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Can Human Rights to Welfare Survive Without Religion?

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Abstract

Many contemporary authors fear that the proliferation of rights-claims may cause human rights to fall victim to their own popularity. If every good that is desired by one or another group of people is cloaked in the venerable garbs of a human right, and there is no way to tell 'real' from 'supposed' human rights, this may generate scepticism towards the concept of human rights in general. However deplorable this situation may be, for moral philosophers it may be thought to involve an opportunity to reaffirm the importance of their discipline. After all, how else could we distinguish genuine from imaginary human rights than by building a theory about the subject? The aim of my paper is to show that this idea is exactly wrong — that the proliferation of human rights claims cannot be stopped even in theory. It is a mistake to think that the proliferation of rights claims results from a lack of awareness of the proper theoretical foundation of human rights. On the contrary, I will argue that the proliferation of rights mirrors a deep problem in secular theories of human rights, that these theories do not have the conceptual resources to limit ever larger rights claims. I will suggest that to understand the present situation, we need to look into the religious presuppositions of the culture in which natural rights to subsistence were first proclaimed. Specifically, I will argue that contemporary theories of human rights are secularized versions of a religious precursor.

Keywords: Relationship between Human Rights and Religion, Traditional and Secular Views, the Nature of Human Rights, Religious Background.

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It has become trite to lament the proliferation of human rights claims. Worse still, it has become trite to observe that many authors today lament the proliferation of human rights claims. This proliferation causes anxiety because it is feared that the practice of voicing otherwise legitimate concerns in the language of human rights may cause human rights to fall victim to their own popularity. While it may be a rewarding strategy to appropriate the force of human rights language in the pursuit of any particular cause, this approach may in the longer run undermine that force. If every good that is desired by one or another group of people is cloaked in the venerable garbs of a human right, and there is no way to tell 'real' from 'supposed' human rights, this may generate scepticism towards the concept of human rights in general.

However deplorable this situation may be, for moral philosophers it may be thought to involve an opportunity to reaffirm the importance of their discipline. After all, how else could we distinguish genuine from imaginary human rights than by building a theory about the subject? Such a theory might succeed in eliciting agreement between people of different persuasion, for example if it could ground the demarcation between real and supposed human rights in some of the suppositions underlying human rights discourse. The idea behind such attempts is that the proliferation of rights claims has resulted from a lack of understanding of what human rights really are, and that it is the job of philosophers to provide the insight necessary to remedy this lack of understanding. A theory of human rights may then show us that some of the goods that are claimed under the heading of human rights are not properly human rights at all, even if they may be worthwhile things for people to have and perhaps even if they are things that governments generally should strive to provide for their citizens.

The aim of this paper is to show that this idea is exactly wrong — that the proliferation of human rights claims cannot be stopped even in theory. It is a mistake to think that the proliferation of rights claims results from a lack of awareness of the proper theoretical foundation of human rights. On the contrary, it will be argued that the proliferation of rights mirrors a deep problem in the theory of human rights itself. The problem is that the theory does not have the conceptual resources to limit ever larger rights claims. I realize that this will seem incredibly implausible at first glance. After all, the best philosophical accounts of natural rights to welfare have all made a case for more or less precise limits to the resources and support to which people are entitled on

account of their human rights.[1] I will argue, however, not only that these limits are *ad hoc*, but that they are *necessarily* so.

Contemporary theories of human rights typically start from an account of human nature. Human beings are considered rights holders because of a distinctly human capacity: they are persons, or agents, capable of purposive behaviour. Human rights are then grounded in this capacity in the sense that these rights are supposed to protect it. As will become apparent in the following pages, what exactly is supposed to be protected by these rights is upon closer inspection much less clear than is typically made to appear. This lack of precision is not accidental, neither is it the result of mere sloppiness on the part of our authors. There are good reasons for this: namely that any attempt to determine precisely what is being protected would result in counterintuitive consequences.

But how to account for this bizarre situation? Since deeply held intuitions are at stake, we can only hope to solve these problems by way of an inquiry into the historical development of these theories. I will suggest that to understand the present situation, we need to look into the religious presuppositions of the culture in which natural rights to subsistence were first proclaimed. Specifically, I will argue that contemporary theories of human rights are secularized versions of a religious precursor. Secularization, however, comes at a price. In the case of human rights theories the price is such it makes these theories completely implausible as theories of what is owed to human beings.

Before we continue, one crucial qualification is needed. In the Western tradition, rights have always been conceptualized in two different ways: either a right is considered as the normative protection of an interest, or a right is the normative control of a sovereign. Accordingly there are also two traditions of natural rights (theories of passive and active rights, according to the terminology introduced by Richard Tuck). In this essay I will be talking only about one of these traditions, namely the tradition that grants human beings rights to subsistence or (in the secularized version of the theory) welfare rights. The claim that the proliferation of rights claims mirrors a deep problem in the theory of human rights is directed only towards this theory, or – to be more precise – to the secular version of the theory. The other tradition of human rights theories relies

1. Throughout this paper I will use the phrases 'human rights' and 'natural rights' interchangeably.

on a conceptualization of rights as the normative power of a sovereign and identifies human beings as sovereigns. Consequently human beings are considered to be able to acquire property rights in themselves and in (previously unowned) parts of the external world. If it were sound, this theory *might* be able to restrict rights claims and would therefore be able to pose an alternative to the problems that haunt the other theory. But, as I have argued elsewhere, it is not.[1]

The line of argument of this paper is very simple. I will start with a brief outline of the tradition of rights to subsistence, and attempt to isolate the religious assumptions that provided plausibility to the claim that human beings have such rights. Next I will introduce three secular theories of human rights to welfare and show how the shift in the underlying assumptions has generated unsolvable problems. This comparison will focus on three crucial (clusters of) questions that any theory of rights has to answer: First, who has these rights, and in virtue of which property do they have these rights? Second, against whom are these rights held, or who has the correlative obligations? And third, to what exactly do people have rights? It will become clear that the problems of secular versions of the theory are due precisely to the change in the background beliefs that supported the religious version of the theory. Because these problems cannot be solved in a secular framework, we have good reasons to abandon the idea of natural rights to welfare.

