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Nicholas Wolterstorff: Justice:Rights and Wrongs

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INTRODUCTION

WHY HOSTILITY TO JUSTICE AND RIGHTS?

Justice and rights are the most contested part of our moral vocabulary, contested not only, or even mainly, by philosophers, but within society generally. To publish a discourse on justice as rights is to plunge into a hornet's nest of controversy.

Few people oppose talk about responsibility and obligation—therapists who believe that guilt feelings are a bad thing, philosophers who see no acceptable way of accounting for obligation, that is about it. Lots of people pay little attention to their own obligations; few declare themselves opposed to talk about obligations. So too with virtue and love. Though many care little about either, few express opposition to talk about them.

Justice and rights are different. Opposition to rights-talk is common. Some of those opposed are also opposed to talking about justice; they connect the two, rights and justice. Others want to pull them apart. Justice is fine; it is talk about rights that is bad.

Why this hostility? Let us take a brief survey, starting with justice. Large swaths of American Christians believe that in the New Testament love supplanted justice—except for retributive justice. Jesus did not teach, in the second of the two commandments, that we are to treat people justly; he taught that we are to love our neighbors as ourselves. In the now-classic book, *Agape and Eros*, published in the early 1930s, Anders Nygren worked out the idea in detail. After interpreting the love ascribed to God in the New Testament, and enjoined on us with regard to our fellows, as the love of pure impartial benevolence, he declared that what we learn from Jesus' words and deeds is that where such "spontaneous love and generosity are found, the order of justice is obsolete and invalidated."¹

This attack on justice, coming as it does from within my own religious community, is not one that I can ignore; most secular academics would be inclined to ignore it. I think that is a mistake on their part. Americans continue to be a religious people, dominantly Christian; we must expect consequences for our culture and society as a whole if many among us

¹ Translated by Philip S. Watson (London: SPCK, 1953), p. 90.

believe that justice is outmoded. And in any case, similar things are being said by secularists, albeit for different reasons.

In her essay, “The Need for More than Justice,”² Annette Baier argues that though justice may still have a place, it has to be supplemented with virtues less cold and calculating. “Care,” she says, “is the new buzz-word, . . . a felt concern for the good of others and for community with them. The ‘cold jealous virtue of justice’ (Hume) is found to be too cold, and it is ‘warmer’ more communitarian virtues and social ideals that are being called in to supplement it.”

Baier explains that the ethics of care is a challenge “to the individualism of the Western tradition, to the fairly entrenched belief in the possibility and desirability of each person pursuing his own good in his own way, constrained only by a minimal formal common good, namely, a working legal apparatus that enforces contracts and protects individuals from undue interference by others” (52). One of the problems with the ethics of justice, she says, is that the rules of justice, at least as understood in a liberal sense, “do little to protect the young or the dying or the starving or any of the relatively powerless against neglect, or to ensure an education that will form persons to be *capable* of conforming to an ethics of care and responsibility” (55).

Others on the contemporary scene are opposed not so much to talk about justice as to talk about rights. The opposition is for a variety of reasons. Some oppose rights-talk because they find so many rights-claims silly that they think it best to purge our vocabulary of all such talk. I agree with the diagnosis but not with the prescribed cure; many rights-claims are silly. The U.N. Declaration on Human Rights declares, in Article 24, that everybody has a right to periodic vacations with pay. Many people do not work for pay. Some, such as children and the handicapped, do not work at all; others work, but not for pay—farmers, housewives, and the like. So how could everybody have a right to a periodic vacation with pay? Claims like this give rights a bad name.³

Others are opposed to rights-talk for political reasons. All the great social protest movements of the twentieth century in the West employed

² In Virginia Held, ed., *Justice and Care: Essential Readings in Feminist Ethics* (Boulder, Colo.; Westview Press, 1995), p. 48. I thank Eleonore Stump for calling this essay to my attention.

³ The most balanced and reflective discussion of the abuse of rights-talk in the American political arena that I know of is *Rights Talk: The Impoverishment of Political Discourse*, by Mary Ann Glendon (New York: Free Press, 1991). Explaining her approach, Glendon says, “The critique of the American rights dialect presented here rejects the radical attack on the very notion of rights that is sometimes heard on both ends of the political spectrum. It is not an assault on specific rights or on the idea of rights in general, but a plea for reevaluation of certain thoughtless, habitual ways of thinking and speaking about rights” (15).

the language of rights. They employed other language as well; but the language of rights was prominent in their vocabulary because, in general, it proved the most powerful. I have in mind the movements of protest against the position assigned in society to children, to women, to Jews, to African-Americans, to homosexuals; I also have in mind the protests against the Afrikaner regime in South Africa and against the Communist regimes in Hungary and Poland. It was these movements that made common coinage of such phrases as “children’s rights,” “women’s rights,” “civil rights,” “human rights,” and so forth.

