CHAPTER 12

Moral Rights

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1. A Brief History of the Concept

As Friedrich Nietzsche once said, only that which has no history can be defined.[1] So, aiming to capture everything people have had in mind when speaking of moral rights (or human rights or natural rights) would indeed be a thankless task. Still, we can capture important ways of using the terms if we start by contrasting moral rights with legal rights.[2] Legal rights are artifacts of a legal process. Whatever moral rights are, they are not that. Rather, a claim of moral right is a claim about what legal rights people *ought* to have. Or at least, that is what many people have had in mind. For example, when a woman in the 19th century claimed a *moral* right to open a bank account in her own name, her point was not, "My right is set out in a statute; you can look it up." Rather, she was making a claim about what her legal standing ought to be. We might express a related idea by speaking of *natural* rights, thereby emphasizing that our reasons for believing in such rights are rooted in our knowledge of the human condition, not in our knowledge of extant legislation.

How did we come to believe in natural rights (or moral rights or human rights)? One problem with discussing a history of ideas (or a history of anything) is that history cannot start at the start. A history is a narrative. It begins where a narrator chooses to begin. Narrators know that every starting point has a history of its own; still, they have to start somewhere. Moreover, they present sequences of events in such a way as to invite readers to interpret observed correlations as signs of cause and effect, but the story remains an invitation, not a proof. With that said, here is one way of telling the story of how we came to believe that we can have moral justifications for particular claims about what our legal rights ought to be.

Richard Tuck says, plausibly, that Western conceptions of individual rights began to take a recognizably modern shape when Justinian's Pandects were rediscovered in Amalfi, Italy, in 1130. The Pandects represented a digest of Roman civil law, as commissioned by Emperor Justinian and produced by the leading legal scholars of Justinian's day around AD 530. David Hume treated this as singularly important. Although this rediscovered Roman jurisprudence did not easily translate into any modern conceptual framework, it is nevertheless, in Tucks's words, "among the men who rediscovered the Digest and created the medieval science of Roman law in the twelfth century that we must look to find the first modern rights theory" (1979, 13).[3]

Western societies of the 12th century were reaching a stage where citizens were becoming concerned about the rule of law less as an antidote to anarchy and more as an antidote to tyranny. A need for peacekeeping was evolving into a felt need to establish limits to the king's power to tax, and to establish that no one (neither kings nor judges, legislators, or police) is above the law. In a sign of things to come, Thomas Beckett, Archbishop of Canterbury, is

credited with the first recorded instance, in 1162, of "determined opposition to the king's arbitrary will in a matter of taxation."[4]

The name "Magna Carta" refers to a series of agreements, issued in England beginning in 1215, that inspire modern constitutional law. The Magna Carta arose out of disputes between King John and English barons regarding the extent of the rights of kings.[5] It established that the king is bound by a rule of law. The charter was streamlined and reissued by John's successor, Henry III, who ruled for 57 years and whose endorsement helped solidify the Magna Carta as a touchstone for English legislation. Pope Innocent III declared the Magna Carta void, saying that since the king was the pope's subject, it was the pope's sole prerogative to choose which rules bind kings. The barons and the king ignored the pope. This was a step in the reassertion of secular authority, which, in its ongoing struggle with papal authority, helped balance and limit the church's power in Europe going forward.

Around 1250, jurist Henry de Bracton famously declared that "law makes the king."[6] As Debbie Levy describes the evolution of this idea,

> In the time of the Magna Carta and half a century later, in Bracton's time, the idea that the king was subject to law was part wishful thinking and part statement of actual fact. Kings of that era did not wish to give up their powers. But times were changing. . . . The Magna Carta did not stop the argument. But beginning in 1215, it was a part of the argument.[7]

The articles of the Magna Carta underwent a long process of revision and reinterpretation and thus became part of an ongoing legal and political reflection, slowly coming to permeate English thought and to affect ordinary citizens. Between 1331 and 1368, Parliament enacted six laws that gave substance to such phrases from the Magna Carta as "lawful judgment of peers," "law of the land," and "free man." Rights of trial by jury were secured in the process, together with procedural rules governing lawful arrest and the expansion of equal standing before the law so as to include any man, "whatever estate or condition he may be."[8]

John Fortescue, England's Chief Justice from 1442 to 1461, would author *The Difference Between an Absolute and Limited Monarchy*, a plea for limited monarchy that arguably represents the beginning of English political thought.[9] In the 1500s, Martin Luther's disruptive innovations culminated in Protestantism, which was in part an idea that each person has a right and a responsibility to seek salvation by praying to God directly rather than through Catholic bishops. What grew in the soil of the right to practice a religion of one's own choosing, and the idea that one's salvation was in one's own hands, was more than religious toleration; it was liberalism itself—the idea that we need not presume to run other people's lives.

