rights thinking in particular has been strongly influenced by theories of rights that make it more sophisticated than innocent expressions of resentment and respect and more resistant to being set aside for utilitarian considerations or the demands of personal relationships. However, this important influence appears to be secondary to the practice of rights thinking, which is more deeply established than any theory of rights. Like other coherent practices, rights thinking is able to resist demands for external justification. Defined by constitutive rules of inference and relevance that distinguish it from thinking in terms of social benefit or concern for others, one either takes part in it or one does not, and doing so, in contrast to asserting a theory, places one in no danger of refutation. To be sure, since thinking in terms of rights and thinking in terms of benefit or concern can produce conflicts, questions of justification do arise. To focus upon forms of thinking is not to suppose that we must uncritically accept whatever practices have actually developed. However, these questions of justification do not promote aspirations to identify one best practice, for they concern the appropriateness of following the practice in certain circumstances. They are of the sort, 'how can you allow this person's right to life to be compromised by the general good in a case like this?' In contrast to conflicts between theories of utility and rights, these circumstantial conflicts do not demonstrate that one of the practices is false and should be set aside or that one is secondary and properly subsumed under the other.

## **2. Rights and Rights Talk**

By a 'theory of rights' I mean a set of general principles that identify rights as criteria for assessing and justifying actions, decisions, and judgments, and specify orders of precedence between rights and other moral considerations, such as utilities and personal relationships. Thus, the principle that everyone has a right to life is



used in justifying the judgment that murder is wrong even if the deed benefits many people or repays a betrayal. However, in providing reasons for action there is considerable intellectual distance between naively identifying something as right or wrong and identifying the further things—the rights and wrongs—invoked to confirm these judgments. Whenever people feel emotions such as resentment and indignation, they take themselves or others to have been wronged in some respect. Wherever institutions of property and practices of promising exist, it is deemed right to respect others' possessions and to fulfil one's obligations. Such judgments carry no special ontological commitments, but where rights and wrongs are supposed to exist, there is also a conceptual edifice that invites philosophical interest, concern, theoretical debate, refinement, and further debate.

One of the great critics of rights, Jeremy Bentham, provides a rationale for distinguishing rights thinking from theoretical disputes in saying that the word 'right' 'in its adjective shape ... is as innocent as a dove: ... passing in at the heart, it gets possession of the understanding'.<sup>8</sup> It is only in its substantive form, as in 'I have a right', that the word licences confusion. This confusion is perhaps apparent in the thought that murder is wrong because a person has a right to life. Why should this justification be necessary? Is it not a moral datum that murder, as a form of undeserved harm, is simply wrong?<sup>9</sup> Rights, as theoretical entities, appear to do little useful work. Worse, by inviting unnecessary controversy, they may undermine an innocent sense of right and wrong.

The Oxford philosopher, J. L. Austin, echoed Bentham in announcing, '*In vino veritas* but in sober symposium, *verum*'.<sup>10</sup> The statement is a reminder that it is often easy to agree that a statement is *true* (*verum*), but when it comes to *truth* (*veritas*) there is commonly disagreement. In the same way, it is often easy to agree about what is right, but when it comes to the nature of rights the story is completely different. Yet, there is an innocent sense of 'truth', as in 'Do you swear to tell the truth, the whole truth, and nothing but the truth', that is, say what is true, speak honestly. There is also an innocent sense of 'rights'. Laws often define rights, as do customary practices. Thus, respect for law can

<sup>8</sup> See Jeremy Bentham, *Anarchical Fallacies*, as excerpted in Jeremy Waldron, *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man* (London: Methuen, 1987), p. 68.

<sup>9</sup> Compare Elizabeth Wolgast, 'Wrong Rights', *Hypatia*, 2 (1987), 25–43, p. 39.

<sup>10</sup> J. L. Austin, 'Truth', in *Philosophical Papers* (Oxford University Press, 1961), p. 85



include respect for the rights that the law creates. This respect constitutes those rights as reasons for action that can override other potential reasons, such as concern for a friend or the good of the community, which are often poor excuses for violating a right. Respect for custom also acknowledges rights and permits the judgment that a boundary is inexcusably crossed when considering the good of one to whom a promise has been made is allowed to override the right conferred in promising. These rights are clearly human contrivances. They do not originally call out for the support of a moral theory and therefore entail no close connection between rights thinking and philosophical theories of rights.

The innocent sense of 'rights' and a distinction between rights thinking and theoretical thinking about rights are easily sustained so long as we focus on the rights that arise from acts of legislation and the special rights created voluntarily by participants in social practices. However, the problematical rights for Bentham are the supposed natural, human, or general rights that become prominent in modern culture. Such general rights impose obligations upon everyone and do not arise out of particular transactions or relationships.<sup>11</sup> I will discuss such rights in the latter half of this essay, noting that even they can be disentangled from problematical theories and verbal 'nonsense upon stilts'. However, doing this successfully depends upon taking Bentham's concerns seriously, displaying general rights as distinct from the natural rights supposed to follow from a sound moral theory. Doing without theoretical thinking of this kind has the important advantage of helping to free 'human rights' from the ambiguity that causes them to appear sometimes as 'natural' but sometimes, more acceptably, as 'general'. This task is itself significantly furthered by distinguishing between thinking in terms of rights and talking in terms of rights, thereby protecting a coherent practice of thinking from verbal carelessness or confusion. Against the background of this distinction it will be possible to state the differences between practical and theoretical thinking more fully.

L. W. Summer observes that 'Public issues are now routinely phrased in the language of rights'.<sup>12</sup> In a similar, if more combative, vein, Roger Scruton notes that 'the notion of "rights" ... has achieved an unnatural predominance in the language of politics'.<sup>13</sup>

<sup>11</sup> See H. L. A. Hart, 'Are There Any Natural Rights?', in Waldron, *Theories of Rights*, pp. 84–88.

<sup>12</sup> L. W. Summer, *The Moral Foundation of Rights* (Oxford: Clarendon Press, 1987), p. 1.

<sup>13</sup> Roger Scruton, *The Meaning of Conservatism* (Harmondsworth: Penguin Books, 1980), p. 50.