One way to defend disagreement with one or another of these social protest movements is to insist that members of the group in question do not have the rights being claimed for them. Children do not have a right to be kept out of the labor force until they are of age, women do not have a right to vote, Jews do not have a right to be treated equally in the academy, South African “blacks” and “coloreds” do not have a right to equal treatment, and so forth. But often defenders of the status quo find the whole discourse of rights menacing; so they try to change the terms of debate. Instead of talking about rights, let us talk about responsibilities, about the social bonds of friendship and loyalty, about what is necessary for a well-ordered society.

Others, again, are opposed to rights-talk for social reasons. They charge that rights-talk expresses and encourages one of the most pervasive and malignant diseases of modern society: possessive individualism. In using such talk one places oneself at the center of the moral universe, focusing on one’s own entitlements to the neglect of one’s obligations to others and the cultivation of those other-directed virtues that are indispensable to the flourishing of our lives together. The prevalence of rights-talk obscures from us our responsibilities to each other and to our communities, obscures from us the singular importance of love, care, friendship, and the like. It demotes the giving self and promotes the grasping self, demotes the humble self and promotes the haughty self. It both encourages and is encouraged by the possessive atomism of the capitalist economy and the liberal polity. It invites us to think of ourselves as sovereign individuals.

Rights-talk is said to be for the purpose of *me* claiming *my possessions*, *you* claiming *your possessions*, *him* claiming *his possessions*. That is what it is for: claiming one’s possessions, giving vent to one’s possessiveness, each against the other. Possessive individualists are not abusing an innocent language by wresting it to their own evil purposes. They are using it as it was meant to be used. Rights-talk is inherently individualistic and possessive. The theologian Stanley Hauerwas put it like this in one of his essays:

The language of rights tends toward individualistic accounts of society and underwrites a view of human relations as exchanges rather than cooperative endeavors. Contemporary political theory has tended to concentrate on the language of rights, not because we have a vision of the good community, but because we do not. As a result, we have tried to underwrite the view that a good society is one where everyone is to be left alone rather than one that tries to secure the kind of cooperation that gives one a sense of contributing to a worthy human enterprise.⁴

And then there are the objections coming from philosophers and others among the intelligentsia. Talk about rights is nonsense, said Jeremy Bentham; and talk about natural rights is nonsense upon stilts. The way to respond to this charge is obvious: develop an account of rights that makes sense.

PRELIMINARY DESCRIPTION OF RIGHTS

I have already indicated the position that I will occupy and defend against this fusillade of objections. I will defend the importance of justice and the importance of rights, in the context of defending the thesis that justice is ultimately grounded on inherent rights. At the heart of my defense will be an attempt to change how we think about rights.

Rights are normative social relationships; sociality is built into the essence of rights. A right is a right *with regard to* someone. In the limiting case, that “someone” is oneself; one is other to oneself. Usually, the other is somebody else than oneself. Rights are toward the other, with regard to the other. Rights are normative bonds between oneself and the other. And for the most part, those normative bonds of oneself to the other are not generated by any exercise of will on one’s part. The bond is there already, antecedent to one’s will, binding oneself and the other together. The other comes into my presence already standing in this normative bond to me.

This normative bond is in the form of the other bearing a legitimate claim on me as to how I treat her, a legitimate claim to my doing certain things to her and refraining from doing other things. If I fail to do the former things, I violate the bond; if I do not refrain from doing the latter things, I also violate the bond. I do not break the normative bond; that still holds. She continues to have that legitimate claim on me as to how I treat her.

⁴ “On the Right to be Tribal,” *Christian Scholar’s Review* 16, no. 3 (March 1987): 238–39.

The legitimate claim against me by the other is a claim to my enhancing her well-being in certain ways. The action or inaction on my part to which the other has a right against me is an action or inaction that would be a good in her life. A common apothegm in present-day political liberalism is that “the right has priority over the good.” In the order of concepts, it is the other way around: the good is prior to the right. One’s rights are rights to goods in one’s life. The converse does not hold: there are many things that are or would be goods in one’s life to which one does not have a right. I think it would be a great good in my life if I had a Rembrandt painting hanging in my living room. Sad to say, I do not have a right to that good. It is because the good is conceptually prior to the right that the second part of my discussion is devoted to the goods to which we have rights, and the third part to having a right to some good.