Around the time we now mark as the dawn of modern philosophy, Dutch thinker Hugo Grotius (1625/2005) was secularizing the idea of natural law. To Grotius, natural law was a question of which social arrangements were most conducive to humanity's progress, given facts about human nature. Grotius argued that there would be laws of nature, dictated by requirements of human nature, even if (perish the thought) there were no deity.[10]

To Grotius, a key empirical fact (and key evidence of God's divine will on the question of individual rights) is the fact that humans are social. To Grotius, questions about what moral rights we have are questions about the kinds of respect we need to have for each other so as to be able to live well together. Our essential God-given survival tools lie in our nature as social and political animals. We can cooperate with others. Moreover, we can negotiate mutually agreeable terms of cooperation. But we do need to cooperate. If we survive, it will be as members of a community. Self-interested we may be. However, self-interest properly understood is not *corrected* by our social nature so much as *given content* by it. More important than almost anything is our needing to know what to expect from others, and needing

other people to know what to expect from us, so they can afford to trust us. Thus, we make promises, represent our word as something that can be counted on, and in the process invite others to feel morally justified in expecting us to do what we said we would. From such moral beginnings, the communities on which we depend are built.

To Grotius, domains of ostensible right are to be evaluated as domains of natural right by empirical investigation of what kind of community such rights sustain over time and in practice.[11] (As per Aquinas, God gave us an ability to learn from experience, and His will is that we not waste that gift.) There would be no rights of any kind in a state of nature, individual or collective. Rather, all rights are artifacts, in the sense of being created by communities. Yet there remain truths about how well particular rights serve a particular community. To Grotius, natural rights are those that a community is warranted in recognizing just in case such recognition forms a foundation for a peaceful thriving community.

To my knowledge, the latter idea has never been made sufficiently precise to settle exactly what our rights are. In practice, we sometimes end up in court, disputing the exact places where one person's right ends and another person's right begins. Theory cannot supply uncontroversial sets of necessary and sufficient conditions, yet judges sometimes succeed in setting out sufficient conditions for resolving a particular conflict in such a way as to make the scope and limits of our legal rights more precise, so that what we subsequently will be morally warranted in expecting from each other is also correspondingly more precise. Theory can do only so much, but theory does not need to do everything. A map likewise tells us only so much about what to expect of the road ahead. Maps complement observation; they do not take its place. Neither does theory.

John Locke (1690/1960), following Grotius, argued that God gave the world to humankind in common for the betterment of humankind. God therefore must have intended that we do what we need to do to put the earth to work. Furthermore, persons are self-owners; they are God's property, to be sure, but against other humans, individuals alone have the right to say yes or no regarding how their bodies are to be put to work.

As Locke might have observed, asserting self-ownership is controversial. Yet, however controversial it may be to assert that Jane has a right to say no to a proposal to use her body in a certain way, asserting that she *doesn't* inevitably is more so: less liberal, less respectful, and less apt to keep the peace. It is that right to say no that makes it safe to venture out into a community in the hope of finding partners with whom one might get to yes.

Locke argued that latecomers could afford to respect claims to particular parcels of land made by settlers who arrived first and staked out those claims. Locke thus extended the idea of self-ownership to include an external resource (land) that people could "incorporate" by mixing labor with it.

The extension is controversial, but the subtle essence of the idea is that there is a question about who has the least-obstructed claim to a resource. Bob is the only one who can reap the fruits of land that Bob improved (cleared, planted, etc.) without having to seize the fruits of another person's labor. This is not to imply that Bob has a mysteriously deep connection to that parcel of land. Rather, the simple and uncontroversial idea is that

(1) Bob has a *bit* of a connection, and

(2) no one else can establish a comparable connection without disregarding Bob's prior claim.

The first labor mixing thus raises the bar on what can justify subsequent acts of taking possession. Some day, there will be another owner, so legitimizing transfer and subsequent ownership usually will involve the consent of a previous owner. Eventually, Locke would have

agreed, labor mixing and *first* appropriation will be largely moot, at least when it comes to the ownership of land.

Working within a Lockean tradition, William Blackstone characterized property (especially in parcels of land) as the "sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe" (1765/1979, 2).[12] In practice, however, the dominion Blackstone had in mind has always been hedged with restrictions: easements, covenants, nuisance laws, zoning laws, regulatory statutes, and more generally by the public interest. Accordingly, your authority over your land may or may not imply a right to build your fence at the very edge of your parcel. It may or may not imply a duty to respect an *easement* between your fence and the neighbor's fence so that neighbors can pass freely from their land to the marketplace. Moreover, your community is warranted in respecting claims like yours *in normal cases* because respecting such claims helps citizens to know what to expect from each other, to share understandings of what they may count as minding their own business, to know how to be of service to each other, and to flourish in the process.

But not all cases are normal. We will return to that point.

2. What Rights Are, By Contrast With Mere Liberty

Fred D. Miller has shown that the concept of a moral right was alive and well in Aristotle's *Politics*. Miller acknowledges that no Greek word naturally translates as a term for moral rights (which long led interpreters to suppose the Greeks had no concept of individual moral rights). However, Miller observes, various Greek terms used by Aristotle nicely correspond to a vocabulary of terms such as *liberty*, *claim*, *power*, and *immunity* that Wesley Hohfeld would articulate in the early 20th century.

Hohfeld saw that several distinct ideas had emerged as conceptual tools for adjudicating legal disputes but felt that the ideas were getting confused because people were using the same term—the term "rights"—to name each of them. This led Hohfeld to introduce his clarifying vocabulary.

