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'Operative' natural rights

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ABSTRACT There is general disagreement today regarding the philosophical basis of human rights. In order to help give human rights a philosophical basis, this article examines the debate between Joel Feinberg and Rex Martin. Accepting Feinberg's work characterising natural rights as rights derived from correct moral principles and identified through the use of reason, as well as Martin's work arguing that valid claims must be recognised in order to function as effective human rights, this article proposes that unrecognised natural rights are 'inoperative' but—contrary to Martin's theory—still existent natural rights, and that recognised natural rights are 'operative' but—contrary to Feinberg's theory—not inalienable natural rights because recognition can be withdrawn. This article thus contains a normative element insofar as it reveals an onus on each person to recognise the rights of others.

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Introduction

There is general disagreement today about the philosophical basis of human rights. The disagreement has its origin in the post-Enlightenment critiques of natural rights. One of the most forceful and prominent contributions to the critique was made by Jeremy Bentham, who ridiculed the idea that rights exist in a transcendental system of laws, dubbing natural rights ‘nonsense on stilts’. Bentham’s and similar arguments largely invalidated the quasi-religious basis on which the concept of natural rights had been built during the Enlightenment, so by the beginning of the twentieth century, very few intellectuals took the concept of natural rights seriously. It was generally believed, as Bentham had argued, that the sole basis of rights was the law or other forms of social recognition. However, the genocide committed by the Nazis during World War II, which was in accordance with the laws they had introduced in Germany after coming to power, made it impossible to accept that the sole basis of rights is the law or other forms of social recognition. Therefore, at the Nuremberg trials, a type of moral law was applied (Perelman, 1980, p. 47). The United Nations was subsequently tasked with introducing a declaration of rights that would apply to all nations. Yet a return to Enlightenment theories of natural rights was unacceptable. The term ‘human right’ was introduced to denote that the rights in question are universal and inalienable, but not necessarily based upon religion. The trouble is that the concept of human rights lacks a philosophical basis. As a result of this indeterminacy, people have been debating the basis of such rights ever since the *Universal Declaration of Human Rights* was introduced in 1948.

One relatively recent debate revolving around Bentham’s critique of natural rights has taken place between Joel Feinberg and Rex Martin. Feinberg has argued that valid human rights are natural rights understood as inalienable rights derived from correct moral principles. In contrast, Martin, in line with Bentham’s thinking, has argued that human rights exist only as long as they are socially recognised.

Through an examination of Feinberg’s and Martin’s theories regarding the basis of human rights, this article proposes an understanding of natural rights that draws on both as follows: When a right derived from a correct moral principle is not socially recognised, contrary to Martin’s theory it still exists, but contrary to Feinberg’s theory it exists only in an ‘inoperative’ and thus alienated state because Martin is correct that it no longer functions or has any effect. Therefore, the concept of ‘operative’ natural rights provides the philosophical basis of recognised human rights derived from correct moral principles, and the concept of ‘inoperative’—but still existent—natural rights provides the philosophical basis of unrecognised human rights derived from correct moral principles.

The debate between Feinberg and Martin

In his article ‘In Defence of Moral Rights’, Joel Feinberg (1992, p. 149) points out that it is possible to say a right is wrongfully withheld from people by their legislators and constitution makers. That was the case at the Nuremberg trials, for example. Therefore, Feinberg (1992, p. 149) argues that the existence of such a right is not believed to depend in any way on its recognition in the society in question, but instead is believed to have an independent source that can establish it even when it is not generally valued or even wanted by the society. It follows that Feinberg (1973, p. 75) views such rights as ‘property, things we own, and from which we may not even temporarily be dispossessed’, adding that even their rightful infringement is not the same as having them taken away and then returned. Feinberg (1992, p. 152) calls such rights ‘natural’ or ‘moral’ rights, which he defines as rights that are

established by ‘objective and universal principles of morality’ and that exist independently of social practice.

Note that Feinberg uses the terms ‘natural right’ and ‘moral right’ interchangeably. However, he gives preference to the latter because—although natural rights are generally understood as ‘part of the nature of things to be discovered by human reason’, as opposed to conventional rights, which are products of human design—sometimes natural rights are understood as ‘conferred on human beings as parts of their original constitutions, like their biological organs, bones, and muscles’ (Feinberg, 1992, pp. 153–154). To avoid being misinterpreted as intending the latter sense of ‘natural right’, Feinberg prefers the term ‘moral right’. Furthermore, since he rejects that natural rights are conferred on us like biological functions, Feinberg (1992, p. 164) shares Bentham’s squeamishness regarding the notion of a ghostly realm of legal-like rules. However, as shown above, he does believe natural rights are ‘part of the nature of things to be discovered by human reason’.