None of this entails that we should give up the idea of welfare rights in a more mundane sense. The fact that millions of people are malnourished or even dying from starvation is certainly the most serious and one of the most urgent ethical problems of our world (see Pogge 2002 for a lucid account). What I am denying is that theories of human rights in any way contribute to the solution of this problem. One of the reasons why it is important to understand the failure of natural rights theories to provide any real guidance to contemporary debates about human rights, is that it may enable us to come to terms with a deep problem in human rights discourse. Even if it would be mistaken to believe that human rights discourse is completely determined by the assumptions that are made explicit in human rights theories, it is arguable that an important part of contemporary thinking about human rights is structured by these underlying assumptions. In as far as this is indeed the case criticism of these theories

1. See: Van Duffel, 2004: 353-75.

will also entail a rejection of a widespread and influential (but ultimately misguided) way of thinking and talking about human rights.

Another reason why analysis of natural rights theories is important is that it may help us understanding some of the sources of the suspicion that exists among certain non-Western intellectuals towards the notion of human rights. If, as I intend to argue, theories of natural rights are indeed in a non-trivial sense dependent upon the theological framework in which they developed, then this might explain some of the resistance towards the idea of human rights.

The Religious Theory: Natural Rights of Subsistence

In the twelfth century theologians and canonists began to discuss a case they had found in Cicero's De Officiis. Suppose a man would find himself in extreme necessity such that he could only save his life by taking something that belonged to another without the consent of the latter—would it be permissible for him to do so? At first theologians answered in the negative: it was better to starve than to sin. After all, Augustine had held that no good intention, no seeming good end could justify doing something that is in itself evil, such as stealing from the rich to give to the poor (Augustine, *Against Lying* 18). But the canonists, perhaps partly because they had different sources before them, came up with another answer. In the *Decretum Gratiani*, a collection of authoritative statements from the Bible, the church fathers and decisions of church councils, they had found contradicting statements on the nature of property. On the one hand, it said that by natural law all things are common to all and it stipulated that no human law could be valid if it contradicted natural law, but on the other hand it stated that property was established by human law (Gratian 1993). The canonists believed that the law as they found it preserved in these documents had to be consistent and they set themselves the task of interpreting these statements so as to harmonize seeming contradictions.[1] They did so by distinguishing different meanings of 'natural law', which sometimes seemed to demand or prohibit certain things, but in other cases only defined something as good, as was the case with common property. Canon lawyers had no doubt that the institution of property was in fact legitimate, but they were also convinced that the earth was given for the sustenance of all human beings. One of the authoritative texts which underlined this belief came from Basil the Great: "You are like one occupying a place in a theatre, who should prohibit others

1 . for a good account See: Berman 1983: 120-164.

from entering, treating that as one's own which was designed for the common use of all. Such are the rich. Because they were first to occupy common goods, they take these goods as their own. If each one would take that which is sufficient for one's needs, leaving what is in excess to those in distress, no one would be rich, no one poor. … That bread which you keep belongs to the hungry; that coat which you preserve in your wardrobe, to the naked …as often as you were able to help others, and refused, so often did you do them wrong. " (Avila, 1983: 50-1)

Commenting on this text the most influential of the early canonists, Huguccio, forged a principle that was to guide almost all canon law reflection on the subject: "by natural law all things are common, which means that in times of necessity they must be shared with those who need them." (Couvreur 1961: 99) Ricardus Anglicus was the first to apply the idea to the case of someone taking something that belonged to someone else: the starving man who took something from the superfluities of the rich in order to survive was not a thief, because in times of necessity all things were common according to natural law. Although some canonists resisted the idea of a person taking matters into his own hands, the right of extreme necessity soon became standard doctrine in canon law.[1] In the thirteenth century the canonistic teaching was transferred to theology by Guillaume of Auxerre, and after having been endorsed by Bonaventure and Aquinas, it was accepted by all schools of theology.[2] During the famous poverty debate in until the beginning of the fourteenth century, it figured in the arguments of both sides (see especially the writings of Mäkinen). Similarly, the principle was transposed to civil law when in appeared in Accursius's *Glossa Ordinaria*, after which it became generally accepted by subsequent generations of civil lawyers.[3] It was, in the words of Swanson "a truth so compelling to churchmen in the later middle ages that political and legal and philosophical systems of whatever nature somehow had to find ways of tucking it in and accommodating it" (Swanson, 1997: 413)

After its general acceptance early in the thirteenth century, the right of extreme necessity was there to stay for a long time. It was endorsed by all major sixteenth century theologians and by early modern civil lawyers like Grotius, Pufendorf, Barbeyrac and Vattel. It appeared in different forms in the political philosophies of such diverse political philosophers as Hobbes,

1. See: Couvreur, 1961: 91-106.
2 See: Courvreur, 1961: 208-53.
3. See: Courvreur, 1961: 151-2; Swanson, 1997: 407-8.

Locke, Hutcheson, Carmichael, Kant, Fichte and arguably even Hume and Smith.[1] One of the remarkable things about the history of the principle is that the almost unanimous acceptance was not matched by a similar agreement on its justification. Some theologians thought that the starving man could licitly take food from its owner, because his consent could be assumed: after all, not giving food to someone in grave necessity would involve mortal sin. But others relied on the idea that the presence of a starving man caused the wealthy to lose his right of dominion over his surplus of food since (as the dictum went) "in times of necessity all things become common." This uncertainty on the precise foundation of the right was a source for many other disagreements. What if the situation improved and the person who had taken food from a rich person to survive was in a position to give something back? Is he obliged to do so? If the owner had in fact lost his dominion over the food, then it seemed that there is no obligation for the poor to settle any debt. After all they had only taken something to which they had as much a right as anyone else.[2] But the underlying consensus – that anyone has a right to the necessities of life – was overwhelming.