There are two issues here. First, the term "rights" does, after all, have a history of being used in different ways, as Nietzsche might have predicted. Second, the term was being used as a way of marking what settles disputes. It is not true that deep metaphysical issues need resolving so as to fix generically correct ways for practitioners to use the term. It is more or less the other way around. As Hohfeld disambiguated the various uses, courts tasked with settling particular conflicts come to require terms to mark what they are doing, when, for example, they settle that I am at *liberty* to use an unoccupied parking spot by settling that I have no duty to refrain from using it. A liberty in that sense is a nonexclusive right. A court would be settling that I have a different kind of right to that parking spot—an exclusive *claim*—just in case it were to settle that (1) I am at liberty to occupy that spot *plus* (2) I have the additional liberty—or better, a *power*—to forbid you from occupying it, where my power points to a correlative duty on your part to respect the claim. Exclusive claims entail correlative duties. Mere liberties do not.

A right to property nowadays tends to be understood as a bundle of complementary but separable rights that could include rights to sell, lend, bequeath, use as collateral, or even destroy. (John Lewis, in 1888, is regarded as the first person to use the "bundle of sticks" metaphor.) However, at the core of any such bundle is the fundamental moral idea of a right to say no. In other words, a right to say no is not merely one stick in a bundle. Rather, a right is a tree. Other sticks are branches; the right to say no is the trunk.

This is not merely a stipulation. Any claim not treated as implying a right to say no is being confused with mere liberty. I could, for example, be the owner of an assault rifle in a meaningful sense even if I have no right to lend it to my friend (for any number of reasons, such as that my friend is too young, too drunk, or too angry). But suppose by contrast that I have no right to stop you from lending it to *your* friend. In that case, I would not own the assault rifle in any familiar sense. That tree would be missing its trunk, not merely a branch.

This does not settle what, if anything, can justify our claiming a right to say no, but it does clarify the topic. When we ask about a right to *that* assault rifle as distinct from a mere liberty to use it, we are asking first and foremost about what such a right is a right to say no to.

The right to say no to trespassers is central to property rights, especially including rights to one's body and to one's labor. Charles Reich (1964) holds that many positive rights can be understood as property rights; the right to say no is central to those rights as well. Hohfeldian *immunities* likewise can be analyzed as bottoming out in rights to say no. But to Hohfeld, there are other rights (e.g., a right—or rather, power—to validate a marriage license), where understanding them as rights to exclude would be less natural and relatively unilluminating.[13]

3. What Rights Are, By Contrast With Mere Interest

I may *want* to get a grade of "A" in your seminar. That is not the same as having a right to an A. I may *need* to get an A grade to qualify for admission to law school. That likewise is not the same as having a right. Similarly, to assert a right to an A grade is neither to say I have an *interest* in an A nor that giving me an A would have *utility*.

Ronald Dworkin (1977) characterizes rights as *trumps*. This is Dworkin's way of contrasting moral rights with interests. To Dworkin, utilities have weight, but rights trump utility, so rights are not weights; instead, rights *trump* questions of weight.

On Dworkin's understanding, taking a person's right to say no seriously is nothing like acknowledging that her refusal carries a lot of weight. The correct way to understand her right is to understand her refusal as ending the story. No means no, period. Does she have good reason to say no? It does not matter. We do not need to know. She does not need to offer us good reasons. The decision is hers.

So, if someone were to say, "I acknowledge that you have a right *but* . . .," then a student of Dworkin's approach might interrupt, saying,

> You can stop right there, because once you acknowledge my right, that stops the conversation. Acknowledging that I have a *right* is nothing like acknowledging that I have an *interest*. When you acknowledge that *x* is mine by right, you are acknowledging not that my interests *count* but that *I am the one who does the counting*. Should I decide that my interest is outweighed? Quite possibly, but if I hold the right, then I am the one who decides, not you.

Interests sometimes conflict. When a person has conflicting interests, she must decide which interest outweighs the other. This case has an interpersonal analog, of course, since conflicts arise between as well as within people. If people have conflicting interests, then someone may have to decide how to weigh them. However, if we settle that one of the parties is entitled as a matter of right, that settles who is licensed to do the weighing. When you insist that you are the one who holds the right, you thereby insist that other people do not (as per Lyons 1984, 126). So, *interests* regularly come into conflict, but we reserve the term *rights* for claims that cannot conflict.

Or so it seems, but the world does not always cooperate. Circumstances change. New kinds of conflict become possible. Claims long treated as settled can be brought into conflict by unanticipated and novel circumstances. (The upcoming section on conflicting rights returns to this reality.)

The contrast between rights and interests was meant to help characterize what rights are. To say *why* we have rights, one approach is to consider the indispensable role that rights play in *serving* interests. To this topic we now turn.

4. Why We Have Rights

When a person asserts a right, she is asserting that I have a duty, namely to deliver to her what she says is hers by right. She may be asserting what we might call a positive right. Or, if she says I am required to stay out of her way and let her tend her own business in peace, she probably is asserting what we might call a negative right. The distinction between negative and positive is time-honored and sometimes useful, even if not always easy to make precise.[14]

Some philosophers are skeptical about moral rights. Jeremy Bentham dismissed talk of natural rights as "nonsense" not because rights-talk did *not* make sense but precisely because it did, and Bentham was not comfortable with what it meant. First, the term refers to rights beyond those granted by the state. Bentham thought that was a mistake. (And here, let's say for now that Bentham's point may not be compelling, but neither is it nonsense.) Second, Bentham was committed to seeing everything that matters as a quantifiable weight. Yet, the fact remains, sometimes we know what people are talking about when they assert a right. They may be wrong, but what they are saying is not nonsense. Even Bentham would see that they have arguments.

