

24. THE NATURE OF RIGHTS¹

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ABSTRACT. The paper seeks to explain rights by first uncovering their specific place in the moral realm. Accounts of rights as claims or entitlements are criticized for attempting to explain the moral concept of rights in terms that are primarily non-moral. Rights are then described as a form of prescriptive presumption, that is, as requirements on deliberations that yield justifiable expectations of certain types of treatment. Similarities and differences between rights and moral rules or principles are examined to uncover the specific role of rights in moral analysis.

After centuries of discussion and defense, rights still remain suspect moral entities.² More than that, there remains confusion over what rights really are. Contemporary definitions usually center on claims or entitlements. I suspect I am not alone, however, in feeling considerable unease with these accounts. They have the virtue of explaining rights in terms of concepts that are clearer and more sharply delineated, but their clarity seems not to shed sufficient light on the moral concept of rights.

I. CRITICISMS OF THE TWO COMMON VIEWS

Feinberg, among others, links rights to valid claims—he stops short of formally defining rights in terms of claims, arguing that such a strict definition would be relatively uninformative given the strong connection between the two.³ But that connection must be questioned. To be sure, much about rights can be explained through an analysis of claiming, but much is missed also.

Rights are often discussed and invoked in the form of claims, e.g., when one's rights are being violated and one demands proper treatment. Having rights, then, leads persons to make claims, but this is not enough to fully explain rights. Consider the two statements:

1. I have a right to X.
2. I have a valid claim to X.

The second statement, unlike the first, immediately raises a further question:

3. What is the basis of the valid claim?

A likely answer is, my right to X! This is a reasonable response to the query raised by (3)--thus indicating that mention of rights adds something to invoking a valid claim.

An emphasis on claims forges a distinction between the claim itself and the basis of the claim. It is for just this reason that statement (2) led so easily to statement (3). Talk of rights straddles both issues. The right is not just the claim--the invoking of the right--but the grounds for the claim.⁴ It is because I have a right to X that I can make a valid claim to it. Thus, speaking of rights as claims separates what is intimately connected under the notion of rights.

This is not to say that rights are decisive while valid claims are not, but that rights operate at the level of justification while valid claims do not. Whenever the justification for a claim is at issue, something else will be appealed to: a contract, a signed statement, a flag flying in the new world, perhaps even a right. The claim states what is demanded but leaves the role of justification to something else. When the justification for a right is at issue, the discussion centers on features of the right itself: exactly what is the right, how is it developed, is it relevant in this case? In short, the question is, how strong a justification does the right provide? This, of course, is to say that rights (unlike claims) can provide a justification.

Such difficulties can lead to examinations of rights in terms of entitlements. Wasserstrom, for example, speaks of entitlements as protecting things one can make special claims to.⁵ In this sense, the entitlement, the right, is what lies behind the claim. Speaking of rights as entitlements, however, may neatly apply only to certain types of rights. Entitlements usually delineate very specific actions or possessions. I am entitled to pass along this path or to use this particular piece of property. Rights, on the other hand, can be notoriously general--even vague. I can invoke a right to life, and this may mean that people ought not run me down with a car or that others ought to come to my aid if I am bleeding in the street. I can, of course, claim to be entitled to such aid or to careful driving by others, but the entitlement seems to involve a specific application of the general right. The general right is not so much a sum of these specific entitlements as the foundation of them. Because I have a right to life, I am entitled to certain (specific) treatment and can make specific claims.⁶

More importantly, describing rights as entitlements tends to miss the social character of rights. An entitlement is often something I possess to the exclusion of others, independently of their active recognition and observance. Entitlements emphasize what I have or ought to have as opposed to what others must give. The focus is on the thing possessed, not whom it is possessed against. Of course, if I have an entitlement to something, I may be led to make claims against others, but this is a ramification of the entitlement and not a fundamental feature of it.