This idea of a right to the necessities of life is connected to another idea—*i.e.* that everyone has a duty to sustain his or her life. Since Augustine denounced suicide as a transgression of the commandment not to kill, Christians have been quasi unanimous in their condemnation of it. Killing oneself is considered the usurpation of a power that belongs to God only. God has given life to human beings, therefore only He has the right to take it away. Christians should endure whatever hardship God has intended for them, and not, to use Locke's wordings, to quit their station wilfully (Plant, 1988: II, 6). Failure to do so is to be disobedient to His will, His providence.[3] Throughout the history of natural rights theories, the command not to kill oneself, as well as others, was connected to the availability of basic necessities. For example, in the course of the medieval poverty debate between the Franciscans and their adversaries,

1. For the sixteenth theologians, See: Kilcullen, 2000: 893-7. Swanson regrettably confounds rights of use and property rights in his account of the school of Salamanca. General accounts of early modern discussions are given in Tully (1980), Horne (1990), Buckle (1991), Swanson (1997) and Fleischacker (2004, 2nd chapter). For Smith, See: Witztum, 2005.
2. See: e.g. Salter 2005
3. See *e.g.* City of God I, 24: "But if the bravest and most renowned heroes … though they had no fear at all of death… would yet rather suffer slavery than commit suicide, how much rather must Christians… shrink from this act, if in God's providence they have been for a season delivered into the hands of their enemies to prove or to correct them!"

the duty to preserve one's life was connected by both sides to the use of goods necessary to sustain one's life. The Franciscans claimed that no religious order could renounce the (restricted) use of goods since the life of mortals is not possible without it.[1] One of the arguments of their opponents was that it was not possible to (licitly) renounce ownership of goods, precisely because it is not licit to renounce use of goods that are consumed in the use, and licit consumption is not possible unless one is the owner of the thing consumed.[2]

Similarly, from the fathers of the church till Locke and beyond, access of every human being to the necessities of life has been considered to limit the amount of legitimate appropriation. Keeping anything over and above one's basic needs was considered unjust if it could be distributed to someone in dire need. The *decretum*, for example, quoted Ambrose saying that if you do not feed someone who is dying of hunger, you have killed him.[3] From the thirteenth century till at least the seventeenth century the idea that people have an 'inclusive' right to those things necessary for survival has been defended on the basis of an original right of use, granted by God that could be limited by the institution of property but could never "be emptied totally" (Ockham, 2000: 443) Despite the many differences in opinion on the precise nature of the rights of the poor, it seems that there existed a relatively broad consensus to the effect that God's grant to human beings implied that every human being should have access to as much goods as necessary to sustain his or her life.

Underlying these assertions of rights is, of course, a concern for the wellbeing of every human being. But there is something more: both the obligation of each human being to preserve his or her life and the strict obligation to sustain the live of other human beings are grounded in a sense of obligation, not just towards oneself or other human beings, but towards God. Being created with a specific purpose, it is not up to human beings to decide how or when they want to leave this world.[4] Every single

1. See: e.g. Bonaventure 1966: 241
2. *e.g.* pope John XXII, 1996, §3
3. dist. 86 c. 21, see Ruston, 2004: 42.
4. See *e.g.* Locke, 1988: II, 6: "For men, being all the Workmanship of One omnipotent, and infinitely wise Maker; All the servants of one Sovereign Master, sent into the world by [God's] order and about his business, they are his Property, whose Workmanship they are, made to last during his, not one another's pleasure." Korkman, 2006: 259-66 shows that Pufendorf, Barbeyrac and Burlamaqui all derive the right to life from the duty of self-preservation, which for them implied a right of violent self-defence, if necessary. For Grotius, see *The Rights of War and ¨Peace* (I, ii, 1; II, i, 3); For Hobbes, see *Leviathan* (I, 14).

human being has a role to fulfil in God's purposes with his creation. This idea is still present in contemporary Christian defences of human rights. Jürgen Moltmann, a protestant theologian, puts it thus:

> Human beings … are destined to live "before the face of God," to respond to the Word of God, and responsibly to carry out their task in the world implied in their being created in the image of God. They are persons before God and as such capable of acting on God's behalf and responsible to him. As a consequence of this, a person's rights and duties as a human being are inalienable and indivisible.[1]

Our responsibility, according to these theologians, is to carry out our part in the divine plan, and to make sure that other people are able to carry out their parts. One important assumption in this line of reasoning towards human rights is that God has created the world such that in principle it should be possible for each human being to fulfil his duty. Another is that God did not create any human being just to let him perish from starvation. From one can deduce that some human being can be held responsible in those cases where someone is about to starve. Since God has given the earth for the sustenance of each human being, someone not have access to basic necessities must be due to some injustice inflicted by someone else.

These are, I believe, the basic ideas that have gone into the religious theory of natural right to subsistence. While this theory requires some rather strong assumptions, none of these are particularly problematic for those who call themselves Christians (or Jews, or Muslims). The question is whether these assumptions can be modified in such a way that they become acceptable for non-believers as well. My thesis is that this cannot be done, and the reason is that some of the assumptions that are reasonable as long as one accepts the theological framework become utterly problematic when they get secularized. As mentioned, I will focus on three basic questions that any human rights theory must answer: Who has these rights? Who are the relevant duty-bearers? and What is the extent of these rights (what are they rights to)? In searching for answers to these questions, I will rely principally upon three authors who have, in my view, provided the best sustained attempts to ground human rights to welfare, namely Raymond Plant, James Griffin and Alan Gewirth. But as far as I can see, nothing in the argument depends on the particular theses of these three authors.

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1. (1984: 23) For roughly similar statements of both Catholics and protestants, see (Gutiérrez, 1977: 159-60), Hollenbach (1979: 126-7), Kasper (1991: 263), Williams (2005: 160-4) and Wolterstorff (1987: 52-3).

Who Are the Subjects of Natural Rights?