I will argue that it is on account of her worth that the other comes into my presence bearing legitimate claims against me as to how I treat her. The rights of the other against me are actions and restraints from action that due respect for her worth requires of me. To fail to treat her as she has a right to my treating her is to demean her, to treat her as if she had less worth than she does. To spy on her for prurient reasons, to insult her, to torture her, to bad-mouth her, is to demean her.

And to demean her is to wrong her. If I fail to treat her in the way she has a right to my treating her, I am guilty; but she is wronged. My moral condition is that of being guilty; her moral condition is that of having been wronged.

Lastly, rights are boundary-markers for our pursuit of life-goods. I am never to enhance the good in someone’s life, my own or another’s, or that of many others, at the cost of wronging someone or other, depriving her of that to which she has a right. I am never to pursue life-goods at the cost of demeaning someone. Rights have been described, and correctly so, in my judgment, as *trumps*. It may be that a wide range of life-goods can be achieved by pursuing some course of action; but if in pursuing that course of action one deprives someone of some good to which they have a right, thereby wronging them, one is not to do that. That good trumps the other goods.

The language of rights is for talking about these matters. It is for talking about these normative social bonds. It is for talking about the fact that sometimes by not enhancing the well-being of the other I fail to give her due respect. It is for talking about that curious and sometimes perplexing interaction, within the realm of the good, between the worth of the other person and the worth of goods in the life of the other.

The normative social bonds of rights are foundational to human community. I do not only mean that *honoring* these bonds is foundational to human community—though certainly it is. Rights themselves are founda-

tional to human community. I have argued elsewhere that speech is a normative social engagement; causality is not sufficient for explaining how it is that by making certain sounds or inscribing certain marks, one makes an assertion, asks a question, issues a request. I argue that one has to appeal to rights to explain it.⁵ But without speech acts such as those, human community is impossible.

HOW RIGHTS GOT A BAD NAME

I have been skimming the surface. Everything I have said will be developed and defended in detail in the pages that follow. But a question already jumps out. If this is what rights are, how did they get such a bad name? How did they acquire their bad reputation? Why are so many so hostile for so many different reasons to talking about rights?

It is easy to see why those who oppose social protest movements prefer that the debate not be conducted in terms of rights. The rights of the other place limits on how I treat her. Not even for reasons of great good to be achieved am I permitted to treat her with less than full respect. Those who oppose liberation movements almost always claim that some great good will be maintained and some great evil averted if the status quo is preserved; they do not want to hear about limits on what they are allowed to do to the other in maintaining the status quo. Likewise, those who want to reshape society to fit their social ideals—National Socialists, Communists, and the like—do not want to hear about the limits that rights are, the boundaries that must not be crossed on pain of violating the worth of the other.

That seems clear enough. But if rights are what I claim they are, normative social bonds, why would anybody connect them with possessive individualism? There is a normative social bond between me and the other whereby the other bears legitimate claims on me as to how I treat her. What connection could there possibly be between that and possessive individualism?

The clue lies not in rights themselves but in the honoring and dishonoring of rights and in the claiming of rights. Notice that it is one thing for the other to have a legitimate claim against me; it is another thing for me to *honor* that legitimate claim. Likewise, it is one thing for me to have a legitimate claim against the other; it is another thing for me to *claim* that legitimate claim, to engage in the action of insisting that it be honored. Having a legitimate claim to police protection is one thing;

⁵ See chapter 3 of my *Divine Discourse* (Cambridge: Cambridge University Press, 1995).

going to a meeting of the city council to insist that the police honor that claim is another.

Now imagine a society inhabited by possessive individualists. What will they do? Each will claim his own rights while neglecting or refusing to honor the rights of others. In no way does this alter the structure of the rights themselves; that structure remains intact and symmetrical. The other comes into my presence bearing claims against me; I come into her presence bearing claims against her. It is the practices of *honoring* and *claiming* rights that have been distorted.