This account of entitlements should not be controversial. A major reason for shifting to entitlements in explaining rights is to eliminate the reference to others. H.J. McCloskey has argued that rights are essentially to something and not *against* someone, because it is often difficult to determine exactly whom a right is against.⁷ But as Feinberg

notes, the difficulty here may be insufficient to justify describing rights without reference to their social aspect.⁸

To be sure, entitlements often have a social basis: the mechanisms for gaining and maintaining entitlements are social (e.g., monetary and contractual exchanges and legal protection). But once these mechanisms are in place, the resulting entitlements may themselves be something that individuals have independently of others. I am entitled to this car, and that's the end of the discussion. I can use the car, destroy it, or save it, without reference to or cooperation with others. Rights are intrinsically social in a more important sense: I am owed (by right) certain treatment *at the hands of other individuals and society*.⁹ Even a right to property (like the car) must be explained in terms of the way others must treat things that are mine. The right itself, and not just the mechanisms used to generate it, is inextricably connected with the beliefs, actions, and cooperation of others.

The difference between rights and entitlements can be gleaned from the way people use the terms. Rights are invoked in response to threats from others (i.e., presumed interference by others with one's rights). Entitlements are often used simply to describe one's property. Again the right deals essentially with relationships among persons, entitlements with what persons possess. It is the social aspect of rights that is captured in talk of claims: a claim is something I can demand and expect from individuals and the community. But claims were, for different reasons, inadequate to explain rights.

The discussions in this section have focused on difficulties for theories that link rights to either claims or entitlements. The criticisms certainly are not devastating—nor can they be. But though there are similarities here, that is not enough to claim identity. Moral rights remain somewhat different from claims or entitlements. Perhaps an alternative analysis can capture the elusive characteristics of rights.

II. RIGHTS AS PRESUMPTIONS

Though the term 'rights' emerges in a number of realms, philosophical discussions focus on rights as a moral concept. Lawyers know what a legal right is, though they may debate exactly what legal rights exist. Controversies over what rights are emerge in the moral realm: what does it mean to speak of a moral right over and above the specific legal rights granted by legislatures and constitutions? Perhaps because the concept is relatively clear, many philosophical discussions rely directly on legalistic elaborations; Feinberg's account certainly does this. Even the concept of entitlements seems more at home in the legal as opposed to the moral realm. This may be a major reason for the uneasy fit between the moral concept of rights and the concepts of claims and entitlements.

A closer fit is likely to emerge only after rights are placed in their appropriate niche in the moral realm. To do this, I shall briefly explain the general moral category rights fall under and then develop the specific niche occupied by rights. Rights imply that the bearer is owed a certain degree of moral consideration.¹⁰ To be owed moral consideration means that the interests and worth of the being in question must be effectively taken into account when persons are deciding how

to act. In short, beings owed moral consideration have a presumption of a certain kind of treatment. Viewing moral concerns as leading to presumptions of treatment may seem to weaken the significance of morality. On many accounts, presumptions are not the stuff of which moral rights and obligations can be made. But presumptions can be understood in (at least) two ways:

1. Predictive Sense: A presumption of a certain treatment implies that what is expected by the presumption is considered likely, but for any number of (unrestricted) reasons, may not occur.¹¹

2. Prescriptive Sense: A presumption of a certain treatment implies that what is demanded by the presumption is required unless relevant and sufficiently strong reasons can be raised to override it.

The second sense of presumption captures the features of moral considerations and the demands they lead to. In the prescriptive sense, the presumption is not primarily a predication about action but a requirement on deliberations (and the resulting actions). Decisions on actions must be consistent with the treatment prescribed unless good reasons can be raised against such actions. Persons can, in a prescriptive sense, presume that others will not attack them. If someone does attack another, grounds for disapproval, censure, and actions to ward off the attack are present (assuming that no relevant and sufficiently strong reasons--like the threatened party's having attacked first--exist). This is, in general, what common moral obligations express: guides to action that must weigh heavily in deliberations on action, but which can be overridden in special cases. We speak of a general obligation not to kill, but we recognize situations in which killing persons can be permissible, for example, when it is the only way to prevent a hired killer from murdering innocent people. Such presumptions are far from trivial. They can provide significant defense and protection for those things important to morally considerable beings.

If the distinguishing feature of moral rights is to be uncovered, the question is, what makes rights a special variety of prescriptive presumption? A reason for speaking of prescriptive presumptions in the first place is the generality of the concept. It can subsume the various ways of describing moral demands. Rights, obligations, and duties can all be described as prescriptive presumptions, for all express guides to action based on moral considerations. Part of what sets rights apart is that rights express prescriptive presumptions in a different way from rules and principles. Moral action guides can be developed from a number of perspectives. Moral rules and principles emphasize what agents must do; rights focus on what persons can expect from others. Thus, rights are expressed from the point of view of the person who is subject to actions of others. Rules and principles are expressed by and for individuals deliberating on actions.