Regarding the question of identifying moral or natural rights, Feinberg (1992, pp. 165–166) explains that a moral right is a right ‘validated as such by correct moral principles’ or more specifically a right that ‘follows from true premises, at least one of which is a moral principle’. However, Feinberg (1992, p. 166) states that he will not attempt to identify correct moral principles or explain where they come from. Such lack of content leads James Griffin (2008, p. 20) to characterise Feinberg’s theory as largely ‘structural’.

Rex Martin is a critic of Feinberg and a prominent proponent of the theory that rights are dependent on social recognition, be it through laws or conventional morality. In his book *A System of Rights*, Martin (1997, p. 2, p. 24, p. 27) argues that rights ‘are socially established ways of acting or ways of being treated’ requiring ‘an institutional setting’, and that social recognition is therefore a constituent element of rights. Martin (1997, p. 54) also identifies Feinberg as having offered ‘the most extensively elaborated and the most philosophically subtle’ alternative theory to his account of rights. According to Martin (1997, p. 51, p. 56), Feinberg argues that rights are valid claims. That is not entirely true since in response to a criticism made by Martin, Feinberg (1980, p. xi) clarified that he had intended in a previous essay to give an account of only claim-rights as valid claims, not of all rights as valid claims, conceding that a full theory of rights would also deal with ‘powers’ and ‘immunities’. Apparently unaware of this clarification, Martin (1997, pp. 55–58) goes on to argue that the validity of a claim never provides the grounds for a legal right; only recognition does. So Martin does disagree even with Feinberg’s qualified statement that all claim-rights are valid claims. To support his argument, Martin (1997, pp. 65–68) states that if a court misinterprets the law and decides that a right does not exist, and then another court overturns that decision, the right is not in effect until the second court’s ruling. Therefore, Martin (1997, pp. 71–72) concludes that recognition is a characteristic feature of legal rights, and that the theory of rights as valid claims, by leaving out an important feature of legal rights, is weakened.

However, Martin (1997, p. 72) still thinks the question remains whether human rights can be explained by the theory. He raises three points ‘in challenge to the idea that human rights are essentially morally valid claims’:

- (1) a valid claim can be normatively sound as regards its justification, but without widespread acknowledgement or affirmation, it won’t function as an effective right;
- (2) what the right requires must be conformed to by second parties, the duty holders—otherwise it’ll be at best a merely nominal right;
- (3) it is desirable for “rights” to have the same sense when we talk either about human rights or about legal rights. (Martin, 1997, p. 73)

It is likely Feinberg would agree that if a 'normatively sound' or morally valid claim is not widely recognised, it is not an effective right, since that is merely a statement of fact. He would also likely agree that if a recognised right is not respected, it is simply nominal, another merely factual statement. However, the assertion that it is undesirable for legal and human rights to have different senses is an evaluative statement and must therefore be demonstrated. The explanation Martin (1997, p. 73, pp. 84–85) offers is that it would 'diminish appreciably' the 'attraction' of the theory that 'valid claims' give 'a univocal sense of rights'. Recall that Feinberg qualified his theory by stating he did not believe valid claims give a univocal sense of rights. However, if one agrees with Martin that a univocal sense of rights is desirable, there still remains the fact that Martin does not demonstrate why it is desirable for legal rights to be given primacy over human rights based upon morally valid arguments, and not the other way round. If one believes that the primary aim of a legal system should be to promote a morally right order, then a legal right based upon a morally invalid argument is undesirable, and the legal denial of a right based upon a morally valid argument is also undesirable. Yet Martin demonstrated with his example of court rulings that both of those undesirable things occur. It would therefore make sense to call morally invalid legal rights 'defective', a term Martin (1997, p. 76, pp. 83–85) instead uses for no demonstrated reason to characterise unrecognised moral rights. In that case, the univocal sense of rights would be the existence of a valid argument for them, not recognition, and where a valid argument is lacking, the right in question would be defective.

Since Martin states that valid claims need (1) social recognition to be at least nominal rights and (2) social adherence to be effective rights, he specifically defines 'full-bodied human rights' as

[...] ways of acting or ways of being treated that have sound normative justification, that have authoritative political recognition or endorsement, and that are maintained by conforming conduct and, where need be, by governmental enforcement (Martin, 1997, p. 73).