The same theme is further developed by Mary Ann Glendon, who laments the fact that 'genuine exchange of ideas about matters of high public importance has come to a virtual standstill' and suggests that 'the prominence of a certain kind of rights talk in our political discussions is both a symptom of, and a contributing factor to, this disorder in the body politic'.<sup>14</sup> All agree that the word 'rights' has not always dominated public discourse. Before the 17th century, the main focus of political morality was a person's duties—what people owed their lords and masters, for example, according to their social station, together with the obligations of nobility. Moreover, the fact that rights talk has gained this prominent position is clearly connected with the reorganization of society around individual agents, hence with weakening responsibility for others and diminished concern for the general good. However, it is one thing for the evolution of society to enable the rhetoric of rights to become effective and another for rights talk to express morally valid and coherent political thinking. The predominance of the discourse of rights does not by itself demonstrate these intellectual virtues. On the contrary, when measured against good rights thinking rights talk can evidently be extended too far, as Scruton and Glendon suggest.

Leaving political discourse aside for the moment, excessive rights talk can be heard in an active debate about the connection between rights and personal relationships. It is held on the one side that friends should not stand upon their rights. 'If you are my friend, ... there are many ways in which you do not need to respect my rights. You can invade my privacy, interrupt what I am doing, fail to respect my private property. ... In these situations I do not experience my rights as being violated or myself as waiving or deciding not to claim my rights. I do not conceptualize the situation in terms of rights at all'.<sup>15</sup> On the other side it is held that for friends to recognize one another's rights may enhance the quality of their relationship. It is, after all, perfectly appropriate to speak of 'rights to respect and concern between friends' and to say, 'As your friend, I have a right to more consideration and respect'.<sup>16</sup>

<sup>14</sup> Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1991), p. x. Since Sumner is Canadian and Scruton British, one would like a fuller account of her further perception that 'there must be a ... specifically American explanation ... for the persistent absoluteness in rights talk that is still more common in the United States than elsewhere' (p. 42).

<sup>15</sup> John Hardwig, 'Should Women Think in Terms of Rights?', in *Feminism & Political Theory* (Chicago: University of Chicago Press, 1990), p. 56.

<sup>16</sup> Cf. Michael J. Meyer, 'Rights Between Friends', *Journal of Philosophy* 69 (1992), 467–483, p. 477 and 481.

However, while 'I have a right' may sometimes be an acceptable verbal alternative in describing the requirements of a close relationship, thinking in terms of relationships has a demonstrably different structure from thinking in terms of rights. Compare the familiar wedding vow, 'I promise to love, honour, and obey,' the second and third parts of which are often thought to be demeaning to free agents but the first part of which is clearly impossible.<sup>17</sup> Promises do confer rights, even upon friends, but promises are voluntary acts whereas loving is not within one's power to will directly. One might deliberately cultivate habits that can lead to love, but one cannot be sure that the desired effect will result. Hence one cannot promise love as one can promise obedience; and if one cannot promise love, then for the same reason one cannot promise concern and respect either.

There is one way in which to bring rights talk and rights thinking together here. It is perfectly possible to give another person the right to expect that one will always act in certain ways, and the promise of 'love' and the like could be interpreted as a promise of loving behaviour rather than emotional connection. Pure rights thinkers could justify speaking of the right to love, concern, and respect in this case. However, when such inveterate rights thinkers reinterpret their language in this way, they do so at the cost of accentuating the separateness of persons to an extent that displays limited appreciation of the reasonableness of thinking in terms of relationships. Moreover, since few people consistently hold to the view that all relationships between individuals rest upon promises, bargains, or contracts, talk of obligations to love, honour, and obey together with the corresponding rights should usually be suspected of verbal exuberance rather than admired as a sign of clear thinking. The signs of this exuberance can be described in contrasts with some of the basic marks of rights thinking. Where rights talk dominates, non-philosophers may not reduce descriptions of emotional relationships to accounts of behaviour, but they do tend to muddle the passions of rectitude. Rather than expressing resentment and indignation, with their conceptions of justice, they exhibit belligerency and anger when their wishes as friends or lovers are neglected. One thus tends to lose the distinction between what one wants and what one is entitled to.

A supporting illustration of differences between rights thinking and right talk can be drawn from Lawrence Kohlberg's 6-stage account of moral maturation. Within his developmental picture there is a sharp distinction between the forms of assessment

<sup>17</sup> Thus, Elizabeth Wolgast, 'Wrong Rights', p. 37. Cf. Hardwig, p. 57.

characteristic of thinking about personal and political relationships. Rights thinking emerges only with the stage-4 'law-and-order' orientation, prior to which people think in terms of good and bad. Thus, at stage-3 'good behaviour is that which pleases or helps others and is approved by them'.<sup>18</sup> One could as well speak of 'rights behaviour' here, but that is simply to acknowledge that to this point there is no conceptual differentiation between the right and the good.<sup>19</sup> Such 'good boy/nice girl' thinking is as easily distinguished from developed rights thinking as the claim of children who say 'it's mine,' meaning 'I want it' rather than 'I have a right to it'. Of course, it is no part of my purpose to endorse Kohlberg's stage-account, whose hierarchically ranked cognitive structures require assumptions that go well beyond the distinctive practices of thinking that can be described without these assumptions. However, the several forms of thinking he successfully distinguishes, along with failures of communication that occur between people who use different forms, show that conceptual sharpness is lost if 'rights' are spoken of before they have gained clear definition.

These illustrations are not to imply a sharp boundary between the ways in which people think and the language used to express these thoughts. The connection between mental processes and their modes of expression is philosophically well established. It is nevertheless desirable to draw the distinction between the rhetorical surface of the culture of rights and the substance of culture as clearly as possible.<sup>20</sup> Doing so may discourage us from invoking the language of rights too casually, falling uncritically into habits of speaking that lead to calling anything of value a right.<sup>21</sup> Although, it may seem harmless to debase the coinage in talking of 'rights to respect and concern' within personal relationships, there is less reason to be sanguine in political instances, such as the 'manifesto rights' characteristic of many modern political charters. The United Nations Universal Charter of Human Rights, for example, speaks of rights that oblige no one in particular, appearing to conflate valid claims

<sup>18</sup> Lawrence Kohlberg, *The Philosophy of Moral Development* (San Francisco: Harper & Row, 1981), pp. 155, 166–167.

<sup>19</sup> This point is developed in Evan Simpson, *Good Lives and Moral Education* (New York: Peter Lang, 1989), pp. 151–152.

<sup>20</sup> The distinction between rhetoric and substance is drawn by Alasdair MacIntyre in 'The Privatization of Good', *The Review of Politics*, 52 (1990), 344–361, p. 349.