Indeed, such arguments were known in Bentham's time. David Hume's argument, in compressed form, was that for people to be able to form communities in which people find their situations agreeable and become adept at finding ways of making themselves useful to others, people need to know what to expect from each other. People need to know they can trust each other. People need to be able to make promises and trust that partners will keep promises. In particular, people need to know that partners will keep promises *because they promised*. People need partners to treat promises as *settling* what to do, not merely as having weight.

The simple point: A utilitarian who starts from a premise that everything that matters is a weight could reason to a conclusion that the utilitarian premise cannot be true. In particular, it is a weighty thing to be able to trust fellow citizens to treat some moral questions as matters of *status*, not *weight*. Bentham should have asked, "What if everyone were to treat everything as a weight?" Will you want your surgeon to be wondering about the weightiest use of your vital organs when he or she picks up that scalpel? A lot of weight rides on whether we can make it safe to trust people to mean it when they say their word is their bond. In a nutshell, it matters whether we can trust people to treat us as coming to the table with status.

Following Bentham and John Stuart Mill, Henry Sidgwick (1874/1996) treated *Methods of Ethics* as methods of deciding what to do. After that, utilitarian theorizing became theorizing about what to do. In the 20th century, utilitarians' questions were not about, for example, what makes some societies famine-proof but, rather, how much to contribute to famine relief. Smith's work in the Scottish Enlightenment's 18th-century heyday on the nature and sources of the wealth of nations would today be unrecognizable as the work of a professor of moral philosophy. Moreover, Smith's observations about free trade policies correlating to societies becoming famine-proof did not prove anything, but Smith was not attempting to prove anything. Smith and Hume were gathering evidence, not proof. They sought to

make moral subjects more like science: observation-based rather than axiomatic. In the aftermath of work like Sidgwick's, however, appearing around the same time as brand-new departments of social science were emerging to colonize the realm of empirical observation, the remnants of academic philosophy were left behind to become a field that was anything but empirical.[15]

So, Smith might have asked, what happens when a community becomes a place where citizens can count on fellow citizens to recognize and respect the status that goes with having rights? The point would not be to prove anything but, rather, to observe whether people find it useful and agreeable to live in a community in which people are treated as having rights. Relevant observations, however, would be of the operation of particular rights in particular times and places. We would be well-advised to understand that such justification as we observe for believing in rights is not a justification for believing in whatever gets called a right. Only some constellations of alleged rights will pass muster, and passing muster will be a contextual thing. In particular, whether we endorse a rights regime depends on whether it creates room that people use to peacefully develop and pursue projects of their own.

Analogously, we manage the traffic of a community with traffic lights, and traffic lights liberate us by turning red. Note: Traffic lights do not signal us to stop just in case stopping would have utility, because a rule like that would be too vague to have utility; it would not provide a clear enough signal about when to expect others to stop. Rather, traffic lights signal us to stop just in case it is someone else's turn. But if the point of traffic management is to enable us to get where we want to go in peace, then we do not want to find ourselves facing traffic lights every 50 feet. We do not want our world to be so thick with duties that duties become suffocating. For our traffic management system to facilitate people getting to their destinations, the presumption has to be that we won't install a light except where doing so helps us to stay out of each other's way. Furthermore, we understand that a green light makes it our turn to proceed in normal cases, but we also understand that not all cases are normal. It is a fact of life that we share the road with emergency vehicles and that (when sirens are sounding) we may need to defer to emergency vehicles regardless of the color of the light.[16]

5. Conflicting Rights

Hillel Steiner (1994), following Kant, treats righted as necessarily *compossible*. Trumps properly understood settle which party is licensed to decide. Analogously, if one side of the intersection has a green light, then the cross traffic has a red light. Or if we do something to make both sides think they have a green light, then we messed up; the result will be gridlock at best and the community will need to fix our mistake.

This suggests an observation-based way to understand conflict and compossibility. That is, if rights are observable social facts created by communities, then whether they conflict is a matter of contingency, not necessity. For you to have a green light means you have the right of way, so we cannot *intend* that both sides think they have the right of way. But the world being what it is, rights long recognized as trumps sometimes run up against an unanticipated and novel consideration that a community cannot afford to treat as having been simply trumped.

In 1936, there was no settled truth of the matter about whether an airplane had any right to fly over someone's land at 10,000 feet in order to deliver mail from New York to Los Angeles. However, it was not forbidden, so, by default, Pacific Air was at liberty to fly. Then a rancher, Hinman, sued Pacific Air Transport, which is how presiding Judge Haney came to be adjudicating a conflict between two long-settled rights that a technological advance had rendered incompossible. Pacific Air was providing its community with a crucial service, and Judge Haney saw that the community could not afford to treat Pacific Air's liberty to provide

service to that community as having been trumped. So Judge Haney ruled against Hinman and clarified the edges of Hinman's right to sue trespassers by ruling that Pacific Air's flight path was not a trespass. The legal community treated Haney's ruling as akin to recognizing customary easements that allowed shippers to use common waterways for conducting the commerce of a community. In the aftermath, Pacific Air Transport went on to become United Airlines.