But note that the language of service and responsibility can also be abused, used to express appalling attitudes of domination, on the one hand, and servility, on the other. And while we are on the topic of individualism, let us also note that rights-talk scarcely has a monopoly on the language of choice for the self-preoccupied individualist. We have all known self-preoccupied persons who thought and spoke not at all in terms of rights but entirely in terms of obligation; their souls were filled to overflowing with their own rectitude—or their own guilt. Offensive or sickly self-preoccupation comes in many forms. Sometimes it employs the language of rights, sometimes it employs the language of duty and obligation, sometimes it employs neither.⁶

WHY WE NEED RIGHTS-TALK

I have explained in preliminary fashion what rights are and what it is, within reality, that rights-talk brings to speech. But why is it important that rights be brought to speech? The critics point to the abuses of rights-talk. I concede the abuses. But rather than concluding that we should abolish rights-talk so as to eliminate the abuses, I hold that we should heal rights-talk *of* the abuses. Something of enormous worth would be lost if we could no longer bring rights, and the violation of rights, to speech. The critics focus entirely on the abuses of rights-talk; they do not ask what would be lost if we threw it all out.

What would be lost is our ability to bring to speech one of the two fundamental dimensions of the moral order: the recipient-dimension, the patient-dimension. To the moral status of each of us there are two dimensions, that of moral agent and that of moral patient or recipient. When we speak of duty, obligation, guilt, benevolence, virtue, rational

⁶ In the idiolect of some philosophers (e.g., John Rawls in *A Theory of Justice*), the word “duty” is reserved for normative constraints generated by some human action, whereas “obligation” is reserved for normative constraints not so generated. I will speak in accord with ordinary English, and treat the two terms as synonyms.

agency, and the like, we focus on the agent-dimension; when we speak of rights and of being wronged, we focus on the recipient-dimension. To eliminate rights-talk would be to make impossible the coming to speech of the recipient-dimension of the moral order.

It may be said, in reply, that rights are the same thing as duties in different words. Suppose one singles out from the agent-dimension generally the part that pertains to obligation and sets to the side those parts that pertain to virtue, love, and the like; what I am calling the recipient-dimension is nothing more, the critic insists, than the obligation part of the agent-dimension, differently described. Everything that can be said in the language of rights can be said in the language of obligation; same facts, different words. Nobody supposes that south and north are fundamentally distinct dimensions of space. I am to the south of you if and only if you are to the north of me; same thing, different words. Nothing is lost if we toss out rights-talk—as long as we keep duty-talk.

In the next chapter I appeal to what I call *the principle of correlatives*: if Y belongs to the sort of entity that can have rights, then X has a right against Y to Y's doing A if and only if Y has an obligation toward X to do A. I hold that this is a necessary truth. But it is not an analytic truth, that is, a proposition true by virtue of the meanings of words and the law of non-contradiction. It is synthetic—to use language that Kant made familiar. It is not because the first clause says the same thing as the second clause that the principle of correlatives is true.

I think the best way to see that we are dealing here with two distinct dimensions of the moral order, connected by necessary truths, rather than one dimension differently described, is to look at duties and rights from the dark sides—from the sides of being guilty and of being wronged. One is guilty if one has failed to do what one was obligated to do; one is wronged if one has not been treated as one had a right to be treated. I think we all have the intuition that your being guilty and my being wronged are not the same thing in different words.

Perhaps the following observation will strengthen this intuition. Suppose that in treating me a certain way you have violated your obligation toward me and that, correlatively, I have been deprived of my right against you to your not treating me that way. You are guilty and I am wronged. Now suppose you are absolved of your guilt. Perhaps you go to a priest, confess your sin, and he absolves you. I am not convinced that absolution for guilt is a possibility; but suppose it is. What then is *my* moral condition? Does your being absolved of your guilt mean that I am now automatically relieved of having been wronged? Of course not. I am in exactly the same moral condition that I was in before the absolution took place. Absolution—if there is such a thing—deals with guilt, not

with being wronged.⁷ It is repentance by one party and forgiveness by the other that deals with being wronged, though in a way very different from absolution. This will become important in chapter 4.

When one thinks of what one is doing in terms of obligations, one focuses on the bearing of one's actions on one's own moral condition: one is upright or guilty. When one thinks of what one is doing in terms of rights, one focuses on the bearing of one's action on the recipient: her rights are honored or she is wronged. If one thinks exclusively in terms of obligations, and if, furthermore, one thinks of guilt as guilt for violating the moral law rather than guilt for wronging the other, then the person who has been wronged falls entirely out of view.⁸

The language of duty and guilt enables the battered wife to point to the effect of her spouse's actions on his moral condition; he is now guilty. The language of rights and of being wronged enables her to point to the effect of her spouse's action on her own moral condition; she has been wronged, deprived of her right to better treatment, treated as if she were of little worth. He is not only guilty of having acted out of accord with the moral law; he is guilty of having wronged *her*—perhaps even by trying to make her feel guilty when it is he who is guilty.