<sup>21</sup> Cf. Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), p. 165.

with needs.<sup>22</sup> The African Charter on Human and People's Rights adds putative communal rights, stating that 'all peoples shall have the right to a general satisfactory environment favourable to their development'.<sup>23</sup> There may be good strategic reasons for such rhetorical licence (it provides a way of advancing interests that should be taken seriously, for example), but this discourse of rights does not necessarily connect with rights thinking. Rather it expresses communal aspirations that may be more defensible without reference to rights. I return to this point at the end of the discussion. For now I hope only to have indicated that it is possible and desirable to note how rights thinking includes conceptual articulations that distinguish it from the thinking expressed in less discriminating rights talk. My intention is thus not to describe how people generally think about rights but how those who exemplify the distinctive practice of rights thinking do.

Yet another plausible example of rights talk in the absence of clear rights thinking is evident in claims that convert offending social forms into ostensible violations of rights, as when the pain caused to women by some salacious literature is construed as an injustice. For example, when the existence of 'girlie' magazines arouses feelings of humiliation in some, the effect may be cast as a subordination of women, hence as a violation of the basic rights that should be enjoyed by all persons in a free society. One way in which to establish the point would be to identify subordination and pictures of subordination.<sup>24</sup> Given this equation it would be reasonable to resent the fact that men can buy girlie magazines, since possessing the pictures is then tantamount to denying women equality, contrary to their established rights. However, the identification of subordination with depictions of subordination is as logically suspect as promises of respect among friends. The vocabulary of rights is not in this case supported by good reasons, which may rather fit characterizations of pornography as a social

<sup>22</sup> On 'manifesto rights' see Joel Feinberg, 'The Nature and Value of Rights', in *Rights, Justice and the Bounds of Liberty* (Princeton University Press, 1980). Short of conflating rights and needs, one can of course argue that 'People have a right to what they need', as claimed in the opening sentence of Evan Simpson, 'The Priority of Needs over Wants', *Social Theory and Practice*, 9 (1982), pp. 95–112.

<sup>23</sup> The Charter, of which this is Article 24, is reprinted in C. M. Peter, ed., *Human Rights in Africa* (Westport, Connecticut: Greenwood Press, 1990), pp. 103–116.

<sup>24</sup> Theoretical foundations for such a view are constructed by Melinda Vadis, 'A First Look at the Pornography/Civil Rights Ordinance: Could Pornography Be the Subordination of Women?', *Journal of Philosophy*, 84 (1987), pp. 487–511.

evil.<sup>25</sup> Because rights talk is unconvincing in this case, resorting to it may generate distracting debate, making it more difficult to address the evil effectively.

An alternative equation helps to establish the point even more clearly. It can be said that feelings of subordination are tantamount to the existence of subordination, so that where such feelings occur basic rights are violated. Now, it is certainly arguable that corrective social action is warranted when feelings of subordination are prevalent, but the argument does not depend upon surrendering the ability to distinguish between emotional responses and the objective considerations that justify them. It is sufficient to note that when many people are made unhappy by the actions of others, the public interest is reasonably aroused. However, the basis of this interest is social utility. To speak of fundamental rights in this connection generates unproductive confusion which is only compounded by the absence of convincing arguments in response to the point that existing rights of free expression conflict with the supposed right not to be subjected to painful experiences.

The point of these observations is to avoid a regimentation of moral language that is supported only by contentious theoretical equations. This is not to banish rights talk from debates about pornography. A place for it can be preserved by identifying weaker but still significant connections between subordination and feelings or pictures of subordination. In the one case, it is possible to sustain the distinction between offending and offensive material—that is, between material that arouses unwanted feelings and material that is worthy of offense—while acknowledging that people are rarely offended for no reason. By exploring these reasons sensitively, one might find that they support a circumscribed right not to be offended in certain ways. In the other case, it may be possible to provide evidence that depictions of subordination influence men to behave towards women as their masters or that forms of subordination are often involved in the production of these depictions. Given a general right of equality, the evidence of such broadly causal connections, if it can be sustained, shows that there is a place for rights thinking here. My point is simply that it is a mistake to allow rights talk to intrude too readily, and possibly harmfully, into matters of social concern.

There is a further patent liability in expressing any plausible interest through rights talk. Extending the vocabulary too far may impair capacities for rights thinking, degrading a conceptual

<sup>25</sup> Cf. W. A. Parent, 'A Second Look at Pornography and the Subordination of Women', *Journal of Philosophy*, 87 (1990), 205–211, p. 211.



resource that has in the past helped to advance important causes. The historical extension of the discourse of rights may in this respect be a poor practical guide to the future. Briefly reviewing well-known parts of this history helps to display the main virtues of rights thinking while beginning to indicate some of its limitations. It also shows that while a culture of rights may have been facilitated by ontological reflections about human freedom, equality, and independence as it became established, the vitality of this culture does not continue to depend upon the truth of an independent theory of human nature. This is important because it permits reserving a place for general rights while heeding Bentham's admonitions about the verbal nonsense of 'natural' rights.

### **3. History and Theory**

Rights are important to the organization of the liberal societies that are marked by social pluralism, mutual accommodation, independent producers, and equality of citizenship. Rights thinking became a major political practice only with the decline of feudalism and the development of a less tradition-bound and more open form of social organization. Serious political interest in rights can therefore be associated with the emergence of the individual from communities and the separation of the state from the main religious and economic institutions. In the absence of a state religion, there is freedom of individual conscience; and with the relative independence of property from the state, the primary economic actors become private persons. One's status as an agent then depends upon freedom to think and to act, freedoms well protected by rights against alien and oppressive conceptions of the good. Thus, Charles Taylor links individualism with the social contract theory of the 17th century and the emergence of interest in general 'rights of man', in contrast to the special rights that are typical of close political relationships, as between popes and emperors in an earlier era, or are generated by the deliberate actions of particular individuals within a recognized sphere of privacy.<sup>26</sup>

In apparent conflict with Taylor and this generally accepted historical sketch, some scholars locate the emergence of the modern concept of the individual around the 12th century.<sup>27</sup> However,

<sup>26</sup> Charles Taylor, 'Atomism', in his *Philosophy and the Human Sciences* (Cambridge University Press, 1985), pp. 188–189.