The point of the story is that Judge Haney found himself having to resolve a conflict. The contesting litigants before his bench were interpreting their rights claims in such a way that the boundaries of their rights, thus conceived, were no longer compossible. Haney had to reinterpret those boundaries in such a way as to make those claims compossible once again in the face of a new reality. The question had an answer, though, insofar as the point of interpreting boundaries one way rather than another was for the rule of law to be a framework for the mutually advantageous interaction that constitutes a community. Ruling in favor of the airline shaped the evolving right to be of service to one's community in a way that made it affordable to be of service. Ruling in favor of Hinman would have been a mistake because it would have set a precedent for forcing airlines to pay off every rancher on the ground for the right to pass overhead. That would have turned ranchers into drawbridge trolls, choking off air traffic by treating the commerce of a community as something ranchers could hold for ransom. It would have weaponized land ownership and maximized transaction cost.

So, Steiner and Kant are correct that compossibility is a basic feature of rights, yet it is unrealistic to see compossibility as a matter of logical necessity. Instead, although compossibility is indeed crucial, we live in a world in which changing populations and changing technology have a way of turning what had been contingently compossible rights into conflicts that need resolving. That makes the ongoing compossibility of rights—that is, rights as observable, functional social facts—an ongoing achievement requiring ongoing maintenance.[17]

What are the exact boundaries of our right to say no? No exact answer can be derived from philosophical theorizing. Instead, communities evolve their own answers, one new challenge at a time. Experience with resolving conflicts settles questions about, say, whether to count flying over someone's land at a height of 10,000 feet as an invasion of privacy. The 1936 Pacific Air case settled that air traffic per se is not a trespass. That settlement became a moral fact in the process of being established as a legal fact. Why? Because it shaped mutual expectations in a way that made us more willing and more able to be of service to our community. Specifications of the right to say no evolve in crucibles of real-life conflict in response to circumstances to which specifications need to be a response, so that members of a community can live together with minimal conflict going forward. (Bungled specifications make it harder to get closure; they leave appellate courts needing to overturn precedents that a community will one day think should never have been set.)

6. What Can Justify Claims of Moral Right

David Hume's greatest work was subtitled "An Attempt to Apply Experimental Methods of Reasoning to Moral Subjects." Hume was pursuing the Enlightenment project of articulating the foundations of science, including moral science. He was seeing an alternative to the Cartesian error of treating geometry as the paradigm science, where the model of reasoning is valid deduction of necessary truths from indubitable axioms. Hume was contrasting observation-based reasoning with deductive reasoning. That is why he stressed that we observe correlation but not causation. We infer causation, but we infer by leaping, not by deducing.

We tend to treat Hume as being skeptical about our knowledge of causation when in fact he was being skeptical about deduction. He was observing that the world of science is a world of evidence, not of proof. Proof (as logicians understand proof) is rare; evidence is everywhere. Hume was observing that our ways of learning about our world involve drawing inferences compatible with observation yet not entailed by observation.

We can observe people coming to know what to expect from each other. Specifically, we can observe people arriving at shared expectations regarding who has a right of way and a right to say no. We observe shared expectations sometimes enabling people to understand each other (in particular, to understand when promises have been made, and when promises can be counted on). We observe people coming to understand what to expect from each other, and what they will see each other as being able to rightly demand.

That is, we can observe the emergence of shared understandings of moral rights, along with a particular kind of justification for such rights, namely people finding those shared understandings useful and agreeable. Hume's way of reasoning—empiricism—is not restricted to drawing conclusions that were already implicit in the axioms from which deductive reasoning starts. Observation-based reasoning goes beyond the content of observation. It infers cause from correlation, but it is no mistake to draw such inferences—so long as we understand that what we are inferring is not necessarily true and could indeed be disconfirmed by further observation.

Observation-based reasoning can likewise be a process of inferring ought from is. Such inference again will not be mistaken as long as one understands that what one infers is at best true, not *necessarily* true, and subject to revision as necessary to be compatible with subsequent observation. We may even revise our understanding about which rights-claims are justified as new information comes in. As David Hume well understood, our conceptions of what is useful and agreeable evolve. What once seemed useful and agreeable may seem not so useful today. We may think everyone finds a certain status quo useful and agreeable, then find that people have different ideas than we do about littering, or about drunk driving, sexism, racism, or any number of concerns that we develop as we go. And if we can infer anything from observation, it is that people in the future will probably wonder "What were they thinking?" in the same way that we are baffled today by what people embraced in centuries past. Today, we see moral rights as timeless rights that people have always had. In a century, we may still see rights as timeless, but what we identify as the content of those timeless rights will change, perhaps for good reason.[18]

That is how justification works in the real world. Even if reality is a realm of timeless moral truth, our access to that moral truth is imperfect and subject to change. Our understanding of our moral rights is subject to disconfirmation by new understandings of what it takes for people to be able to live well together.