It is tempting to think that the question "Who has these rights?" can be answered by simple reference to the meaning of the phrase "human rights" so that these rights are *by definition* held by all and only by human beings. But when the question is a request to provide a justification for granting rights only to human beings, such a stipulative move will turn out to be unpersuasive. Neither will it do to refer to the fact that human beings are all member of the same species. On what is probably the best account, species are groups of interbreeding natural populations that are reproductively isolated from other such groups.[1] Accepting species membership as a morally basis on which to grant rights leads to counter-intuitive consequences. The species 'Homo Sapiens' may well have come into existence by bifurcation from another species. Should this be the case, would the species from which ours has evolved not already have had the same rights? Similarly, our species might in the future give birth to new species. Would we deny the members of these new species rights, merely because they cannot interbreed with us? These and similar problems[2] are not merely an embarrassment for speciesism. They show that reproductive isolation in itself cannot possibly provide a moral justification for differential treatment of organisms.

A more plausible route would be to suggest that it is not reproductive isolation as such, but the consequences of the process that are morally relevant. Reproductive isolation allows interbreeding groups to preserve gene complexes specifically adapted to a particular ecological environment. Possibly the justification of granting rights to some and not to other organisms would lie not so much in species membership but in a certain quality that is possessed by the members of a species. Again, mere similarity in genetic structure seems just as dubious as a criterion for moral standing as species membership. But perhaps there is some other trait that is specific to human beings that could do the job. Many candidates for such a characteristic have been proposed: from the indistinct appeal to a notion of human dignity, over the tendency to be sociable, to the ability to acquire language. The clearest and apparently most promising notion is a certain conception of agency. Human beings can form pictures of what a good life is like and act to try to realize these pictures,[3] they are able to form and

1. See: Mayr, 1996: 265.
2. See: Graft, 1997: 14-6.
3. See: Griffin, 2000: 29; 2001a: 310, 319; 2001b: 4.

follow a conception of the good and to pursue ends.[1] They are capable of voluntary and purposive behaviour in the sense of being able to control their behaviour by their unforced choice with a view to attaining their goals (Gewirth 1982: 54).

Even if this conception of agency adequately summarizes some intuitions shared by many of us regarding the uniqueness of human beings among animals, it nevertheless fails as a proper ground for human rights. The reason is simply that not all human beings have these capacities of agency. While some philosophers have bitten the bullet, and maintained that 'human' in 'human rights' does not refer to all human beings, but only to agents (Griffin 2001a: 312), the conclusion that children do not have rights has proven too hard to swallow for most authors. Consequently some of them have come up with ad hoc arguments that aim to explain why, despite the fact that their initial case for human rights would seem to lead to the opposite conclusion, children nevertheless have rights. Two examples may suffice to illustrate this tendency.

Diana Meyers has argued for the existence of inalienable rights from the claim that no moral system can, on pain of becoming self-defeating, impose certain duties on people. A moral system is self-defeating, according to Meyers, "if it holds both that moral agents ought to do their duty and that moral interaction as prescribed by the moral system ought to stop." (Meyers, 1986: 37) Consequently, there are certain things that no moral system could oblige us to sacrifice (without being self-defeating). Inalienable rights are the moral instruments through which moral systems implement these restraints on moral prescription.[2] Any moral system must grant inalienable rights to such goods which it is always supererogatory to sacrifice altruistically. To hold inalienable rights, one must therefore be capable of moral agency since only moral persons can incur obligations and make supererogatory gestures.[3] Given this characterization of inalienable rights, one would have thought that children cannot have rights, since they cannot have moral duties. In addition, Meyers also unambiguously states that a moral system need not be self-perpetuating: a moral system need not proscribe the propagation of the species.[4] Nevertheless she argues that children have inalienable rights to moral education "because it can never be obligatory for an adult to deprive a

1. See: Plant, 1988: 71; 1980: 93.
2. See: Meyers, 1986: 51.
3 . See: Meyers, 1986: 2-121.
4 See: Meyers, 1986: 131

child to the object of the right." (Meyers, 1986: 135) Not only does this move collapse the in this context essential distinction between failing to provide a good like education and actively depriving someone of a good that she would otherwise have. But it is also clearly in contradiction with the criteria of possession of inalienable rights offered by the author.

Secondly, consider Gewirth's case for children's rights. According to Gewirth, every moral agent must claim for himself rights to those things that he needs to be an agent. Any agent must also admit that being a prospective purposive agent is a sufficient reason for having these generic rights.[1] Again, since children are not (yet) prospective purposive agents it would seem that children do not have these rights. But then Gewirth claims that "since all humans are such agents having such needs, the generic moral rights to freedom and well-being are human rights." (Gewirth, 1982: 51) Like mentally deficient persons and people with brain damage, however, children only have generic rights proportional to the degree to which they have the abilities of agency.[2] Gewirth himself admits both that some animals also have some of these abilities (but he never mentions animal rights in this context) and that having the abilities of agency in certain degrees is not the same as being a prospective purposive agent to a certain degree.[3] It remains mysterious, then, why having certain abilities to a degree insufficient of being an agent would, in the case of children, suffice to ground generic rights. Gewirth further claims that children have preparatory rights, for example to be given a kind of upbringing that will enable them to become prospective agents whose generic rights must be respected by agents,[4] but he simply fails to provide an argument for these rights.

Could these arguments be made to work? Since young children are not agents on any plausible conception of agency, the only route to defend children's rights on the basis of a theory that connects rights with agency would be to emphasize their potential to become agents. However, the argument from potentiality is notoriously problematic.[5] Two objections have traditionally been raised against it. The first, the scope objection, complains that an argument on the basis of potential proves too much. If children are potential agents, so are foetuses, and so too are (pairs of) egg-

1. See: Gewirth, 1982: 51.
2. See: Gewirth, 1982: 55.
3. See: Gewirth, 1978: 122.
4. See: Gewirth, 1978: 141.
5. for an excellent account, See: Perret, 2000.

cells and sperm-cells. So if children have rights because they are potential agents, foetuses and egg- and sperm-cells supposedly have them too. But this is clearly absurd. Friends of the argument from potential have insisted that the threat of regression can be stopped by distinguishing identity-preserving potentiality from non-identity preserving potentiality. So a human foetus might have rights because it is the same being as the one that will develop into a person, while a sperm-cell isn't. But even if the distinction eliminates the problem of scope, it leaves the second objection unanswered. This objection denies that the potential to become something is relevant to the possession of rights or privileges that are due to the actual being. Just as a potential president does not have any claim to the prerogatives of the office, the fact that someone is a potential person only indicates that she might in the future have the rights of personhood. To avoid misinterpretation, I am certainly not denying that children have moral status. I am merely denying that arguments for rights to persons can be extended towards young children on the basis of their potential to become persons.