<sup>27</sup> For a useful discussion of rights prior to the 17th century, see Brian Tierney, 'Origins of Natural Rights Language: Text and Contexts, 1150–1250', *History of Political Thought*, 10 (1989), pp. 615–646.



these views become consistent if we distinguish the time when individualism appeared from the time it became dominant. Peter Abelard expressed a form of individualism but it was not widely accepted in his culture, modern political consciousness having arisen only with the wide-spread recognition of free, equal, and independent individuals. This consciousness, in Taylor's view, was shaped by primacy-of-rights theories, but we have reason to call this proposition into question. When Gilligan refers to the primacy of separation she finds the priority of the individual to be a central feature of rights thinking and points to the consequent need for a contractual theory of connection, but she identifies no underlying primacy-of-rights theory as contributing to the development of this thinking. Some further argument is needed in order to demonstrate this supporting role, but the argument is absent from Taylor's account. Moreover, it is far from clear that the moral and political confidence expressed by the American Declaration of Independence and echoed in the Declaration of the Rights of Man and the Citizen of 1789 can be explained by reference to such a theory. The confidence remains widespread, but primacy-of-rights theories are objects of philosophical and political contention by communitarians and by the rulers of authoritarian states who advocate the welfare of their subjects rather than their human rights. The Declarations thus make claims that remain no less theoretically questionable than the manifesto rights listed in the Universal Declaration of Human Rights, leaving the intellectual primacy of these theoretical claims in doubt.

As I have already suggested, the efficacy of rights theories does not reside in their directly shaping the rights thinking that dominates Western political consciousness. It lies, rather, in facilitating the dominance of this practice of thinking by helping to lower the threshold for employing it. The first point is simply that there have long been persons in whom feelings of justice, a sense of self-respect, and willingness to elevate law over compassion and expediency are dominant. The form of thinking does not derive from a theory, rather the theory encourages such thinking. The second point is that the theory does this largely by making the rules of rights thinking easier to invoke. The effect is simple and straightforward: as assertions of individual freedom and equal citizenship gain acceptance, the claims of personal relationships and the general advantage become relatively less pressing. It becomes increasingly difficult for the latter non-rights claims to weigh in heavily against the claims of personal agency. Annette Baier helps to illustrate the point in noting that '[w]hat we regard as ours by right is what we are unwilling to beg for and only limitedly willing to say

thank you for. ... The increasing tendency to talk of universal rights and the extension of their content correlates with this ability to beg or to respond generously to beggars'.<sup>28</sup> When persons increasingly depict themselves as independent agents rather than occupiers of social roles, general rights are able to emerge as primary moral and political considerations that can be set aside only for exigent reasons. This is not only a matter of formulating concepts of freedom, equality, and independence theoretically, of course, since theories articulate already-occurring social changes. It is in this way, however, that such changes become increasingly reflected in conscious patterns of judgment that resist trading off rights against other moral considerations.

A theory of rights like Locke's can have the interesting secondary effect of holding the line against attempts by newer rights thinkers to lower the threshold still further, but the main source of resistance lies elsewhere. The evolution of modern society has not led to the extinction of personal relationships, theories of which encourage maintaining a relatively high threshold of appropriateness for rights thinking. This counter-pressure is especially obvious in theories of community that define two historical poles of opposition to primacy-of-rights theories. On the one hand, Burke's opposition to the revolution in France expressed his conservative respect for a still-existing political community. The assertion of general 'rights of man' endorsed forms of personal independence that could not be harmonized with 'binding up the constitution of our country with our dearest domestic ties'.<sup>29</sup> On the other hand, Marx's admiration for that revolution rested upon the half-step it appeared to take towards a new form of political community in which human beings, no longer separated from their social nature, would not require egoistic rights to freedom of religion, private property, and the pursuit of personal happiness. Such potent communitarian criticisms help enable social ties to continue making serious moral demands.

However, reinforcing the idea that men and women are communal beings does not fundamentally undermine rights thinking but only restricts it. The critique properly identifies an affinity between rights and independent agency, but it does not successfully establish the damaging point that independent agency is tantamount to selfishness. The most interesting reason for its limited success is that communitarianism itself effectively protects rights

<sup>28</sup> Annette Baier, *Moral Prejudices* (Cambridge, MA: Harvard University Press, 1994), p. 226

<sup>29</sup> Edmund Burke, *Reflections on the Revolution in France* (Harmondsworth: Penguin Books, 1968), p. 120.

thinking from charges of egoism and explains how this way of thinking confounds the moral doubts that arise from a focus upon relationships. Where rights thinking has become dominant, the practice exemplifies the primary insight of communitarianism, namely that we are deeply bound to others in ways that make us creatures of custom, intolerance, and absence of choice. Looked at abstractly, any practice consists in a set of social expectations or conventions that can be broken only at the expense of disapproval by other participants. In the case of a practice of thinking that includes rules of correct reasoning, deviation from these rules will be seen as unfortunate lapses from rationality. Looked at more concretely, people who suggest that a woman's place is in the home or that political office should be open only to owners of property are regarded with incomprehension by contemporary rights thinkers. In a liberal society, people tempted by such thoughts will be disinclined to express them for fear of this response. Rights thinking, when it becomes the mark of good political thinking, thus includes communitarian expectations of conformity. Politically correct thinking is demanded of everyone, on pain of conviction for irrationality and exclusion from polite society. The low thresholds for the general rights that belong to any individuals and the special rights possessed by particular persons are sustained by this unavoidable demand.

There is nothing offensive in the demand. It simply reflects the need for any practice to proceed in accordance with a set of rules—the common expectations that express general acceptance of a way of acting or thinking. Of course, acceptance of this idea acknowledges only an abstract form of communitarianism. Communal support for rights thinking does not entail that this thinking itself expresses the outlook of a community except in an extremely thin sense, for rights thinking becomes supreme only when political association has become differentiated from traditional communal life. Nonetheless, modern political life does remain deeply communal in this one respect: by binding people together in a common cognitive practice, in which each participant values the opinion of the others who cooperate in it, modern society is only superficially egoistic.