We may learn more about which ways of respecting each other help us maintain a peace that goes beyond mere grudging truce—that recognizes everyone as having destinations of their own and treats all destinations as presumptively yet by no means necessarily on a par.[19] As we know from experience, each of us has had many ideas about what is worth living for, and some of those ideas proved better than others. The point has to be that each person is tasked with deciding for themselves, not that everyone makes equally good decisions. It is enough—it had better be enough—to operate with a working presumption that one person's hopes and dreams matter as much as anyone else's. We do well as neighbors when we understand that good neighbors do not see neighbors as items to sacrifice on the altar of the common good; good neighbors treat neighbors—*all* neighbors—as having a right to say no.

But this approach treats justification as a process of supplying evidence rather than proof. It does not treat biconditional analysis—providing necessary and sufficient conditions—as

the aim of moral science. The objective is to observe, then draw inferences about what fits observation, then stand ready to learn more about what kind of community is facilitated as people learn to expect one kind of treatment rather than another.

7. Remedies

A right is violated. Then what? What is supposed to happen? Calabresi and Melamed (1972) describe three remedies. (The following analysis covers property in one's person and, arguably, any other kind of moral right, although Calabresi and Melamed focus on how their three categories illuminate our ways of respecting rights to property in particular.) In normal cases, a piece of property, *p*, is protected by a *property rule*, meaning no one may use it without the owner's permission. An intentional violation in that case is considered to be theft, say, or criminal trespass. However, there are other cases in which I damage your property unintentionally. I meant no harm, but I did, after all, harm you. What then? In this kind of case, a functional community does not treat as a criminal, yet still needs to take my transgression seriously. In our society, this is a circumstance in which *p* is protected by a *liability rule*, meaning no one may use it without making the victim whole—that is, compensating the owner for damage done. In a third kind of case, *p* is protected by an *inalienability rule*, meaning no one may use *p* even with the owner's permission.

In the case of liability rules, the fundamental rationale is that sometimes it costs too much or is impossible to get consent. Moreover, sometimes an activity (e.g., driving) poses inherent risks that a community needs to tolerate so that neighbors can undertake the projects upon which communities are built. Every time we pull out of a driveway, there is a risk that we will accidentally damage someone's property. Imagine a rule: We cannot get in a car to make a delivery unless we first get advance permission from everyone who might be put at risk. Suppose we see that, under such a rule, much of what we call cooperation would never get off the ground. In that case, realistically, advance permission will not be the operative requirement. Predictably, the operative rule will be a liability rule. Why? Because people want to be able to afford to live together and want people to feel encouraged to find ways to make themselves useful. Thus, we expect to see people devising rules that help them limit the cost of living together and of delivering goods and services to each other. When liability rules help, what they are doing has that as a moral justification.

In passing, an inalienability rule seems like an altogether different idea. One reason for inalienability rules is that, in some contexts, some rights are so fundamental that we would cease fully to be persons if we were to sell them. For example, we may say my kidney is my property even while denying that this implies any right to sell my kidney. If we say that, we would not be denying that my kidney is mine. Instead, we would be saying my right to it is inalienable.

There can be robust rights to say no that sometimes are protected by *liability* rules and are defeasible by such things as a doctrine of necessity.[20] Or, some rights give us the essence of contract law—but when they are further limited by doctrines of unconscionability (which rule out enforcing such things as an agreement to be a slave), then that further protection is akin to an *inalienability* rule.

So, there are various ways of defining limits of scope and of defeasibility, enabling us to locate and relocate the nuanced edges of rights without denaturing them—that is, without losing sight of what distinguishes trumps from mere interests. Instead, limits of scope acknowledge that the justifications that make rights trumps in normal cases do not apply to emergencies that pose a threat to a community's ability to carry on as a community. That kind of distinction can be ambiguous, and it has been abused in practice. However, there has

never been a rights-respecting community that did not distinguish between (1) normal cases in which respecting the boundaries created by a given right was essential to people being good neighbors and (2) emergency cases in which respecting those boundaries would itself pose a threat.

The takings clause of the U.S. Constitution's fifth amendment specifies that private property may not be taken for public use unless just compensation is paid. The clause does not explicitly affirm the public's right to seize property for public use, although it has been understood that way. On one interpretation, takings clauses properly affirm that even when an overwhelmingly compelling public interest renders a community unable to afford to treat a right as protected by a property rule, the public must at least respect that right to the extent of honoring it with a liability rule.

As a rule, however, the protection afforded by liability rules is not good enough. Here is the problem. Suppose someone steals your car, then returns it undamaged with the gas tank full. Lack of damages notwithstanding, your rights were violated in a serious way. For property rights to do what they are supposed to do, the right to exclude needs to have "teeth." It needs to be protected by property rules, not liability rules, and the penalty for *intentional* trespass must be real, not nominal. Thus, in 1997, Judge Bablitch of the Supreme Court of Wisconsin, in the case of *Jacque v. Steenberg Homes*, reaffirmed the role of property rules in a functional system of property. In the case, Steenberg intentionally crossed Jacque's property to deliver a motor home to Jacque's neighbor, despite Jacque having denied Steenberg's request for permission. A lower court had awarded Jacque one dollar in compensatory damages (because there had been no significant damage) and denied punitive damages on the ground that merely nominal damages could not sustain substantial punitive damages. Judge Bablitch ruled that this would have been the correct ruling in a case of *accidental* trespass, but in a case of *intentional* trespass, punitive damage awards may bear the entire burden of deterrence, so the court must have the latitude to make punitive damages substantial enough to deter.[21]