The language of duty and guilt enables the oppressed to point to the effect of the oppressor's actions on the moral condition of the oppressors; the oppressors are guilty. The language of rights and of being wronged enables the oppressed to bring their own moral condition into the picture: they have been deprived of their right to better treatment, treated as if they were of little worth. The oppressors are guilty of having wronged them. The reason the language of rights has proved so powerful in social protest movements is that it brings the victims and their moral condition into the light of day.

In September 1985 a remarkable pamphlet called *The Kairos Document* was issued by over 150 theologians and church leaders in South Africa.

⁷ Matthew H. Kramer, in his essay "Rights without Trimmings" (in Matthew H. Kramer, N. E. Simmonds, and Hillel Steiner, *A Debate over Rights: Philosophical Enquiries* [Oxford: Clarendon Press, 1998]), claims to be following W. H. Hohfeld in declaring that, among the various things that are called "rights," *claim-rights* are those for whom the Principle of Correlatives holds by definition of "a right." On this interpretation, instantiations of the Principle of Correlatives would be analytic truths. In chapter 11 I argue that this is a misinterpretation of Hohfeld. Of course, one could introduce such a concept and call it a concept of *rights*; but that would not be the same as our concept of a claim-right.

⁸ The recent "Restorative Justice" movement should be mentioned here. The criminal justice system, as it normally functions in the United States, charges the accused with having committed a crime against the state; if he is convicted, the state then punishes him. The Restorative Justice movement tries to bring the breach of moral relationship between the accused and the victim back into the picture, both in the trial stage and in the subsequent punishment and rehabilitation stage.

In what they say about “Church Theology,” in a section of the pamphlet called “Justice,” the authors point to the difference between the two dimensions of the moral order that I have been calling attention to. They state why those in power prefer to attend only to the agent-dimension and why it is important to bring the recipient-dimension into the light. The pamphlet was written before the overthrow of the white minority regime in South Africa.

It would be quite wrong to give the impression that “Church Theology” in South Africa is not particularly concerned about the need for justice. There have been some very strong and very sincere demands for justice. But the question we need to ask here, the very serious theological question is: What kind of justice? An examination of Church statements and pronouncements gives the distinct impression that the justice that is envisaged is the *justice of reform*, that is to say, a justice that is determined by the oppressor, by the white minority and that is offered to the people as a kind of concession. . . . The general idea appears to be that one must simply appeal to the conscience and goodwill of those who are responsible for injustice in our land.

The problem that we are dealing with here in South Africa is not merely a problem of personal guilt. . . . We cannot just sit back and wait for the oppressor to see the light so that the oppressed can put out their hands and beg for the crumbs of some small reforms. That in itself would be degrading and oppressive.

THE CONTEMPORARY POLEMIC AGAINST JUSTICE AS RIGHTS

There’s a polemic making the rounds nowadays against the way of thinking about justice that I will articulate in the pages that follow—not now a polemic against justice nor a polemic against rights, but a polemic against justice as grounded ultimately on inherent rights. I have explained, in preliminary fashion, how I think of rights. Let me now add that I think of a social order as just insofar as its members enjoy the goods to which they have rights. Some of those rights are conferred on those who otherwise would not have them by actions on the part of human beings—the issuing of legislation, the performance of speech acts, and so forth. Some are not so conferred. The latter are natural rights. Natural rights are in good measure inherent to those who have them. That is to say, they have these rights not because the rights have been conferred on beings of their sort by God or by some socially transcendent norm extrinsic to themselves; they have them on account of the worth of beings

of their sort. I hold that all rights are ultimately so grounded. I call this way of thinking about justice *justice as inherent rights*.

The polemic I have in mind against this way of thinking about justice is not merely negative; it offers an alternative way of thinking about justice—*justice as right order*. Natural law for the right ordering of society is what ultimately grounds justice, so it is said, not the inherent rights of members of society.

The polemic against justice as inherent rights by those who favor justice as right order is conducted almost entirely by means of a narrative, and a social critique based on the narrative.⁹ Once upon a time, so it is said, everybody who thought about justice thought of it in terms of right order. Individualistic modes of thought then gave birth to the idea of inherent natural rights. As such modes of thought became more common, the old way of thinking about justice gradually lost its appeal and was displaced by the conception of justice as grounded on inherent rights. Individualism is in the DNA of both the idea of inherent natural rights and the conception of justice as inherent rights. There is an intrinsic connection between, on the one hand, the idea of inherent natural rights and the conception of justice as inherent rights and, on the other hand, the possessive individualism of modern society. Earlier we noted that the language of rights is susceptible to being bent to the purposes of the possessive individualist. The claim here is that the connection between the language of inherent natural rights and possessive individualism is not contingent, as I have represented it as being, but essential.