This distinction in perspective between rights and obligations or duties is hardly novel, but to raise it can yield problems. Wasserstrom cites Benn and Peters' contention that rights explain the same normative relationship as duties,¹² in order to highlight problems with making rights a derivative and, thus, uninteresting concept. But the recognition that rights represent moral action guides that are expressed from a different perspective than duties need not imply that rights are derived from duties. Rather, the emphasis on prescriptive presumptions is de-

signed to show the connections between rights and duties without explicitly deriving either from the other. Both rights and obligations fall under a single moral category; both express moral demands and yield prescriptive guides to action. This categorization accomplishes the goal of placing rights squarely within the moral realm, but it does not make rights derivatives of duties or obligations. Indeed, it remains possible to elaborate rights as a very special type of prescriptive presumption.

Rights are often described as the most important moral commodity in existence.¹³ In other words, the types of reason that will override a presumption of right will be quite limited. One might express this by saying that presumptions of right can only be outweighed by other presumptions of right. This is an extension of Vlastos' point that the reasons for overriding rights must be the same as the reasons for establishing rights.¹⁴ Rights, then, would serve to delineate a sphere of especially important values, those requiring the highest level of protection and respect.¹⁵ Bearers of rights will be worthy of this high degree of respect and will possess the strongest possible presumption of treatment regarding the object of the right.¹⁶ On such a view, the right is nothing more than an especially strong moral action guide, expressed from the point of view of persons as subjects to the actions of others. But rights need be nothing more.

Connecting rights with presumptions makes clear that rights function basically at the level of deliberation. To be sure, rights are often invoked as demands that persons act in a specific way, not simply that they think in a certain way. But the prescriptive sense of presumptions captures the only legitimate explanation of this use of rights: these presumptions must immediately be translated into actions unless special circumstances obtain. And of course, one can determine whether special circumstances obtain only by deliberating.

To invoke a right as a demand for action implies that deliberations cannot uncover any special circumstances in the case at hand. Thus, to decide on one's actions in a morally appropriate manner, one must examine any rights that might be affected by the actions. This is exactly what is demanded by a prescriptive presumption. Persons must take account of those demands unless good and sufficient reasons for overriding the presumption can be uncovered.

Many other accounts of rights do place primary emphasis on action: having a right to life means that others must not act in ways that will lead to one's death. But such a perspective raises notorious difficulties about whether rights are absolute or *prima facie*. To claim that a right is absolute and must always be upheld in action leads to obvious difficulties concerning legitimate exceptions. Even the right to life can be justifiably overridden in (at least) some cases of self-defense. A possible way around this trap is to include allowable exceptions in the statement of the right. Besides being a Herculean task, such a strategy yields the unsavory conclusion that the right to life does not exist in some cases. When, for example, one's life threatens another, one does not have a right to life. As many have noted, such results seem not to capture what we mean by rights. For one thing, a right is not a complicated set of conditions and exceptions. More importantly, a right is, in some way, always with the bearer. I have my rights, even if others can sometimes justifiably act contrary to them.

Because of such difficulties, many philosophers have described rights as *prima facie*, not absolute. All things being equal, others ought not kill me, but there can be situations in which relevant and strong reasons can justify actions that would lead to my death. Discussions of *prima facie* rights move toward an account of rights as influences on deliberations without giving up the description of rights as demands for action. A *prima facie* right in the sense described above is nothing more than a presumption of a certain type of treatment. It is a demand that a specified treatment enter into deliberations on action in a significant way; if there are no relevant and sufficiently strong reasons against it, actions in accordance with the right must follow.

Once rights are analyzed in terms of prescriptive presumptions, however, there is no need to speak of *prima facie* rights. The sense in which rights are absolute can be made clear. As the strongest possible presumptions of a certain type of treatment, rights need no exceptions. When a right is at issue, one must always take account of the presumption involved. If sufficient counter-reasons are present, actions inconsistent with the treatment prescribed by the right may follow. But the right still exists and remains absolute; a presumption does not disappear even when it is not acted on. It is for this reason that even justified actions that go against the presumptions associated with rights generally yield unfortunate and unhappy situations. One is legitimately upset when one must kill an attacker in order to save oneself.