8. Conclusion

People are driven to theorize about rights when they perceive a need to get clearer about what people ought to be able to expect from each other, indeed ought to be able to demand as a matter of right, especially from fellow citizens and from those who govern. The concept of a moral right developed over centuries, and may continue to evolve. Wesley Hohfeld advanced our understanding of how the term 'rights' came to be used in logically related but functionally distinct ways as required by new legal contexts. Calabresi and Melamed advanced our understanding of alternative remedies for different ways of violating rights. Ronald Dworkin advanced our understanding of an essential difference between taking interests seriously and taking rights seriously: interests weigh, but rights trump.

Philippa Foot once said, "When anthropologists or sociologists look at contemporary moral philosophy they must be struck by a fact about it which is indeed remarkable: that morality is not treated as an essentially social phenomenon."[22] It could be, though. Theorizing about morality and about what we ought to be able to expect from each other as a matter of right might take its cue less from what we now call moral philosophy and more from what we once called political economy. In turn, political economy might take its cue from the economic analysis of law, an area of research that considers how evolving legal precedent may have shaped rules of engagement that help people to know what to expect from each other and get comfortable with what they are learning to expect from each other.

Among our habitable ideals—principles we can live with—are those by which courts and citizens avoid and resolve conflict. Philosophers have been taught to presume justice is more fundamental than conflict resolution. Yet philosophy done well is neither as autonomous as that nor as unworldly. Stuart Hampshire goes so far as to say "fairness in procedures for resolving conflicts is the fundamental kind of fairness" (2001, 4). Stephen Darwall says modern philosophy's break with scholasticism was rooted in a secular insight that harmony of interests is not guaranteed (1993, 416). Rather, such harmony as we observe is an achievement.

Accordingly, the relationship between rights and conflict resolution is not a one-way relation of more to less fundamental. Instead, our thinking about rightful claims is a dance of mutual specification anchored to evolving facts about what is helping people manage traffic, settle disputes, feel at peace with settlements made, develop a liberating mutual understanding of what it means to mind their own business, and work toward making sure neighbors are better off with them than without. When a rule of law is working, it is helping people resolve and avoid conflict, and ultimately learn to trust each other enough and adjust their expectations enough to constitute themselves as a kingdom of ends.

The work of judges and courts can *yield* principles precisely by not *starting* with principles. Judges can instead start at the start by asking litigants what the fight is about. Ideally, cases culminate in verdicts with which everyone is comfortable, diverse though people may be. Cases close when people stop fighting. Adjudicated resolutions send litigants away with new information, as new precedents are set that shape what people going forward will expect from each other. That goal—knowing what to expect—is at the heart of what it takes for social animals to be able to navigate in communities.

That is what Hume and Smith were studying at a time when political economy and economic analysis of law were still within the purview of philosophy.[23] We can talk about all of this without being drawn into 20th-century debates about whether rights-claims can be rendered compatible with 20th-century utilitarian theories about what to do.[24] And our claims would resemble scientific claims so long as we acknowledge that we are observing correlations rather than deducing necessary and sufficient conditions. As with any other process of scientific observation, some of what we infer from observed correlation (whether about causality or about morality) is likely to need revising some day in the light of further observation. This is one direction that I expect philosophical theorizing about rights to take going forward.

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This chapter borrows generally from Schmidtz (2023). The first section borrows heavily from Schmidtz and Brennan (2010). I have learned a great deal about the general subject from Joel Feinberg and Allen Buchanan.

Notes

1. Chapter 2 of *Genealogy of Morals* (Nietzsche 1994).
2. James Nickel's (2003) *Stanford Encyclopedia of Philosophy* entry on human rights offers a definitive general overview on the history of academic theorizing on the topic.
3. But the following section takes up Fred Miller's analysis of Aristotle's *Politics*. Tuck did not have the benefit of Miller's analysis when he was writing his book on rights; still, Tuck's analysis is illuminating as far as it goes.

