

*Rights and Reason: An Introduction to the Philosophy of Rights*

By Jonathan Gorman

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Respect for human rights, as Jonathan Gorman says in the opening chapter of this book, expresses what might be called the moral fundamentalism of Western civilization. Widening respect for human rights is commonly thought to mark objective moral progress in human affairs. Nevertheless, the ontological status of human rights remains a subject of great controversy. For at least as long as some have proclaimed and defended their existence, others have dismissed all talk of human rights as so much bunkum. Jeremy Bentham's infamous dig at the French in *Anarchical Fantasies* that 'Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense – nonsense upon stilts' was not, of course directed against all rights, but only against those rights that were not the 'child[ren] of laws'. Only from 'real laws', he said – that is, positive laws, not natural laws – 'come real rights'. Alasdair MacIntyre has more recently argued in *After Virtue* (Notre Dame, 1981) that belief in 'natural or human rights', as opposed to rights conferred by positive

laws or customs, 'is one with belief in witches and in unicorns'. Although Gorman begins by asking the Richard Rorty-inspired question 'Must human rights face the same philosophical risks as Truth and God?' (p. x), he is not one of the unbelievers. He wants to defend the existence of human rights. He offers a heterodox account of the origin and nature of these rights, however. This account is the fruit of an investigation of the history of moral philosophy and its relationship with human reason. It is this investigation that forms the bulk of the book.

Gorman's strategy is to isolate a set of properties that are normally taken to be constitutive of human rights, subject them to a critique, and ultimately reject them. He begins with the properties of independence (from us), eternity and consistency, commonly believed to be essential to human rights. As one might imagine, Plato is the culprit here. Although there are no 'rights' in Plato, any modern conception of the ethical as an independent, unchanging and consistent reality ultimately derives from him. It is reason that provides us with access to this independent ethical reality. Reason, then, is the source of ethical knowledge, and this knowledge is essentially motivating.

Hobbes and Locke did not refer to the ethical in terms of an independently existing realm. Nevertheless, they were both ethical rationalists like Plato. They both believed that it was reason that provided us with access to external and unchanging ethical standards (laws of nature, in Hobbes's case, and natural rights, in Locke's case). This kind of ethical rationalism was, however, torpedoed by Hume. Holding that 'reason alone can never be a motive to any action of the will' (quoted, p. 67), and that ethics is essentially concerned with motives for action, Hume argued that external standards of reason cannot motivate us, and that reason cannot provide us with the content of any standards independent of desires and experience.

It was Kant, according to Gorman, who salvaged ethical rationalism. Reason does not provide us with access to external unchanging ethical standards. Rather, reason constructs these very standards, and reason itself motivates us. This entails that the first property of ultimate ethical values in general, and human rights in particular, namely independence, must be abandoned. It is replaced by the property of universality, with the result that 'human rights ... may then be humanity-dependent, unchanging and universal' (p. 122). Kant's own account of history and human nature, however, is interpreted by Gorman as having the implication that reason changes over time, which 'implies that morality changes over time' (p. 121). The result is that the second property, namely eternity, may also be abandoned. Ultimate ethical values in general, and human rights in particular, may change over time, as a result of changes in human nature. It is a consequence of this that universality may be abandoned also. Gorman's final target is consistency, 'a dogma ... expressed in the claim that human rights – or indeed, rights more generally – must be *compossible*' (p. 123; italics in original), that is, that human rights must be consistent with each other. Here Gorman turns to Isaiah Berlin's pluralism of conflicting ethical values – for example, freedom versus equality – and Ronald Dworkin's pluralism of conflicting ethical principles – for example, contracts must be enforced versus no one is permitted to profit from his own wrongdoing – to argue for the possibility that 'moral reality is inherently and essentially inconsistent' (p. 127) and for 'pluralism of moral truth' (p. 129). He rejects the requirement that human rights must be compossible. Thus the final property of ultimate ethical values in general, and human rights in particular, namely consistency, may also be abandoned. The conclusion he reaches is that human rights are our own products and that 'human rights have no independent metaphysical existence, are not plausibly universal, may with reason change over time, and may be intelligibly inconsistent with each other' (p. 183).