It may be argued that shifting rights from a demand for action to a requirement on deliberation simply changes the location of the *prima facie* aspect of rights. With respect to the effect of rights on actions, this claim is true. Prescriptive presumptions do not absolutely require that specific actions be performed any more than *prima facie* rights do. But the view that rights operate basically as an influence on deliberations brings out a further feature of rights that is clouded by the emphasis on *prima facie* rights. Rights are absolute in the sense that they must be considered in decision making. This clearly delineates the way that rights are always with the bearer. The fact that actions inconsistent with the demands associated with rights may sometimes be justifiable does not affect the existence, force, or nature of rights.

Considering rights as prescriptive presumptions, which are (1) absolute in the realm of deliberation but (2) do not automatically determine action, appropriately limits the role of rights in moral analysis. It is often popular to expect conceptions of rights to be helpful in settling difficult moral problems--specifically, moral problems that arise from clashes of rights. Thus, there have been numerous calls for rankings of rights.¹⁷ Indeed, Nickel and Martin speak of the need to describe rights as *prima facie* until a suitable ranking is developed.¹⁸ Given the notorious difficulties of developing rankings of rights, it may be quite some time before we have a complete account of rights in the sense sought by Nickel and Martin.

Calls for rankings seem, however, to be modern fixations. There is very little discussion in the works of early theorists on rights (e.g., Locke and Rousseau) concerning cases in which different rights support conflicting actions. These issues were not relevant. The reason for invoking rights was to emphasize that all human beings should be brought into the moral community as full members. Again, this role for rights is captured in the conception of rights as prescriptive presumptions. The

point of such an account is that bearers of rights must have the interests protected by right considered seriously when agents are deliberating on how to act. This does not imply that agents can never act contrary to rights. One may find situations in which one must decide among a number of conflicting rights. Here, one faces a difficult moral problem. The problem arises as a result of rights performing their role in moral analysis: such conflicts emerge after the bearers of the rights in conflict have had their interests brought into moral discourse. This is, I think, what Locke and Rousseau had in mind.

It is not an accident that rights theories arose as Europe was advancing out of a feudal system in which many human beings were treated as less than full members of the moral community. Locke was ultimately concerned with guaranteeing that individuals be considered as beings who could control their lives and who were not subject to the whims of monarchs or religious authorities. Rousseau carried on the task, arguing also against economic oppression of human beings. Such goals in no way imply that a general theory of rights always determine appropriate action.

Rights can *define* specific moral problems, but nothing in the nature of rights will provide an easy solution to such problems. The only way to settle these issues will be to examine the specific features of each case to see which value is most important in the particular context. Consider the case of suicide. One can state the problem in terms of whether the right to life is stronger than the right to choose, but the problem will not be resolved until one is clear on the nature of the specific dispute. One's judgment may be quite different depending on whether the case concerns voluntary euthanasia due to a debilitating terminal illness or a young teenager depressed over poor grades. Once we reach a conclusion on these separate cases, we are inclined to say that we have decided the right to life (or choice) is stronger. But in reaching such a conclusion, we dealt not with the nature of the rights involved but with the special features of each case.

In short, it is unnecessary to expect a theory of rights to settle difficult moral problems. It may be wiser to limit the role of rights to that implied by early theorists and by the conception of rights as prescriptive presumptions. Such a limitation of the role of rights in no way implies that rights are ineffective. For one thing, given the special strength of rights, they will still determine actions when there is no clash among rights. As noted at the outset, the presumptions associated with rights must be followed unless relevant and sufficient counter reasons are present. And such reasons can reasonably be limited to demands associated with other presumptions of rights. When clashes do occur, rights will succeed in highlighting difficult moral issues, those that require serious thought. One need not ask rights to do any more.

The ultimate criticism of descriptions of rights as claims or entitlements is that they mask the crucial sense of rights as expressions of strong moral action guides. Describing rights as a form of prescriptive presumptions captures just that fact. Since such presumptions are expressions of moral action guides, this account of rights clearly captures their social aspect. One can expect that others will deliberate and act in certain ways. Thus, while prescriptive presumptions can certainly lead to claims, as expressions of moral obligations, they also provide a basis for claims. In ordinary situations, to cite a relevant moral action guide

is sufficient reason for action. Prescriptive presumptions, like rights, straddle the distinction between claims and the basis for claims.