4. Thurston 1912, 677.
5. Part of the background for this development: In the aftermath of 1066, William the Conqueror had no choice but to be an absentee ruler, preoccupied as his army was with defending Normandy. Thus, William allowed English law to remain the locally originated assortment of overlapping and evolving jurisdictions that it was. He respected local English custom and recognized local government by autonomous "shires" so that he could maintain control with a skeleton force of Norman knights.
6. De Bracton 1915.
7. Levy 2007, 112.
8. Holt 1992, 10.
9. Lockwood 1997.
10. Around the same time, Thomas Hobbes was planting comparably influential seeds of what would become Western liberalism by daring to ask a then-scandalous question about why citizens have any duty to obey kings (scandalous because it dared to presume that kings did not own their subjects).
11. That is how we might interpret, say, usufructuary rights, collective ownership of the means of production, primogeniture, strict liability, limited liability, fishing rights on the open sea, and all the real questions of nitty-gritty institutional detail that philosophy no longer equips scholars to discuss. Note that rights imply correlative duties, but we learn as we go what that means in practice. There is no correlative duty to roll over and die for the sake of respecting rights. Instead, correlative duties are social facts, more or less, about what it takes to be a good neighbor—what kind of respect we need to show our neighbors in order for our neighbors to be able to trust us, and as a result be better off with us than without us.
12. Although this discussion is about moral rights in general, the common law of property arguably is our richest historical reservoir of conflict and conflict resolution from which general conceptions of what we need to be able to expect from each other evolved. In this realm, disagreements are not interminable. A court is tasked with settling questions that come before the court—*settling* in the sense of sending litigants away with mutual understandings that everyone can live with, and settling what people will expect (and will thus have reason to expect) from each other going forward. Verdicts are not idle speculation; verdicts have consequences. There are real stakes, and real stakes impose a discipline on courts that are absent in scholarly debate. If the court does not settle the conflict, then the litigants end up back in court, or worse.
13. Even what may seem like a perfect definition can turn out to be an awkward way of trying to illuminate questions that we have not yet asked. The game of defining terms has always been like that; it has value only insofar as we learn its limitations and stop asking it to do what cannot be done.
14. See Berlin (1997) for an influential discussion of a contrast between negative and positive liberty.
15. Sumner (1987) argues (unsuccessfully in the opinion of Copp 1989) that moral rights can be grounded in 20th-century-style utilitarianism as a theory about what to do. I have some sympathy for the observation-based elements of Sumner's approach but no sympathy for utilitarianism per se, or for that matter, any theory that treats ethics as first and foremost a question of what to do.
16. Of course, literal traffic management is only a metaphor for rules that manage commercial traffic. It is a good metaphor, but not good enough to illustrate that commercial traffic management has a point beyond merely helping us stay out of each other's way as we pursue separate destinations. *Literal* traffic management's purpose is to minimize conflict. *Commercial* traffic management's additional purpose is to position us to be of service to others. See also Schmidtz (2007, 2016a, 2016b).
17. As David Copp observes in a personal communication, my being the owner of my garage does not imply that I can do whatever I want in my garage. Do I have a right to store top secret government files in my garage? What settles that question is not whether I am the rightful owner of my garage so much as what the law requires of me when it comes to handling top secret government files. But what the law requires changes as courts or legislatures respond to evolving information about risks associated with storing particular things in my garage.

18. As David Copp notes in comments on an earlier draft, our beliefs about the rights of women have changed. Similarly, it is hard to understand how there was ever a time when anyone could think slavery was defensible. The problem was not as simple as sheer callousness or sheer self-interest, however, because we also have a history of not seeing what is wrong with smoking, or with drunk driving, or with not wearing seat belts, and a host of maxims where self-interest and morality are in perfect alignment. Evidently, something other than self-interest (fear of being mocked by peers, for example) has a history of blinding us to how we ought to treat ourselves, not only how we ought to treat others.

    That said, we still need a way of speaking about times before a given right is recognized. Before women had a right to have a bank account in their own name, do we say women *should have had* such a right? Or do we say women *always did have* such a right, but we failed to see it? One way of speaking treats the existence of rights as an observable emerging social fact and separates observation from questions about which legal rights command moral respect, or which would command our respect if they were to emerge. The difference matters, but the pros and cons of different ways of speaking depend on the context.
19. Being on a par does not entail equality; it invites a *presumption*. Saying two holes on a golf course are each par 4 is not to say they are equal; it says a skilled golfer should need no more than four stokes to finish either hole.
20. Doctrines of necessity acknowledge the possibility of being tipped by circumstances into a state of nature. A cabin in the forest may be our property as a matter of right, but that does not rule out a lost hiker breaking into our cabin if that is what it takes for a lost hiker to save her life. However, once a hiker is safe, she is not at liberty to say, "I am safe now. I didn't violate rights. So it's all good." On the contrary, she did violate rights. The violation was permissible in a sense, but not in the sense that the emergency *voided* the right. Instead, the emergency affects the remedy called for by the violation. It changes what counts as making things right. Establishing that the situation was an emergency thus helps establish that there was no criminal intent, and absent mens rea, the trespass cannot be treated as a crime but must instead be treated as a tort. The cabin's proper owner stands invited to submit a bill for damages, with the hiker being responsible for paying damages and thereby making the victim whole.
21. Again, there are cases in which key questions are terminological, yet not to be settled by analytic philosophy. Had Steenberg crossed Jacque's land to save his life, Bablitch might have called that unintentional. The question was not how "unintentional" is used in other contexts, but whether it was useful in that case for marking why a community needs to give a break to lost hikers but not to people who willfully disrespect neighbors.
22. Foot 1978, 189.
23. In a way, that is what Buchanan (2013) does today, deeming it a mistake to evaluate international rights law by reference to whatever theory of moral human rights it is designed to put into practice. To Buchanan, international rights law's relationship to moral rights is not as unidirectional as that.
24. Hume knew that not every instance of respecting a social practice has utility. That did not trouble him in the way it has troubled 20th-century utilitarians. Hume simply noted that we see justice as a virtue not because we find particular cases of doing justice useful/agreeable but because we find it useful/agreeable to be able to count on having a certain status regardless of whether such recognition is useful/agreeable in a given case. (Think of laws regarding whether illegally obtained evidence is admissible in court.)

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