It is said that both for correctly understanding justice and for the health of society we must recover that older, more venerable way of thinking that was displaced by the justice as inherent rights conception. We must rid our thought of the idea that there are inherent natural rights and think of justice as right order. A good brief statement of the contrast between these two ways of thinking, along with an allusion to the narrative, is this passage from an essay by Joan Lockwood O'Donovan:

A close analysis of the history of the concept of subjective rights in the light of earlier theological-political conceptualization reveals a progressive antagonism between the older Christian tradition of political right and the newer voluntarist, individualist, and subjectivist orientation. The contrasting logic of the two orientations may be conveyed quite simply: where in the older patristic and medieval tradition, God's right established a matrix of divine, natural, and

⁹ An influential telling of the story is Leo Strauss's *Natural Right and History* (Chicago: University of Chicago Press, 1953). The story, as Strauss tells it, is of what he calls "the classic theory of natural right" losing ground to what he calls "the modern theory of natural right[s]."

human laws or objective obligations that constituted the ordering justice of political community, in the newer tradition God's right established discrete rights, possessed by individuals originally and by communities derivatively, that determined civil order and justice.¹⁰

In the essay from which this passage comes, O'Donovan elaborates the evaluation to which she here alludes. The introduction and use of the concept of subjective rights in general, and of *inherent natural* and *human* subjective rights in particular, has been a calamity of the first order. The concept of inherent natural rights was born in late medieval nominalism and was an indispensable component in the individualistic mentality of the Enlightenment; it is intrinsically connected to the egocentric possessive individualism that haunts modern society. Patently incompatible though it is with sound Christian theology, "the question that has yet to be satisfactorily answered . . . is why Christian thinkers have been and are willing" to buy into it. Why have they been "willing to adopt a child of such questionable parentage as the concept of human rights" and the conception of justice to which this concept belongs? Her hope, says O'Donovan, is that the historical analysis offered in her essay will at least have "sharpened" the question.¹¹ Before we do anything else, we must address this narrative.

But why must we address this narrative? Why not follow the time-honored tradition of analytic philosophy and confine oneself to systematic issues? Why not ignore social critique and narratives about origins and proceed immediately to the construction of theory, in the course thereof addressing whatever may be the systematic points at issue between these two ways of thinking? Even the little I have already said about rights, namely, that they are normative social relationships, is enough to cast doubt on the history and the social analysis. No need to play the intellectual historian. Let the narrative wither away.

It is tempting. But it will not do. The power of the polemic against the conception of justice as inherent rights by right order theorists lies almost entirely in the story they tell about the origins and social affinities of theories of the former sort. It does not lie in the power of their systematic argumentation; they have offered surprisingly little of that. The systematic account of justice and of rights that I will develop does indeed show that possessive individualism cannot be in the DNA of the conception of justice as inherent rights; those who think otherwise have to be making a mistake somewhere. But not to identify the mistake is to leave those

¹⁰ Joan Lockwood O'Donovan, "The Concept of Rights in Christian Moral Discourse," in Michael Cromartie, ed., *A Preserving Grace: Protestants, Catholics, and Natural Law* (Grand Rapids: Eerdmans, 1997), p. 145.

¹¹ *Ibid.*, p. 155.

who have been persuaded by the narrative in possession of an unsettling question: if there is no intrinsic connection between the conception of justice as inherent rights and possessive individualism, why did that conception emerge from individualistic ways of thinking? And why, as individualistic modes of thought spread, did the older way of thinking of justice as right order give way to the newer way of thinking of justice as based on inherent rights? Until those questions are addressed and undermined, the case for thinking of justice as based on inherent rights will be incomplete.

We have no choice but to engage in the archeology of rights, showing where and why the familiar narrative is mistaken and offering a counter-narrative.

IS THERE A THIRD CONCEPTION OF JUSTICE?

Though I judge that the story about origins told by devotees of the right order conception is seriously mistaken, and the conception itself systematically untenable, I nonetheless hold that they have made an important contribution to reflections on justice by forcefully calling our attention to the fact that, in the thought of the West, there are two fundamentally different ways of thinking about justice. Distinguishing those two ways is indispensable for understanding our intellectual heritage; discerning their structure and implications is indispensable for our own systematic reflections on justice. I depart from adherents of the right order conception in their historical claims about origins; I affirm their historical claim that in the thought of the West there are two fundamentally distinct ways of thinking about justice, both vying for attention and allegiance.