Even if it would succeed, the argument from potential would be impotent to transform theories of rights of persons into theories of human rights. There are two reasons for this. Firstly, the inclusion of potential persons in the category of rights subjects would still leave out several categories. Apart from those human beings (young children) that are not *yet* agents, there are those human beings (*e.g.* elderly people suffering from dementia) are not agents *any more*. Moreover, some human beings *never have been and never will be* agents in the relevant sense. If we accept personhood as the ground of rights, we will have to admit that some elderly people and certain categories of disabled people do not have rights. The second reason is that there are other non-human persons. According to Peter Singer, the evidence is at present most conclusive for the great apes, but several other species may in the near future also be shown to have the capacities that we associate with personhood. Several non-human species have been shown to create complex social systems, have self-awareness, exhibit altruistic behaviour, and use language. So if children are considered to have rights on account of their potential for personhood, how much more are these animals entitled to the rights connected with their *actual* personhood? But if they are, then these rights are not human rights.

Rights of persons are not human rights, because not all human beings are persons. But the conclusion that a significant part of the human race does

not have human rights has proven unacceptable to most contemporary authors, hence their attempts to circumvent the implication of their own arguments by adding *ad hoc* categories of right-holders. A more promising way to avoid this problem would be to deny that personhood or agency is essential to having rights, or, alternatively, to employ a conception of personhood that is not dependent on the possession of certain capacities like the ability to reason or develop life-plans. Contemporary Christians often seem equivocal precisely on this point. Thomas Williams, for example, claims that the distinction between human beings and persons is foreign to a Christian understanding of humanity: "regardless of the label applied, all human beings are equal in dignity and must be treated as persons." (Williams, 2005: 132) He quotes the 1987 declaration *Donum Vitae* of the Congregation for the Doctrine of the Faith, where the problem of personhood versus agency is answered with a rhetorical question: "How could a human individual not be a human person?" but subsequently employs Wojtyła's work to connect personhood to the experience of subjectivity and the power of self-determination.[1] Similarly, Max Stackhouse, in a talk on human rights insists that human dignity is not an inherent but a bestowed dignity. "If it were an inherent dignity you could look around and find examples of people in infancy or people in the aged who hardly seem to manifest any of these characteristics of inherent dignity as an empirical matter," Stackhouse explains, after which he goes on to associate human dignity to the capacities to use reason, to exercise will and to love (as if the capacity to use reason is not an empirical quality).

The common ground in the Christian understanding of human dignity is that it does not depend on any empirical capacity that any particular human being might or might not possess. The dignity of human beings lies primarily in their role in God's providence. That is why Christians can claim that even an unborn foetus from its earliest beginning is a human person and has a value incomparable to that of any other creature. God gives life to all beings, and has created even the tiniest human being with a soul.

Now it is easy to see why the religious theory of human rights to subsistence is not vulnerable to the problem of finding an appropriate criterion for identifying right-holders. Since it is not the plans of human beings, but God's plan, that is the ground of human rights according to this theory, any human being is a rights holder on condition that he or

1 . See: Williams, 2005: 132-9.

she has this special function in God's plan. Thus the ability to have rights is dependent on God's intentions, not upon one's capacities of agency.[1] Christians are confident that any human being, whether still a foetus or mentally handicapped or comatose, has such a role in God's eyes, and that therefore every human being must have rights to the necessities that allow them to sustain their life. In short, the problem of children's rights and rights of other people that do not have capacities of agency which embarrasses contemporary secular theories of human rights, causes no embarrassment for the religious theory.

Who Is Responsible for Realizing Rights?

It is often assumed that rights to welfare are correlative to duties of someone else, or, in Hohfeldian terminology, that they are claim-rights. It is important to see, however, that strictly speaking this characterization is inaccurate. Human rights to welfare are primarily rights *to something* and only in second instance are they rights *against someone*. Human rights to things like adequate nutrition, housing, health, etcetera, are first and foremost claims to have (or use, or enjoy) these things. But because these things are not always readily available, it makes sense to ask who has the duty to provide them (for the moment, I will disregard duties not to interfere with the enjoyment of goods). In this sense, one could say that a theory must be able to derive claim-rights from the initial rights to things. Because claim-rights are correlative to duties, and because they therefore only exist on condition that an identifiable entity can be considered to be under a duty, a theory of rights must be able to identify the bearers of the correlative duties.

Many authors have thought that human rights are rights held by citizens exclusively against their government. Probably this idea derives some intuitive support from the fact that today it is primarily governments that either protect or violate these rights. But it is nevertheless wrong. There is no conceptual mistake involved in thinking that militia involved in ethnic cleansing are violating human rights, even if those militia are not controlled by any government. Nor is it a mistake to think that the human rights of the victims of a famine entail duties on the part of individuals in other countries to provide for food. As far as I can see, then, the only plausible derivation of *rights against* from *rights to* in a secular theory of human rights to welfare is to assume that these rights are held against all other human beings (or, indeed, all entities capable of having duties).

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1. See: e.g. Trimiew, 1997: 274-5.

However, this derivation of claim-rights (*i.e.* rights correlative to duties of someone else) from rights to welfare generates an absurd consequence. If everyone has welfare rights against everyone else, all human beings must have duties to provide for the needs of all other human beings. Even if we take into account that anyone shares these duties with everyone else, still each human being has these duties *as an individual*. The corollary is that one has failed to do one's duty whenever someone does not obtain what he or she has a right to, even if one has done one's utmost in a desperate attempt to provide for all the as yet unmet rights-claims. But following the "ought implies can" principle, no one can have moral duties that extend far beyond what is in their power to do. And if these duties don't exist, neither do the correlative claim-rights.