The historical extension of general rights helps to make this clearer. Bentham's and Burke's forms of resistance to these rights express their respective views that social utility and human relationships already take precedence over matters of abstract right at a low level, whereas acceptance of general rights supposes that the threshold for utilitarian and caring thinking is high. It is a serious problem for utilitarian thinkers that this high threshold is a natural

result of the fact that in a pluralistic society it is difficult to determine where social utility lies except in extreme cases. For the caring perspective a similar problem results from the fact that the needs of complex political relationships include a system of impartial rules that are not easily set aside in favour of personal discretion.<sup>30</sup> Nevertheless, in such circumstances the general rights that express the abstract equality of diverse citizens mark a relationship that distinguishes individual people from atomistic agents. Within the working political arrangements that are the home of these rights, the rule of right can be a vitally important shared good in spite of the absence of a common good in the narrower sense typical of traditional communities.<sup>31</sup>

There is a further respect in which rights thinking may be free from narrow selfishness. Since the dominance of rights thinking does not rest upon any independent cognitive requirement, nothing guarantees that it will endure, but it may be substantially altered in its content without necessarily being fundamentally changed. In contrast to the social contracts of the 17th century, which sought protection of life, liberty, and security of the person against arbitrary governments, the social charters of the 20th century would oblige governments to take positive action to mitigate the effects of poverty and social disadvantage. Welfare, understood to encompass at least a basic income, becomes a right rather than a mark of a benevolent society. It expresses justice rather than concern. As the right to life is extended to the right to the means of life, as negative liberty spawns positive liberty, and as the state becomes responsible for ensuring a certain approximation of material equality between persons, constitutional entitlements replace moral manifestos. As a general right welfare then stands outside matters that are legitimate objects of political contestation. The transition from the social contract to a social charter thus instills a further form of political relationship.

This development, so far from the individualism of the social contract, would be fully consistent with rights thinking, in contrast, for example, to the claim of special rights for friends discussed earlier. However, the development refers to the content of rights thinking, parts of which can be promoted and resisted

<sup>30</sup> Compare Charles E. Larmore's 'praise of bureaucracy' in *Patterns of Moral Complexity* (Cambridge University Press, 1987) pp. 40–42.

<sup>31</sup> On the rule of right that is a paramount good in liberal societies see Charles Taylor, 'Cross-Purposes: The Liberal-Communitarian Debate', in Nancy L. Rosenblum, *Liberalism and the Moral Life* (Cambridge, MA: Harvard University Press, 1989), pp. 172ff.; and Ronald Dworkin, 'Liberal Community', *California Law Review* 77 (1989), 479–504.

through argument. Whether rights thinking should embrace welfare rights can be contested, even by rights thinkers who see no sufficient rationale for the extension. It is useful to understand their reasons and the limitations of these reasons. One basic approach to welfare rights is that of Rawls, who proposes two independent principles of liberty and equality and defends their combination.<sup>32</sup> This view is contested by Nozick, who maintains in effect that the principles are inconsistent.<sup>33</sup> An alternative approach suggests that liberty and equality are inseparable: liberty being empty without the means to liberty, a principle of liberty has egalitarian implications.<sup>34</sup> However, this play of concepts is inconclusive. The critics of extension can challenge the equation of liberty and the means to liberty as specious, while defenders can insist that the charge of incompatibility is not proven. These arguments thus centre on points of logical analysis. Objections to extension can accept that positive rights would be well founded by the principle of liberty together with the independent justification of a principle of equality or with the correct identification of liberty and the means of liberty, but the justification is faulty and the identification groundless, leaving the new rights claim unjustified. This is the form of argument I used in suggesting that certain claims for rights of friends or women may be no more than rights talk.

It is a form of argument that can be overused. The principal weakness of the logical critique is that it does not address the kinds of reasons most persuasively advanced for extending rights thinking into new areas. Successful movements for new rights do not typically rely upon theoretical argument but upon experience and analogy. Effective arguments do not proceed by establishing that liberty entails the means to liberty, for example, but by extending the interpretation of the principle of liberty towards greater equality through comparisons, as between poverty and prison. It is when people come to see impressive similarities between the absence of liberty and the absence of means to its effective expression that the extension of rights to include welfare seems warranted. No one can be logically compelled to consider the analogy a good one—it can be argued on the other side that providing welfare to some is like forced labour for others—but it is also true that there are no obvious limits the extension of rights thinking that

<sup>32</sup> John Rawls, *A Theory of Justice* (Oxford: Clarendon Press, 1972), pp. 60–65, 150–161.

<sup>33</sup> Robert Nozick, *Anarchy, State, and Utopia*, pp. 164–166.

<sup>34</sup>For one account of this general type see James P. Sterba, 'From Liberty to Welfare', *Ethics* 105 (1994), pp. 64–98.

can occur in this way. As long as appreciation of new comparisons is encouraged by people's experiences, new rights will be identified. Moreover, these extensions in the content of rights thinking are facilitated by the historical development in which the practice became politically dominant over other forms of moral thinking. The generally lowered threshold for rights thinking encourages the formulation of moral claims in terms of rights, so that claims for public provision are pressed as universal entitlements rather than as particular needs, questions of affordability are neglected, and effects upon social relationships are deemed secondary to the requirement of justice. The dominance of rights thinking may thus discourage questions of practical feasibility and social coherence, although these questions have considerable philosophical interest. This interest does not attach primarily to the particular contents of rights thinking that reflect successful political advocacy and the persuasiveness of certain analogies but to the overall limits of the practice that define the viable forms of hybrid thinking. It is the latter notice that I intend to consider primarily in asking how much rights thinking is a good thing.

#### **4. How Far Should Rights Thinking Extend?**

Just as rights thinking is in one respect deeply communitarian, I am going to suggest that it is in another respect deeply utilitarian, rights thinking ultimately depending upon its usefulness. It will prove to be a good way to think if it enables people to resolve serious practical problems when other ways of thinking do not. Hobbes's warring individuals and Rousseau's inconstant companions show how thinking only in terms of one's own advantage yields outcomes that are inferior to mutual advantage and how mutual advantage may be achieved through the recognition of general rights. Both *Leviathan* and the *Discourse on Inequality* offer accounts of human development in which natural desires become constrained or enlarged through a form of thinking that assigns legal or normative protections to all members of civil society. Harmful competition and indifference are then replaced by perceptions of others that command respect for their interests. Rights are thus useful products of human imagination and can claim a solid pragmatic basis.

To be sure the value of rights thinking cannot be conclusively defended in this way. Pragmatic virtues explain but they do not clearly justify. The pragmatic defense is, in one way, not good enough if we are interested in the validity of a way of thinking,



when usefulness alone will prove disappointing. Usefulness is no more available as a reason for rights-thinking than the fact that people are happier when they believe certain things rather than others is a reason for belief. However, the demand for reasons seems misdirected in the former case. Because a form of thinking defines reasons for those who practice it, they determine what considerations are relevant and acceptable for the participants. Unless external foundations can be found for the practice it will not itself have reasons in this sense. It cannot then be maintained that forms of reasoning are accepted because they are right.