A key term here is 'sound normative justification' because, since the Nazi genocide was 'a way of treating' Jews that had 'authoritative political recognition' and 'endorsement' and was 'maintained by conforming conduct and, where need be, by governmental enforcement', Martin's definition of human rights could apply to genocide without the term 'sound normative justification'. Also of note, Martin's term 'sound normative justification' is similar to Feinberg's statement above that moral rights are rights 'validated as such by correct moral principles', where 'validated' is replaced by 'justification', 'correct' is replaced by 'sound' and 'moral principles' is replaced by 'normative'.

Martin (1997, pp. 75–79) continues by arguing, however, that even when 'moral justification' for a right exists 'as a valid argument' supported by a 'critical moral principle' that, once understood, 'would be regarded as reasonable by persons at different times or in different cultures', even then a society unaware of the argument or reflectively unable to acknowledge it owing to its 'high-order beliefs' (religious, scientific, etc.) cannot be said to have a duty to respect the right. Martin (1997, p. 81) concludes that even when a 'sound argument from objective moral principle (s)' requires that all humans be treated in a certain way, this 'valid moral claim' would fail to be a right in any society that does not recognise it. This conclusion places Martin in the same tradition as Bentham (2011, p. 380), who argued that even if something ought to be a right, it does not follow that it is a right.

David Lyons (2006, pp. 14–15) disagrees with Martin's arguments because whenever someone within a society claims a right, he or she will 'almost certainly' be appealing to values that are 'reasonably accessible' to the other community members since

they are accessible to him or her. Therefore, 'it would seem difficult to find cases in which the invocation of a moral right can be dismissed, on social recognition grounds, as a misuse of the concept' (Lyons, 2006, p. 15). While Lyons makes a valid point, it does not seem to invalidate social recognition as the ultimate basis of human rights. Furthermore, Lyons discusses disagreements between individuals in the same society rather than cases where one society disagrees with another, which are the focus of Martin's discussion of high-order beliefs.

The real problem with Martin's argument appears instead to be as follows. Martin does not accept that individuals nullify a right recognised by their government if they are unaware of, or reflectively unable to acknowledge, its justification. At most, they render it nominal if they are numerous enough. However, he accepts that individuals exercising sovereignty nullify the same right in their territory if they are unaware of, or reflectively unable to acknowledge, its justification. The only feature separating the first group from the second is sovereign power. So, essentially, according to Martin, might equals 'right'.

In sum, the main difference between Feinberg's and Martin's theories is that in Feinberg's view, a correct moral principle can establish a natural right regardless of social recognition, whereas in Martin's view, sound normative justification and social recognition are both required. In other words, Feinberg views natural rights, not as human constructs, but as simply there 'to be discovered', whereas Martin sees them as a combination of man-made and non-man-made elements. Martin views natural rights as coming into existence at the stage where man-made elements, including sovereign power, are added to non-man-made elements and therefore where morally valid claims have transitioned from being claims to being practices. For Feinberg, their existence is a given, independent of man-made elements.

Conclusion

Recall, however, that according to Martin, a morally valid claim that is recognised and respected is a 'full-bodied' human right, whereas a morally valid claim that is recognised but not respected is a 'merely nominal' human right, and a morally valid claim that is not even recognised, let alone respected, is a valid claim that 'won't function as an effective right'. In other words, the morally valid claim is not an operative human right, 'operative' being defined as 'functioning or having effect'.¹ Martin (1997, pp. 84–85) also states that a nominal right that loses recognition has 'ceased to be a right', in other words, there is 'no right left'. Yet there is a difference between being inoperative and being non-existent. The inappropriate use of the word 'bodied' for something intangible obscures the difference. It seems more logical that the polar opposite of 'fully operative' is 'fully inoperative' rather than non-existent. After all, by ceasing to exist, a thing does not necessarily become fully inoperative,² and by becoming fully inoperative, a thing does not necessarily cease to exist,³ as Martin assumes in the case of rights.