Carl Wellman, who has given this issue its most systematic treatment,[1] thinks there is also a problem of duplication. If everyone were to perform his or her duty, there would be a vast duplication of effort.[2] This problem could perhaps be solved by following Narveson in holding that the duties that we all have are duties to do something, "even if that 'something' is a matter of seeing that someone else does it". (Narveson, 1967: 235-6) So our primary duties would be those of supporting institutions that provide the goods are required to meet people's legitimate claims.[3] However, even if this proposal answers worries of duplication (Wellman would probably maintain that it doesn't), it leaves the problem of an excess of duties unresolved. Whether or not we will be able to "see to it" that someone else provides for all people's basic needs will depend on the actual existence of institutions that are able to meet the needs of everyone, and this is a matter that cannot be assumed in a normative theory. Consequently, we cannot ascribe all these duties to people.

Could we not say that people merely have the duty to do what is in their power to meet the needs of other people? We could; but the consequence would be that people only have rights to those things that other people are able to provide, and this is something different from what is implied in statements of human rights. This I take to be the basic insight in those many dismissals of human rights to welfare as "utopian" or "mere ideals," and what defenders of human rights[4], have refused to take seriously, probably because there is no solution to this problem.

1. See: Wellman, 1982: 35-9 & 159-163.
2. See: Wellman, 1982: 160.
3. See: Plant. 1984: 81-2.
4. See: Nickel, 1982.

Again, these problems do not afflict the religious predecessor of contemporary theories of natural welfare rights. I suggested that rights to subsistence have a rather specific function in the religious framework in which they were first formulated. They are rights to the goods that enable human beings to subsist so that they may continue to perform their role in God's plan with his creation. The ought-implies-can principle is also applicable here, but in a reversed sense. Since God is considered omnipotent and good, he would not put anyone on this earth only to let him perish. Therefore he must have provided the necessary goods for his creatures to be able to sustain their lives (at least for the time he intended them to live) and he must have given them the right to use these things. The availability of the goods necessary for human beings to fulfil their duty can therefore be assumed in Christian theology. Yet, even though God is said to have created the most perfect of all possible worlds, it may still contain evil not intended or caused by God but freely chosen by those of his creatures capable of free choice. One of these evils is triggered by greed inciting people to take more than they need even up to a point of making it impossible for others to sustain their lives. Since doing so interferes with God's intentions, people clearly have a duty to abstain from taking more than they need if doing so prevents others need in order to survive. These duties are not strictly correlative to the right of people to the things they need, but they are justified on the same basis.

We can now see why the religious theory of rights to subsistence does not generate an excess of duties that people are not able to discharge. According to this theory, the baseline situation is one where people have access to the goods that they have a right to use. Therefore, duties not to violate these rights take the form of 'negative duties' not to interfere with the use of these things that people are entitled to use, *e.g.* by appropriating a too large share for oneself. Because these duties are 'negative' in this sense, it is in principle always possible to identify those who are violating their duties in any situation in which people fail to have access to the things to which they have rights. To make this scenario more tangible, you could envisage a situation where several people are each allowed (have a 'right') to take one piece of a pie, and there are only so many pieces as there are people. In this situation, it is obvious that those who have taken more than their share could be held accountable, even if it is not possible to say that any of those people has a perfect duty to one identifiable other person. Each of them has an imperfect duty not to take more than her share in case doing so will deprive someone of the means

necessary to survive. Despite the fact that this is an imperfect duty because it is not owed to any particular human being, it is nevertheless a duty of justice in the sense that not discharging it will definitely cause the rights of some people to be violated. Such, I submit, is the relation between natural rights of use and duties of human beings. As each human is assigned a certain measure, those duties the breach of which will cause rights infringement are both easily identifiable and viable.

On possible problem with this theory, or my depiction of it, is that there exists another way to construe the way God has provided for the human race. After all, the idea that God has always provided enough food for everyone might seem outrageous in view of the fact that throughout large parts of its history life has been a struggle for survival for most people, and often many of them have lost this struggle. Religious thinkers have of course not been oblivious of this fact, and they have seen in this a task of human kind to remove the evil of scarcity. God may consequently be seen to work not just directly in the creation of the earth and its produce, but also through human beings as second order causes.[1] It is up to human beings to fulfil Gods intentions, and this also includes providing enough food for all human beings to subsist. But when this is thought to be the case, it will turn out to be much harder or even impossible to decide who bears responsibility in those instances where some people fail to have enough to subsist. For if it is easy to tell who has taken more than she needs, it is certainly much harder to tell who has not done enough to relieve the suffering of those who are not able to provide for themselves. This objection may be granted, provided that it is kept in mind that the problem is quite a different one than that of an excess of duties that troubles the secular theory. The difficulty of deciding who is responsible in case the earth fails to produce enough for everyone is an epistemological one. It may, in other words, be impossible to decide who has not performed her duty. But the lack of enough means of subsistence for everyone does not imply that *everyone* has failed to do their duty, as it does in the secular theory.

Can Secular Theories Avoid Proliferation?

One of the remarkable features of theories of rights to subsistence from the twelfth century onwards is that they were always unequivocal about the extent of these rights. Whatever canonists, theologians and lawyers disagreed about, there was never any doubt about the area of application of the

1. See: Barrera 205.

principle of extreme necessity: only in cases where people were lacking (or were in danger of being without) the barest necessities of life—i.e. those things the absence of which would cause certain or almost certain death—was it permissible to have recourse to the property of other people without their permission. The motivation for the principle, together with a few additional assumptions, makes it clear why this should be the case. The basic idea behind the principle of extreme necessity was that earthly goods were given by God for everyone's sustenance, to allow each of us to act upon our duty in Gods plan with his creation. To do whatever it is we are destined to do according to Gods providence each of us has been given access to a portion of the earth's goods and a specific set of talents. Our skills and industry may at times allow us to acquire more than we strictly need, but such abundant acquisition nevertheless remains unjust if it frustrates the principal aim for which these goods were created, which is to provide for basic needs of all human beings. Because God has given to each of us the necessary talents to do what we are supposed to do in this life, it is reasonable to suppose that as long as we have access to the enough products of the earth so as to allow us to necessities of life, and so long as we are not actively prevented from doing so, we will also be able to carry out our mission in Gods redemptive plan.