Between the chapters on Kant and on Berlin and Dworkin there are two chapters on Wesley Hohfeld. Hohfeld's analysis of the logic of rights (and of duties, privileges, powers and immunities) is both examined on its own level and shown to be largely a description of a rule-governed social practice, namely the law in modern Western states. In order for Hohfeld's analysis to apply to human rights, it would have to be the case that there is a universal social conventional practice to be described; otherwise, it is inapplicable. Of course, for some, the absence of any such conventional practice entails that there can be no human rights. As Gorman says, following L. W. Sumner,

The dispute between the natural law theorists and Bentham ... is over whether there can be *non-conventional* rule systems that can create rights. Bentham says no ... By contrast, the natural law theorists like Locke are committed to saying yes ... Bentham's point would be that ... we cannot explain how such rules can give moral reasons for action in the absence of a social convention. There would have to be a social convention requiring, in effect, that any such independent natural rules should be followed.

(p. 103; italics in original)

Finally, Gorman argues that the 'history of moral thought discloses two broad foundations for further understanding: rights as based on the *objective* good for a person, and rights as based on a person's *desires* or *choices*' (p. 165; italics in original). These two approaches lie behind the two main competing theories of rights: the interest theory of rights and the will theory of rights. Gorman appears to favour the interest theory of rights, insofar as it permits a wider range of criteria for determining what rights people have, and can extend rights to children, foetuses, animals and corporations, among others. According to the interest theory, however, it may be that some rights may not be waived, and hence, the theory may be paternalistic about rights. Gorman's conclusion is that a pluralism of theories of rights is possible, and reason cannot decide between them. With a consequent pluralism of inconsistent rights, in cases of conflict of rights there may only be 'localized procedures for resolving jointly unperformable conflicting actions' (p. 192).

I have several problems with this book. The first concerns the interpretation of individual moral philosophers in the early chapters. Quite often Gorman makes claims which most contemporary historians of moral and political philosophy would reject. At various times in the chapter on Hobbes, for example, Gorman refers to 'The covenant with the sovereign – the social contract' (p. 49). However, for Hobbes the social contract is between (equal) individuals, not between individuals and a sovereign. Individuals determine that the creation of a sovereign is to their advantage. They agree with one another to confer absolute authority on someone, so as to create a sovereign, and they confer that absolute authority upon one, or many, or all of their number. The sovereign is thus created by the social contract, and is not a party to the contract. Gorman also argues that Hobbes is a pure ethical conventionalist, and that for Hobbes 'All moral considerations, then, are a creation within society, and have no "natural" existence' (p. 44). But Hobbes does allow for the possibility of obligation even in the state of nature. If in the state of nature I am captured, but manage to persuade my captor to let me go in return for a ransom that I covenant to pay, then I am obligated to pay that ransom to my captor. I have no grounds to fear non-performance, since my captor, by releasing me, has fulfilled his part of the covenant. Hobbes is not, then, a pure ethical conventionalist. Finally, Gorman takes Hobbes to task for his 'so-called Right of Nature', which is 'not a "right" in an ordinary sense that we would accept today, for it imposes no obligations on others'

(p. 48). But this is merely to say that the Right of Nature is not a claim-right. It is, however, a permission-right. Each individual in the state of nature is permitted to (has no duty not to) do what is required for his or her self-preservation. This permission is a genuine moral permission; an individual is indeed justified in, for example, killing another and taking her food, if this is required for self-preservation.