This article therefore proposes that a recognised and respected morally valid claim is a 'fully operative' natural right, that a recognised but unrespected morally valid claim is a merely nominal natural right and therefore a 'partially operative' or 'partially inoperative' natural right depending on the perspective, and that an unrecognised morally valid claim is a 'fully inoperative' natural right. The same applies to morally valid powers and immunities. As a result, the concept of 'fully operative' natural rights provides the philosophical basis of recognised and respected human rights derived from correct moral principles, that is, recognised and respected human rights that are naturally right, and the concept of 'fully inoperative' natural rights provides the philosophical basis of unrecognised human rights derived

from correct moral principles. As for recognised human rights that are not derived from correct moral principles, in other words, recognised human rights that are not naturally right, they are defective legal rights and not natural rights at all. Therefore, while Feinberg held that a correct moral principle can establish a moral or natural right regardless of social recognition, this article qualifies that when a right derived from a correct moral principle is not recognised, the principle establishes it as simply an 'inoperative' natural right. When such a right receives recognition, which is partly a function of free will and is therefore partly human-made, it becomes 'operative' in us to the extent that it is recognised, and when it receives legal recognition and enforcement, it becomes fully operative in us.

In light of that qualification, the question remains whether alienation is taking place when a natural right is inoperative. Recall that Feinberg understands natural rights as a kind of property from which we may not be even temporarily dispossessed, which is a discreet 'shalt not' statement implying a certain inalienability. Of course, morally valid claims inhere in each of us by virtue of both our individual status as a human being, a given, and the moral principles flowing from human nature, also givens, which are, to use Feinberg's term, the 'independent source' that establishes natural rights. So can we be alienated from something inherent in us? Consider those whose productive activity is not a freely chosen expression of their humanity exercised in free co-operation with others in order to create products and services that directly meet each other's needs, but is simply a reluctantly undertaken means to the end of individually obtaining money in order to meet needs individually and indirectly. In the same way that people can be considered alienated from their actions, what they create, and each other, so too can people be considered alienated from their natural rights. In other words, to the extent that 'alienation' implies, as one of its constitutive elements, something that is preventing humans from fully realising their humanity, that is, their inherent qualities, be they expressive, creative, social or moral, and therefore something that is dehumanising, then a failure to recognise natural rights is a form of alienation, not only for those who are thus prevented from exercising their natural rights, but also for those who fail to perceive the reflectively accessible truth present in correct moral principles. This article therefore proposes that a natural right becomes more or less alienated as it becomes more or less unrecognised and unrecognised.

Given that we can be alienated from our natural rights by lack of recognition, by their lack of operativeness in others and even in ourselves, are Bentham and Martin correct in rejecting the statement 'I have a right' when the right in question lacks the necessary recognition to be exercised? They are not correct when the statement is used to mean 'a right inheres in me, even if only in a latent⁴ form, that is, whether it is recognised or not', but they are indeed correct when it is used to mean 'I possess a right', even when 'possess' is used in the natural sense to imply, not legal ownership of something, a human construct, but that something is at the disposal of one's will, either momentarily or more enduringly. A man subjected to torture who thereby loses control of his words and actions is not said to be in full possession of himself in that moment because his words and actions are no longer at the disposal of his will. Similarly, we do not fully possess unrecognised, that is, alienated, natural rights because they are not at the full disposal of our will. Feinberg thus misuses the word 'possess'. Since Bentham and Martin understand the statement 'I have a right' to mean 'I possess a right', they are correct in rejecting it when the right is unrecognised, whereas anyone who understands the statement to mean 'the right inheres in me, even when I am not in full possession of it' is also correct.

Since natural rights inhere in us, Bentham and Martin are incorrect in asserting that in the absence of recognition, rights cease to exist; natural rights continue to exist, not as fully

unalienated possessions, for that would require social recognition and respect, but in a fully inoperative state, capable of being recognised but not yet recognised, not yet operative. Therefore, clearly, their fully inoperative state is not located in 'another realm'; natural rights inhere in this realm, where human reason and recognition can occur, and where correct moral principles can be identified.

Data availability

Data sharing is not applicable to this article as no datasets were generated or analysed.

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Notes

- 1 Oxford Dictionaries, <http://www.oxforddictionaries.com/definition/english/operative>. Consulted 15 March 2020.
- 2 For example, when a star that has already died can still be viewed from the earth because of the time it takes light to travel from the star to the earth, or when one of your loved ones continues to have an effect on your actions after his or her death.
- 3 For example, when anger or pride, etc., has led you to suppress your love for someone so much that your love ceases, at least temporarily, to have an effect on your actions.
- 4 'Latent' being defined as 'existing but not yet developed or manifest' (<http://www.oxforddictionaries.com/definition/latent>. Consulted 15 March 2020); 'manifest' being defined as 'clear or obvious to the eye or mind' (<http://www.oxforddictionaries.com/definition/manifest>. Consulted 15 March 2020).

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Competing interests

The author declares no competing interests.

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