The secularized theory has retained the idea that people should live their life according to some plan, but instead of having a duty to abide by a divine plan people are now supposed to develop a plan for their own life. What distinguishes human beings from other creatures and grounds their status as rights subjects, according to these theories, is precisely their ability to develop such a plan themselves. However, this shift in the basis of human rights, from a divine plan to a plan generated by the person herself, has two significant implications, both of which make it impossible for the secular theory to limit the amount of legitimate rights-claims in a non-arbitrary way. First, in the secular theory the notion of autonomy that grounds human rights is very different – and, indeed, much more demanding – than the analogous notion in the religious theory. It makes sense in the secular theory not just to say that people *are* autonomous, but that they have a right to those things that allow them to become autonomous. This is one reason why these theories accord more extensive sets of rights to people, but, as we shall see, it also prevents them from non-arbitrarily limiting this set. Second, in the secular theory there is no guarantee that a person who has achieved autonomy in the sense of being able to make plans will also be able to achieve any of his ends. Contrary to the religious theory, where only the

availability of basic necessities or interference with their liberty could thwart people's ability to execute their duty to God, the secular theory cannot possibly presume that people will be able to accomplish the goals they set for themselves, even if they have enough to survive and are not hindered in their endeavours. Contemporary theories of natural rights to welfare typically hold that rights protect people's ability to generate plans and to pursue them. But what is necessary to be able to 'pursue' one's goals remains unclear, and this lack of clarity signals the inability of the theory to ground limits to the duties correlative to these rights.

Take the requirements of autonomy first. Traditional theories typically attached human value or dignity to the special place of human beings in Gods plan with his creation. Whatever the name that was given to this quality, it was always something that is supposedly present in any human being, irrespective of whether their rights have been violated or not. Contemporary theories of welfare rights are fundamentally different in this respect: they connect a specifically human life with the ability to generate plans for oneself, to choose one's own course through life or one's "conception of the good," and to act purposively—that is, with a view of attaining the goals one has set for oneself.[1] The important difference is that this is not a capacity that even adult human beings naturally possess. Capacities necessary to rationally plan one's actions, for example to distinguish relevant factors in opting for a certain profession rather than another, have to be developed. That is why all of these authors see education as an essential human right, because it is essential to nourish requisite abilities to be able to choose autonomously, like being able to estimate and assess the probable consequences of different options that one faces at different points on one's life. Clearly these qualities are not innate—they require education and access to information. And this generates the first serious problem with delineating the extent of people's human rights, for it cannot be denied that the abilities relevant to making informed and sound choices between different alternative courses of life come in many degrees, and that there is in principle no end to the amount of education that can further enhance these abilities. Consequently, if the need to develop these abilities is a ground for human rights (because they are essential to develop autonomous agency), there is also no limit to the amount of assistance that is required by human rights.

1. See: e.g. Griffin 1984: 138; Griffin 2000: 29; Plant 1980: 93; Plant 1984: 71; Gewirth 1982: 54-5.

This objection has not been taken seriously by proponents of theories of human rights to welfare. Griffin, for example, dismisses the objection that the notion of 'minimal' is too indeterminate to constitute a feasible claim on others, saying that it "assumes that human rights are constructed out of materials that are, in some way, purely moral. … Messy practical considerations … enter into the definition of the domain of very many moral norms – say, of such norms as, Don't deliberately kill the innocent." (Griffin, 2000: 33) But the problem for these theories of human rights goes beyond that of deciding the applicability of a norm—it is one of deciding what measure of autonomy is required by the norm itself. Since our intuitions tell us that there is a significant difference between those things that are required by people's human rights and things that are not, the characterization of the realm of human rights norms cannot be grounded in an arbitrary distinction based on practical considerations. But theories that grounds human rights in a notion of 'autonomy' that is gradually enhanced by education cannot limit the abilities required by the norm that rights ought to be respected other than by a philosopher's fiat. Failure of these theories to provide any clear guidance in this respect also means that they are of no avail in stopping the proliferation of rights claims.

The second problem has to do with the requirement in these theories that people have the ability to act. Talk about 'personhood,' 'agency' and 'autonomy' may lead one to think that human rights, according to these theories, primarily protect certain mental abilities, like being able to choose based on the basis of a rational assessment of the relevant factors influencing the outcomes of one's decisions. But this impression is mistaken. Griffin, for example, states that "autonomy, on its own, is not enough. It is not enough to be able to choose one's path through life if one cannot move." (Griffin, 1984: 138-9) Living as agents implies not just choosing autonomy but also "freely pursuing our conception of a good life." (2000: 40) According to Plant, human rights generate duties to "provide those needs that are equally necessary conditions for the pursuit of any end." (1980: 61) For Gewirth, human beings have rights to freedom and wellbeing because these are "the necessary conditions of action". (Gewirth, 1982: 53) It is in itself interesting to wonder why a theory that grounds rights in agency should also protect actions, but for the present purpose I will take it as given that any plausible theory of human rights to welfare should at least protect people's ability to act—*i.e.* that no theory that allows people unable to pursue any end is likely to satisfy our intuitions on the subject. The crucial question is then: "Which actions are to be protected, in what way and why?"

One conceivable answer seems to follow naturally from the intuition that it is not so much their ability to make plans, but their ability to achieve the goals they have set for themselves that really counts for people. Accordingly, one could suggest that people have natural rights to the means that enable them to realize their plans. But this answer would have the absurd implication that people have rights to the realization of anything they decide to pursue. As such, any impulse, any whim that one might come up with would be elevated to the status of grounding rights-claims against other people to provide the assistance necessary for its realization. Evidently, a theory of natural rights to welfare, if it is to be plausible, must somehow limit potential right-claims. If it is to be a theory of natural rights, it seems that this limitation must be based in an account of the nature of human beings. A straightforward way of doing this would be to provide a list of "especially important functions in human life." (Nussbaum, 1992: 214) From the perspective of theories of natural rights, however, such an objective list approach may be seen to be liable to the very same problem that we started off from. Nussbaum herself claims that the list "is, and should be, open-ended" (Nussbaum, 1992: 216). It is always possible, then, for a group to suggest that new items should be added to the list. And since it is not clear what counts as criterion for something to be included, except that it has to be part of "the actual self-interpretations and self-evaluations of human beings in history," (Nussbaum, 1992: 215) it is not so clear either what should count as an argument for or against such an inclusion, except a ballot or a philosopher's fiat. Hence the objective list strategy is unlikely to be helpful in halting the proliferation of rights-claims.