In the discussion of Kant there are some equally contestable claims. Gorman argues that, on Kant's account, 'If I act wrongly, then I do not act rationally. If I do not act rationally, then I do not have a rational will. If I do not have a rational will then I do not have a good will. If I do not have a good will then I have no essential and unconditional value, since *only* a good will is unconditionally good. I then deserve no respect as an end. I may be acceptably treated as a means' (p. 116; italics in original). However, the fact that a person acts irrationally on any particular occasion does not entail that the person lacks a rational will. Indeed, it would not be possible to act irrationally unless one had a rational will. Animals, on Kant's account, are a-rational beings; they never act irrationally, but only a-rationally. Furthermore, not having a good will – i.e. a will that *always* acts only on that maxim that can be willed as a universal law – does not entail that one is not an end to be respected. Human beings are capable of acting morally, that is, are capable of acting on maxims that can at the same time be willed as universal laws. Hence they have dignity, or are ends to be respected.

More generally, it is sometimes hard to see how the positions of the individual moral philosophers discussed can be reinterpreted as positions on rights, without distorting their positions. In the case of Plato, for example, Gorman says that 'Plato did not consider "rights" at all', and "'Justice", on his theory, is the "master moral concept"' (p. 33). However, Gorman soon adds: 'Yet – while not Plato's expression of the position – "rights" may themselves come to be seen as the "master moral concept" in so far as they come to be central in our moral understanding, with "justice", in so far as that is something different, subordinate to them' (p. 34). In Bk. I of the *Republic*, however, which Gorman discusses, the interlocutors conclude that truth telling and paying back what one owes are sometimes just and sometimes unjust. The implication is that there are allowable exceptions to every particular moral rule. Hence, justice transcends any set of particular moral rules, and particular moral rules do not constitute anything essential to justice. Surely the same argument would be made about any set of particular rights. There are allowable exceptions to every particular right, and hence justice transcends any set of particular rights, and particular rights do not constitute anything essential to justice. The proposal to make rights central, and make justice subordinate to them, would amount to a reversal of Plato's position.

A similar worry arises in the case of Kant. Kant is said to provide 'a moral philosophy that gives us the principles governing our duties, and that characterizes the entities to which we owe those duties. Those entities, in virtue of the duties we have to them, have rights against us to the performance of those duties. These duties are universally and equally held, and in consequence the rights that exist in virtue of them are also universally and equally held. All rights are consistent with each other: they are "compossible"' (pp. 81–2). However, Kant divides ethical duties to others into *perfect* and *imperfect* duties. While any particular person may be said to have claim-rights against me to fulfil my perfect duties (she may be said to have a claim-right against me that I not lie to her, for example, since I have a perfect duty to others not to lie), it is not true that any particular person may be said to have claim-rights against me to fulfil my imperfect duties. Although it is an imperfect duty to be beneficent to others (in general), any act of beneficence towards a particular person is meritorious, and not a duty that is owed to that particular person. Hence, a particular

person may not be said to have a claim-right against me that I be beneficent to her. Ethical duties to others, then, cannot be captured in terms of claim-rights. Substituting rights for duties would amount to changing Kant's moral philosophy.

With respect to the main argument of the book, the arguments against the properties of independence, eternality and consistency being constitutive of ultimate ethical values in general, and human rights in particular, rest heavily on the claims that ethics is essentially concerned with motivation, that human nature is changing, and that moral reality may be essentially inconsistent. The first claim amounts to motivational internalism. All moral realists who are motivational externalists, such as G. E. Moore, would reject it. The second claim, which Gorman also says is implied by evolutionary theory, appears to prove too much. Does it follow from the fact of changing human nature that the truths of logic and mathematics are also mutable? If not; then all those ethical rationalists who hold that ethical truths are conceptual truths that are discovered *a priori*, such as Locke and Kant, need not be worried. The third claim appears to be, in the end, misleading. All that is being claimed is that no single value or principle, or compossible set of values and principles, exhausts ethical reality. It is merely the 'claim to universality, of totality, of uniqueness' (p. 134) of any single value or principle, or compossible set, which is being rejected. However, this much would appear to be accepted by all contemporary ethical particularists, such as Jonathan Dancy. What remains uncertain is whether Gorman has an argument for the conclusion that in the case of a particular conflict of rights, there is no right answer to the question of which right takes priority in this particular case, even if it is granted that this right does not always take priority.

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