My delineation, in the next chapter, of these two ways of thinking about justice will evoke questions from opposite directions. Some will press the question of whether these two ways are really distinct. Others will press the question of whether there are not additional ways of thinking about justice. My discussion in the next chapter will constitute my answer to the first question. Let me say a word here about the second.

The most obvious candidate for a third way of thinking about justice is justice as equality. Justice as equality has entered deep into the thought and art of the West: justice is a blindfolded woman holding a balanced pair of scales. Aquinas says in one place that “justice by its name implies equality” (*S.th.* II-II, q. 58, art. 2, *resp*). Later he makes the same point a bit more elaborately: “even as the object of justice is something equal in external things, so too the object of injustice is something unequal” (q.

59, art. 2, *resp.*).¹² Aquinas's formula comes, of course, from Aristotle's famous discussion of justice in the *Nicomachean Ethics*: "The just is equal, as all men suppose it to be, even apart from argument" (1131a 13). Many writers—Hume, for example—assume without question that Aristotle was right about this: justice is equality.

I have no stake in there being just two fundamentally distinct ways of thinking about justice. As I explained, my reason for discussing the justice as right order conception is that those who favor this conception have launched a vigorous attack against the conception I favor. But I doubt that justice as equality is a way of thinking about justice that is fundamental in the way that justice as right order and justice as inherent rights are fundamental.

Aristotle is describing for us what he regards as the general pattern of justice, its general contour: justice is always equality of a certain sort. His conception is unlike the two I will be dealing with in that it makes no attempt at grounding justice ontologically. Thus one could marry justice as equality to ontological Platonism. Ultimately, what makes a society just, one could say, is that it conforms to the Form the Just Itself; and the general character of conformity to the Just Itself is equality of a certain sort in commutative, distributive, and retributive engagements. Alternatively, someone committed to a Rawlsian approach could argue against Rawls's two principles of justice and in favor of Aristotelian equality.

I hold that equality does not capture the contour of justice; Aristotle was mistaken about this. Justice is sometimes present when equality of treatment is absent, and equality is sometimes present when justice is absent. Because nothing in what I have to say will depend on whether I am right about this, let me state my reasons for this conclusion very briefly.

In claiming that justice is determined by equality of treatment, be it arithmetical or proportional equality, Aristotle is assuming that justice always involves drawing comparisons between or among persons with respect to treatment. That seems clearly not true. One way of assigning grades in a class is "on the curve"; a certain proportion are to get A's, a certain proportion B's, and so forth. Assigning grades in that way requires making comparisons. And to determine whether a given student has been treated justly, one has to look at what the other students have done and the grades they have received. But one can also assign grades by determining each case on its own merits, in which case one does not make comparisons of treatment. Does this work merit an A? Then justice requires that one give it an A. It makes no difference what the other students have done and how they are being treated. It does not even

¹² See also *S. th.* II-II, q. 57, art. 1, *resp.*

make any difference whether there are other students. One can grade the student in a one-member class justly or unjustly. Justice does not require equality of treatment among two or more recipients.

But neither does equality of treatment ensure justice. Imagine the following grading situation. A mathematics professor has instituted a system of grading on the curve according to which 20 percent of the class are to get A's on any test that is given, 20 percent B's, the same for C's, the same for D's, and the remainder are to get F's. He now gives a very difficult examination containing 100 problems. To his astonishment, 20 percent of the class get all the problems right, 20 percent miss just one, another 20 percent miss just two, another 20 percent miss just three, and all the rest miss just four. He announces the grades; and there is a howl of outrage from all but those who missed no problems. This is unjust, they say. Why? The Aristotelian principle of proportional equality has been followed to perfection: the greater the merit, the greater the gain, the less the merit, the greater the loss. Yes. But though differences in treatment perfectly map differences in merit, it is unjust to give a failing grade to someone who missed only four out of a hundred difficult problems.¹³

WHY NO DISCUSSION OF RAWLS'S THEORY?

A few paragraphs back I mentioned John Rawls. Such is the fame of John Rawls's *Theory of Justice* that almost everyone who picks up this book will want to know what I have to say about Rawls. Apart from incidental comments, I do not have anything to say about Rawls. The reason for my silence is straightforward. Though Rawls's theory of justice is an inherent natural rights theory, he does nothing at all to develop an account of such rights. He simply assumes their existence. My interlocutors will be those who do not just appeal to such rights but have something to say about them.