Now, external considerations are available for assessing many practices. Slave-owning can be rejected for its denial of human equality, however exquisite the internal logic of its rules. However, this judgment depends upon acceptance of human equality as a reason against involuntary servitude, and a similar onus of proof resides with those who believe that there can be external reasons for accepting or rejecting practices that define reasons. Richard Flathman accepts this onus in attempting to show how 'the practice of rights' can best be justified, but his argument does not seem fully to satisfy it. He suggests for one thing that 'this assumption [of the intrinsic value of the individual] is probably essential to justifying the practice', but as I noted at the beginning of this discussion the assumption appears to be constitutive of the practice rather than providing a reason external to it. For the rest, rights are justified because 'they serve important interests of the individuals who exercise them' and 'protect arrangements, institutions, and norms important to all members [of society].'<sup>35</sup> This seems tantamount to accepting usefulness as an explanation of rights thinking and foregoing the search for justification in any stronger sense.

If this is so, then it is sufficient to recognize that rights thinking enjoys the allegiance of people of good will and commonsense who acknowledge rights in behaviour and in law as long as they continue to prove themselves in practice. Animus against the dominance of rights thinking is thus misplaced, since in modern circumstances a moderately low threshold for this form of thinking works better than any available alternative. There is still room for lamenting the fact that because rights thinking neglects legitimate claims of close personal relationships it also frustrates the civic friendship that is a desirable part of political life. That is to say, deliberating together in order to find a consensus on social purposes is not encouraged by the rights thinking that protects the partic-

<sup>35</sup> Richard E. Flathman, *The Practice of Rights* (Cambridge University Press, 1976). My quotations are from pages 165 and 220.



ular purposes of separate agents. Nonetheless, until an effective option of this kind becomes available, the liberal societies that take general rights most seriously deserve continuing loyalty.

Even so, this resting place is rarely stable, being subject to both internal and external discomforts. Internally, proposals to extend rights beyond individual persons will be made and demand attention. Externally, there will be concern that if practices are basic then any useful and consistent set of rules of thinking will be defensible in principle. There is thus no setting one definitively above another, making any way of thinking appear arbitrary or precarious. Against rights thinking, and in favour of it, basic ontological commitments may then be championed in order to give the favoured practice a more secure and decisive justification than coherence and practicality provide. Thus, Burke, in deploring the barren view of general rights in which a king is seen as but a man rather than as an object of awe and veneration, promoted a conception of human beings as inherently related. For his liberal opponents, by contrast, kings and queens are properly seen as but men and women in virtue of their natural independence. Yet for utilitarians men and women are but animals—animals with unusual capacities, perhaps, but nonetheless animals whose primary moral attribute is their common sentience, leaving human beings with no privileged claim to prosper or survive. A form of cosmic thinking pursues this declension still further: kings and queens, men and women, plants and animals are but things, none of which has special standing in the universe.

As a response to the groundlessness of practices of thinking these ontological appeals are not generally compelling, although they may be used to support internal proposals in an interesting way. Consider the above declension: For a rights thinker who also views sentience as ontologically salient, general rights will seem to attach to animals or to all living things, while one who thinks of existence as a quality may extend rights to the cosmos. Thus, some environmentalists appeal to the nature of life in assigning general rights to species of animals and plants, and future defenders of Mars will no doubt maintain that the red planet has a right to remain in its present state and oppose its greening by human hands.<sup>36</sup> However, the extension of rights thinking into new domains in this way is gratuitous, since there is no effective way of adjudicating philosophically between the competing claims on which they rest. The practice-

<sup>36</sup> Thus Don MacNiven asks seriously, 'does Mars have a right to be left in its natural state?', *Creative Morality* (London: Routledge, 1993), p. 203. Kim Stanley Robinson develops the nice irony of casting the green party as the anti-environmental party in his novel, *Red Mars* (New York: Bantam Books, 1993).

conception does not preclude such extensions: to assign rights to non-human things or their environment is not incoherent. However, it does not encourage these assignments, since from the practice-view extensions of rights are not driven by ontological reflection but by the effectiveness of a form of thinking in identifying solutions to practical problems.

If practices had to rest upon ontological commitment then they would remain as precarious as before. In the case of rights thinking, the inherent questionability of any supporting ontology would make the moral claims that are supposed to rest upon it philosophically suspect. Now, an appropriate reply would be that it is a responsibility of philosophers to avoid questionable assertions that certain questions cannot be answered, especially when justice may depend upon the answer, but there is a pair of complementary problems for this rejoinder. The first is that no one has shown how to distinguish the supposed ontological basis of a form of thinking from its ideological superstructure. In each case the ontology can be understood as an expression of the corresponding form of thinking as well as it can be understood as an underlying presupposition of that form. It is thus unclear that the competition between these contrasting visions can be settled or even that it should be. What would settle it is agreement that one or another of the practices of thinking they are produced to defend is correct thinking, but then it is the rules of thinking that count, not their supposed ontological rationale. This introduces the second problem, which is that ontological commitments are, after all, neither expressions nor presuppositions of any practice of thinking but independent of them. It is notable that the extension of rights thinking to animals described above borrows from an idea commonly associated with utilitarian thinking but which is not inherent to it either, the identification of the good being open to a variety of interpretations. Moreover, all of the ontological conceptions express aspects of our existence. So it is that people, for various purposes, view the universe as lacking preference for living beings, or the world as ennobling sentient experience, or humanity as having no natural ranks, or particular societies as complex webs of relationships and distinctions. It is not necessary to make a final choice between these views or to use them to bolster particular practices of thinking, the usefulness of which for particular purposes is a sufficient warrant for them.<sup>37</sup>

If no grounds have been identified that necessitate the extension of rights to non-human things, the question remains whether

<sup>37</sup> For another statement of the sufficiency of a practice-view see Dworkin, 'Liberal Community'.

movements for group rights can be given an adequate rationale. Such rights, if established, provide recognition and protection for particular communities and cultures rather than for individual agents. The arguments presented so far have defended the dominance of rights thinking that coincides with recognition of general rights, and they have also accepted the potential reasonableness of a substantive extension of the practice that embraces positive rights. These rights are rights of individuals, and it is commonly assumed that rights attach primarily to individual agents, whereas collective agents are tied by obligations and responsibilities.<sup>38</sup> While some believe this distinction to be fundamental, however, others want to take rights claims beyond individual persons. By agreeing that rights thinking can have objects that are not human beings, I have already indicated that such a limitation to individuals is conceptually questionable, but it is worth exploring the point in slightly more detail and noting how the limitation might nevertheless be pragmatically justified.