III. CONCLUSION

Attempts to link rights to claims or entitlements succeed in demystifying rights in a sense. After years of debate over whether rights had some special ontological status, contemporary discussions have sought to explain rights in 'ordinary' terms. But though this strategy accomplishes de-mystification with respect to the ontological question, it enhances mystification in an alternative sense. Neither the concept of claims nor that of entitlements seems to capture fully the moral concept of rights. Perhaps it is time to take rights at face value, to accept them simply as one of many ways to express moral action guides. In other words, one must recognize rights as prescriptive presumptions that are distinguished from other types by their special strength.

END NOTES

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² R.G. Frey, for example, suggests that because of difficulties over the nature and content of rights, we ought to give up such claims. See "The Case against Animals", in *Interests and Rights: The Case Against Animals* (N.Y.: Oxford University Press, 1980).

³ See Joel Feinberg, "The Nature and Value of Rights", in *Rights, Justice, and the Bounds of Liberty* (Princeton, N.J.: Princeton University Press, 1980), 149.

⁴ I am not saying that the concept of a claim is simple and unambiguous. As Professor Lomasky noted (in comments to the APA version of this paper), talk of claims can refer either to that which is claimed (the content of the claim) or the act of claiming (the demand for what is claimed). On the surface, neither of these senses deals with justification. Lomasky stated, however, that acts of claiming have their basis in that which is claimed. This is true in a sense; any justification for a claim will have its foundations in the thing claimed. But this does not imply that the thing claimed provides the justification. Something else must be appealed to to provide that.

⁵ See Richard Wasserstrom, "Rights, Human Rights, and Racial Discrimination", reprinted in *Human Rights*, ed. A.I. Melden (Belmont, California: Wadsworth Publishing Company, 1970), 98.

⁶ To be sure, people often speak of very specific rights (like the right to periodic vacations with pay, as enumerated in the Universal Declaration of Rights), but not all, or the most important, discussions of rights occur at this level.

⁷ See H.J. McCloskey, "Rights", *Philosophical Quarterly*, Vol. 15 (1965), 118f.

⁸ See Feinberg, 154-55.

⁹ I do not mean to imply that rights always involve positive actions by others. I speak of actions broadly here, to include forbearances as well as accomplishments.

¹⁰ I speak of *moral* consideration because of the focus of this paper. Strictly speaking, one might describe rights as providing the bearer with a degree of consideration, moral, legal, or otherwise, depending on the context in which rights arise.

¹¹ Since presumptions in this sense are no more than predictions that a certain type of treatment will take place, little moral significance may be attached to whatever action does in fact occur. One may, for example, presume that a casual acquaintance will give one a birthday present, without the implication that the acquaintance is in any way obligated to do so--and, thus, without grounds for censure if, for whatever reason, a present is not forthcoming.

¹² S.J. Benn and F.S. Peters, *Social Principles and the Democratic State*, 89; cited in Wasserstrom, 98.

¹³ Using claim-language, Wasserstrom describes rights as "the strongest kind of claim that there is." (Wasserstrom, 99). Such a view is echoed by many writers. Bertram Bandman, for example, notes, "rights are among the strongest grounds for other people's duties." ("Are There Human Rights?", *The Journal of Value Inquiry*, Vol. 12, no. 3 (Autumn 1978), 217.)

¹⁴ See Gregory Vlastos, "Justice and Equality", reprinted in *Human Rights*, ed., A.I. Melden (Belmont, CA: Wadsworth Publishing Company, 1970).

¹⁵ These are, in essence, the points Wasserstrom describes as marking rights as distinctive moral commodities. See Wasserstrom, 98-99.

¹⁶ Such a position for rights seems to be responsible for the popularity of making claims to rights. If having a right is to be owed the strongest possible presumption of a certain kind of treatment, to make a claim to right represents the greatest possible demand on others. Thus, minorities and women have demanded not just moral consideration or respect, but moral (and legal) rights.

¹⁷ Richards argues for the importance of achieving "the desideratum of a general theory of rights which explicates the complex ways in which rights are invoked and weighed." (David A.J. Richards, "Rights and Autonomy", *Ethics*, Vol. 92 (October 1981), 20.)

¹⁸ See Rex Martin and James W. Nickel, "Recent Work on the Concept of Rights", *American Philosophical Quarterly*, Vol. 17, no. 3 (July 1980), 174-75.