The claim that Rawls's theory of justice is an inherent natural rights theory will take many readers aback. Rawls's presentation of his theory certainly does not give that appearance. Michael Zuckert, in his essay "Big Government and Rights: Locke, Rawls, and Liberalism," states very nicely what the structure of Rawls's theory appears to be: "our rights derive from justice." For Locke, "rights first, then justice"; for Rawls, "jus-

¹³ These points, about the relation of justice to equality, are developed more fully in Joel Feinberg, "Noncomparative Justice," *Philosophical Review* 83, issue 3 (July 1974). Oliver O'Donovan also argues against justice as equality in chapter 3, "Justice and Equality," in his *The Ways of Judgment* (Grand Rapids: Wm. B. Eerdmans, 2005).

tice first, then rights.”¹⁴ But in a well-known article of almost three decades ago, Ronald Dworkin argued that when one looks beneath the surface, one finds inherent natural rights at the basis of the theory.

Fundamental to Rawls’s theory is the principle of equal respect for all members of the social order (or for all members who can engage in the relevant “bargaining”). The question is, what is the basis for this principle of equal respect? Dworkin’s conclusion is that “justice as fairness rests on the assumption of a natural right of all men and women to equality of concern and respect, a right they possess not by virtue of birth or characteristic or merit or excellence but simply as human beings with the capacity to make plans and give justice.”¹⁵

Dworkin’s argument is almost entirely deductive: given other things Rawls says, this has to be his view. But there are passages in *Theory of Justice* that confirm Dworkin’s interpretation—though it has to be said that Rawls was evidently very reluctant to bring his appeal to inherent natural rights (and duties) to the surface, which is why most readers miss it. The most explicit passage in the main body of the text is this:

Some writers have distinguished between equality as it is invoked in connection with the distribution of certain goods, some of which will almost certainly give higher status or prestige to those who are more favored, and equality as it applies to the respect which is owed to persons irrespective of their social position. Equality of the first kind is defined by the second principle of justice which regulates the structure of organizations and distributive shares so that social cooperation is both efficient and fair. But equality of the second kind is fundamental. It is defined by the first principle of justice and by such natural duties as that of mutual respect; it is owed to human beings as moral persons. The natural basis of equality explains its deeper significance.¹⁶

An even more revealing passage occurs in a footnote—which itself is an indication of how reluctant Rawls was to make explicit the natural rights basis of his theory:

This fact [that “the capacity for moral personality is a sufficient condition for being entitled to equal justice”] can be used to interpret the concept of natural rights. For one thing, it explains why it is

¹⁴ Chapter 12 in *Launching Liberalism: On Lockean Political Philosophy* (Lawrence: University Press of Kansas, 2002), p. 317.

¹⁵ “Justice and Rights,” in Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), p. 182.

¹⁶ John Rawls, *A Theory of Justice*, rev. ed. (Cambridge: Harvard University Press, 1999), p. 447.

appropriate to call by this name the rights that justice protects. These claims depend solely on certain natural attributes the presence of which can be ascertained by natural reason pursuing common sense methods of inquiry. The existence of these attributes and the claims based upon them is established independently from social conventions and legal norms. The propriety of the term “natural” is that it suggests the contrast between the rights identified by the theory of justice and the rights defined by law and custom. But more than this, the concept of natural rights includes the idea that these rights are assigned in the first instance to persons, and that they are given a special weight. Claims easily overridden for other values are not natural rights. Now the rights protected by the first principle have both of these features in view of the priority rules. Thus justice as fairness has the characteristic marks of a natural rights theory. Not only does it ground fundamental rights on natural attributes and distinguish their bases from social norms, but it assigns rights to persons by principles of equal justice. (442–43).¹⁷

The most innovative feature of Rawls’s approach is that, rather than declaring a society to be just insofar as the inherent natural rights of its members are honored, and then giving an account of those rights, he claims to be able to develop a theory of social justice by appealing to just one such right, the right of rational moral agents to be treated with equal respect. In so doing he is assuming that principles of distribution that fully honor that right will secure the non-violation of every other inherent natural right. Whether this extraordinarily bold assumption is correct is the deepest issue in Rawlsian theory, though rarely discussed. It is an issue that need not detain us.

¹⁷ This footnote was called to my attention by Edward Song. I should note that Rawls’s position in his later *Political Liberalism* is explicitly and deliberately not a natural rights position.