Iris Young develops a case for certain group rights by describing 'the disadvantage and injustice some people suffer not because a tyrannical power coerces them, but because of the everyday practices of a well-intentioned liberal society' in which 'some are privileged while others are oppressed'.<sup>39</sup> On the basis of this account it seems easy to justify special rights of representation for groups of people who suffer systematic disadvantages, together perhaps with the right to veto proposals that could sustain their oppression. Of course, such a view needs to avoid the logical problems of arguments that attempt to identify domination with pictures of domination and liberty with equality of condition. The existence of privilege does not entail the existence of oppression. It makes sense for some to say that they are entitled to their privileges because of hard work or good fortune and that others' relative disadvantages can be remedied within a liberal regime of general rights. Consequently, rights for disadvantaged groups depend upon establishing some other connection between privilege and oppression. Thus, the more that privilege resembles freedom, for example, the more members of disadvantaged groups seem to lack freedoms that the rich enjoy. The privileges of the advantaged thus appear as defects of justice, since they are departures from equal freedom. Lacking equal freedom, disadvantaged groups are in some sense oppressed, and justice will require their having effective rights.

The analogies between privilege and freedom, disadvantage and

<sup>38</sup> Thus Baier, *Moral Prejudices*, pp. 238–239.

<sup>39</sup> Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press, 1990), p. 41 and p. 163.

oppression are of course contestable. They are resisted by standard liberal theories and intuitions, as well as departing from the conception of individual agency that coincides historically with the dominance of rights thinking. However, it would be rash to suppose that we are dealing here only with rights talk. The circumstances of groups are possible objects of the passions of rectitude and the obligations of governments. The assertion of group rights permits holding that they override the advantages enjoyed by other groups and even the possible benefits to everyone of the existence of privileged social strata.<sup>40</sup> Moreover, when rights are claimed by groups, the claims typically entail no more than imperfect obligations towards other elements of the wider society.<sup>41</sup> In place of such virtues as charity and neighbourliness, holders of presumptive group rights often stress pride in their distinctness and independence from the rest of the society. The rights ascribed to groups thus celebrate the separateness and otherness that form a significant part of rights thinking. The whole basic framework of pure rights thinking is present here. It thus appears to remain an open possibility that rights thinking can encompass rights of groups, although it remains in doubt whether such an extension of the practice might flourish on account of its usefulness for addressing practical problems successfully. Two lines of argument suggest a negative answer.

The growth of general civil and political rights extended privileges and provided universal protections and capacities that could attract most persons' loyalty once they had lost the bonds of traditional community and the capacity to agree on a particular sense of the good. The extension of positive rights is possible in the welfare states because of widespread realization that all participants in a social system might enjoy a fair, if unequal, share in its benefits without harming economic prosperity, or even enhancing it by providing everyone with economic opportunities. In both cases, the entrenchment of rights occurs through general agreement rather than as the victory of one set of interests over another. In the absence of any independent moral law, fundamental rights must rest upon such a consensus. However, a comparable scenario for group rights is not easy to describe. The circumstances of the privileged and the disadvantaged are different in significant ways that make it difficult to promote general consensus on the compar-

<sup>40</sup> For a clear statement of the idea that the general advantage may be promoted by the existence of privileged strata, see John Rawls's explication of democratic equality in *A Theory of Justice*, pp. 75–83.

<sup>41</sup> Cf. the characterization of group rights by Iris Young in *Justice and the Politics of Difference*, pp. 182–186.

isons that support the extension of rights to groups. Those who identify themselves as among the poor, for example, may be receptive to the analogy between privilege and freedom while those who are comfortable easily regard it as a gross confusion of distinct concepts and conditions. The impediment of such sharply contrasting views leaves it doubtful that the causes of disadvantaged groups are best pursued through conceptions of rights. Since group rights are claimed on what many regard as questionable grounds, they thereby encourage continuing opposition from some rights thinkers. Moreover, as some critics of rights thinking suggest, group rights are difficult to reconcile with a conception of democracy that embraces all citizens, encourages general political participation, and possibly provides the best hope of the disadvantaged. On this view, it is the sense of mutual responsibility that comes from taking the perspective of all people that may be most effectively translated into enhanced powers for those whose self-identity is tied to particular groups.

The resort to rights thinking to improve the position of groups may therefore not be very useful in advancing their interests. Doubts arising both internally and externally to rights thinking count against expecting such an extension of rights to be successful, although not decisively, since there is no definite limit to such extensions fixed by the rules of rights thinking. It is not impossible to conceive of a polity whose members found their primary sense of political identity in multicultural advancement. In countries in which there are indigenous minorities or in which there have been decades of immigration, tensions between groups may be addressed by according to each the right to assistance with their independent development, and these rights are then plausibly demanded by other self-defeated communities. The happy result is the priority of responsibility within groups and of respect between them. Although the multicultural society has its attractions, however, it must contend with the difficulty irony of resorting to rights in order to protect community. The standard of rights for communities does not represent a viable hybrid of caring and rights thinking, unless it can identify a way of dealing with circumstances in which the rights of one group to survive and flourish, conflict with those of other groups or with the established rights of all individuals. Intractable and deadly cultural hostilities may occur between rights holders unless it is possible to agree upon a threshold above which the general rights of individuals prevail over the rights of fundamental groups. The existence of such a threshold, however, entails that forms of cultural life are open to examination that leaves their members free to revise or

desert them, so that the right of groups to survive and flourish is very limited.<sup>42</sup>

If instead group rights are conceived as basic and thus to tend towards the absoluteness of pure rights thinking, then there is another reason to believe that rights thinking is unlikely to remain useful. As already noted in connection with constitutionally entrenched welfare rights, to establish a right as basic in this way is to remove it from official political debate about public goods, making the threshold for considerations of general advantage and mutual responsibility very high. It is therefore to insulate the objects of rights thinking from the utilitarian and communal perspectives, enabling judges to uphold positive rights without concern for their economic and social costs. This objection to seeking constitutional consensus on positive rights is well addressed by such expressions of a social charter as Rawls's difference principle, whose criterion of application includes economic and social benefit. Welfare rights are not to be pressed at the expense of the well-being or self-respect of the least advantaged. No such ready solution is available for the corresponding objection to groups rights, which is that judges may uphold these rights without concern for their costs to national identity, hence without regard to the very consensus that is the condition of their legitimacy. Since successful politics is in large part the art of balancing such competing considerations, embodying the aspirations of groups in fundamental rights and withdrawing them from discussion removes from political thinking its capacity to consider serious social evils and to enhance social connection. By neglecting hybrid thinking in this way, we become unable to address matters of central human importance deliberately. The disadvantages of this depoliticization to the public spheres suggest that the continual extension of rights thinking will lose its pragmatic rationale before fully encompassing all existing things, all organisms, or even social groups.

## 5. Conclusion

Although this essay ranges over a number of central issues in recent discussion of rights, the several parts converge upon a primary thesis, providing pieces of evidence which together support

<sup>42</sup> The freedom of each generation to determine its future for itself is an idea that runs through rights thinkers from Thomas Paine, in *The Rights of Man*, to Jürgen Habermas, in *Multiculturalism: Examining the Politics of Recognition*, ed by Amy Gutmann (Princeton University Press, 1994), pp. 130–131.



the general point that moral thinking is a self-sufficient practice or cluster of practices. Philosophers can usefully comment upon this practice, showing that it may be unwarranted or unwise to expunge portions of it or allow one portion to dominate the others. Rights thinking, in particular, is effective in resolving serious problems between people and should continue to claim adherents as long as it contributes to the hybrid vigour of moral reflection. However, I have also assembled reasons for holding that rights thinking and the other forms of moral thinking are not subject to negative or positive demonstration, that is, refutation or justification according to the strictest philosophical standards. To be sure, the refutation of a practice is not impossible. Rights thinking could be rejected if it led to dilemmas about action, but it is far more likely that it will simply fail to identify the correct course of action in certain circumstances. Deep contradictions are not to be expected in a practice whose rules have been thoroughly tested, but the rules may still prove unequal to their task. The justification of a practice of thinking, beyond its internal consistency and pragmatic value, is a more philosophically dubious proposition.

Consider the theory of 'operative rights' recently developed by Beth J. Singer. In a thesis that is broadly consistent with mine she describes rights as 'historically evolved social institutions' and operative in the 'exercise of individual judgment'. Hence, rights are 'institutionalized in the communities to which we belong' and exist 'only in communities whose norms prescribe respect for them'.<sup>43</sup> However, Singer adds that certain 'universal human needs' are 'necessary conditions of normative community' and finds that 'dialogic reciprocity is the basis of the authority of all social norms'.<sup>44</sup> From such a standpoint, she argues, it is a straightforward matter to show that animals cannot have rights but that communities can.

The problem with this line of argument is much more serious than Flathman's weak justification of the practice of rights. It offers not a practice-account but an *ideal-practice-account*. By describing such an ideal practice appropriately it is certainly possible to define *a priori* exclusions and potentialities. Thus, animals cannot possibly have rights because they cannot enter into the rights-relations that require respect for the rights of others, but communities may have rights because they can engage in dialogic reciprocity. This is a version of Habermas's discourse ethics,

<sup>43</sup> Beth J. Singer, *Operative Rights* (Albany: State University of New York Press, 1993), pp. xiii–xv.

<sup>44</sup> *Ibid.* pp. 62, 97.



which attempts to derive universal moral requirements from the presuppositions of argumentation, 'discourse or argumentation [being] a more exacting type of communication, going beyond any particular form of life'.<sup>45</sup> While the norms of such ideal communication are plausible standards for actual practices, however, they are not logically derived from these practices. The proposed norms do not restrict what it is possible for actual speakers to do, such as lying to one another. Lying is inconsistent with the rules of ideal discourse ethics, but it is an action perfectly possible in ordinary communication and is not incoherent behaviour amongst those who actually argue with one another. So, too, for the actual practice of rights thinking, in which the ascription of rights to animals and communities is a matter in which no a priori determination should be expected.

The indefinite scope of this practice can also be described in terms of sensitivity to thresholds. As we have noted, utilitarian thinking is particularly appropriate in contexts in which serious good beckons or evil threatens. To a first approximation, these are contexts in which the seriousness of the good or the evil is demonstrable, making it easy to see that the agent had no moral choice but to act contrary to laws or rights. Where this demonstration is not possible, one remains below the evidential threshold, that is within the region where rights thinking appropriately dominates. Now, it is easy to understand philosophical dissatisfaction with this merely formal point. In practice, thresholds are imprecise, being distinguished by grey areas rather than sharp lines. This imprecision is what makes the grey areas inevitable sites of moral difficulty and social controversy. Although there are clear cases, there are also those in which one must trust to discrimination rather than rules, and perceptions differ.

It is clear that the identification of thresholds depends powerfully upon social opinion. To assess a person as sufficiently discriminating, perceptive, or sensitive is to employ norms of judgment from which the social element cannot be abstracted. Such assessments are, of course, very complicated. They presuppose the kind of capacity for independent judgment that is demonstrated by imaginative extensions of norms to novel cases in contrast to slavish conformity to rule, but there must be a rough consensus, an established practice, from which to depart. The importance of imagination may be expressed in saying that in matters subject to judgment there is no objectively right answer, but for there even to be a question worth debating there must be the shared assumption

<sup>45</sup> Jürgen Habermas, *Moral Consciousness and Communicative Action* (Cambridge, MA: MIT Press, 1990), p. 202.

tions represented by conventional opinion. It therefore seems a reasonable conjecture that where social cohesion is so poor and shared assumptions so few that thresholds are impossible to discern, pure rights thinking may enjoy a great advantage. In authoritarian regimes whose rulers have a clear vision of the good society utilitarian thinking may be dominant and rights may be ignored, but in an open society pure utilitarian thinking is hampered not only by threshold questions but also by doubts about what constitutes a public good. This further promotes a culture in which political issues are routinely discussed in terms of rights. Under these circumstances rights claims may extend well beyond civil and political protections to economic entitlements, justice for the natural environment, or the advancement of any other political cause.

Notwithstanding contention about the location of thresholds, multi-dimensional moral and political discussion depends upon sensitivity to them. Without recognizing thresholds, the hybrid thinking in which conflicts among rights, utility, and concern in relationships assume moral interest does not occur. I have suggested that for pure rights and utilitarian thinkers, such moral dilemmas fail to arise. However, they do not arise for hybrid thinkers either. As long as appropriate thresholds can be recognized, it is clear when rights or utility should prevail. In the grey areas in which the threshold cannot be located exactly individuals will be uncertain (often painfully) and people will disagree (sometimes vigorously). These situations do not pose philosophical dilemmas, however. Rather, they are among the cases in which it is not possible to identify the desirable course of action with confidence. There is no demonstrably correct judgment, so that one is faced with a practical quandary in which one must decide for oneself. This is not to say that one must simply depend upon personal opinion but rather that one must do one's best to exercise responsible moral authority in the absence of clear guides. The philosophical examination of rights thinking shows that it is as rational as any practice one can define.

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