Theories that ground rights in human agency or in a characterization of human action seem more promising in this respect. They do not merely aim to identify things that we as human beings find particularly important, but to identify those features that make human action possible at all. Griffin, Plant and Gewirth all stress that human rights are not rights to the actual realizations of one's life-plans but to the conditions necessary for agency. Griffin states that human rights "are rights not to anything that promotes human *good* or *flourishing*, but merely to what is needed for human *status*". (Griffin, 2001a: 312) They are protections of agency, of living as agents, which means "autonomously choosing and freely pursuing our conception of a good life". (2000: 29, 40) Similarly, Plant defines basic needs as those which "have to be satisfied in order to do anything at all". (Plant,1988: 60) Gewirth holds that rights-claims are essentially linked to

action because they are "demands on the part of agents that the essential prerequisites of their actions at least not be interfered with". (Gewirth, 1978: 77) Generic rights, for Gewirth, are rights to the necessary goods of action *for any agent*, and he contrasts this "material necessity" with principles centered in the purposes, inclinations, or ideals for which some agent may contingently act and whose requirements he may hence evade by shifting his desires or opinions" (Gewirth, 1982: 53). So agents have rights to those things that are necessary to be able to act *as an agent* at all, or so it seems. What are those things? Gewirth, Griffin and Plant all identify freedom and wellbeing as the minimal requirements of agency (with certain variations). But there is something deeply disturbing about this consensus, since the agreement is about something that is so obviously false. Just a few moments of reflection suffice to realize that neither freedom nor wellbeing is necessary for someone to be – or even to function as – an agent.

Take freedom first: even if it is not always clear what notion of freedom these authors have in mind, it is safe to assume that none of them would regard a prisoner like, say, Nelson Mandela when he was detained for his resistance to apartheid, free in the sense required by human rights. But it does not follow from the fact that he was unjustly detained that he was prevented from exercising agency. Griffin recognizes this problem, saying that "a person can …be cruelly persecuted, without ceasing to be an agent. …there is a sense in which persecution can even enhance agency". (Griffin, 2001a: 319) He confronts this objection by putting forward an 'ampler' picture of autonomy as that of a self-deteminer "who, within limits, is not blocked from pursuing his or her conception of a good life". (Griffin, 2001a: 319) Griffin, Plant and Gewirth at times suggest that the relevant conception of freedom is negative freedom. Hence, in addition to a right to the things necessary to become autonomous agents, people have a right not to be intervened with in the pursuit of their goals. The problem with this suggestion is that it is not easy to see how negative freedom can be related in an appropriate way to the agency of the person who has the right to be free.

In what way is freedom necessary for someone to be an agent? The most obvious answer is that agency requires not just an ability to make plans, but to realize (at least some of) them. And this is what freedom contributes: it allows the agent to put (some of) her plans into practice. Nonetheless, there are two problems with this suggestion. The first s that negative freedom is not always sufficient to enable an agent to achieve any of her aims. Some agents, who are autonomous in the sense of being able

to set goals for themselves, may lack the ability to actively realize any of these goals. In those cases, negative freedom (absence of interference by other agents) cannot sensibly be thought to enhance their agency. But this conclusion goes for all agents. If someone's agency is enhanced by the prospect of realizing at least some of her plans, then it is not the absence of interference as such that contributes to agency, but the actual capacity to realize those plans. The second problem, then, is that it is not at al clear why negative freedom should have a privileged position in these theories over absence of other obstacles in general. Why would an intervention of another agent limit one's agency any more than other obstacles? Or conversely, why would natural obstacles be any less of a limitation to one's ability to determine the shape of one's life than interference by human beings? Thus, in as far as freedom is at all necessary for agency the relevant conception can only be one of 'positive' freedom. But if this is true, then the theory that connects rights to agency is in no better position than the objective list approach. For if agency requires that people be able to realize at least some of there plans, the problem is again that there is no non-arbitrary way to limit the amount of abilities to realize that will satisfy the requirements of agency.

Defenders of natural rights to welfare might object to the suggestion that negative freedom can only be justified by reference to its contribution to an agent's ability to realize some of her goals. Might not the mere ability to pursue one's life-plan be an essential element in a substantive conception of agency, even if it doesn't include any guarantees that the agent will actually be able to achieve any of the things that she is pursuing? Is not the ability to pursue something worthwhile of ultimate value for an agent? Yet, despite the rhetorical force connected with phrases like "the pursuit of happiness," it doesn't do any work in justifying negative freedom. The reason is again quite simple: someone who is imprisoned might continue to pursue happiness, even if some of her efforts will be blocked by interference from others. There is again no reason to think that the absence of negative freedom will rob an agent from the ability to pursue happiness any more than absence of positive freedom would.

Griffin, Plant and Gewirth also think that well-being is required for agency. Plant, for example, writes that "agency must also include some element of a worthwhile life or physical well-being, because it is very difficult to imagine how a life of rational agency could ever be pursued if the whole effort of a person's life is devoted to securing the bare minimum

to survive". (Plant, 1988: 61) But Griffin's concession with regard to freedom is also relevant here: in some cases, people's agency might even be enhanced when someone has to endure strenuous conditions. Consequently, there is no reason to think that hardship is incompatible with people being rational agents. Of course, there is an important sense in which well-being might enhance agency—namely by making it possible for a person to develop her capacity for autonomy. In as far as this is the case, however, it is again a reason for doubting that a theory that grants people an inclusive right to be autonomous, can generate any precise limits people's legitimate claims to enhance their wellbeing.

Once more, when we bring to mind the fact that intuitions regarding human rights have for centuries been shaped by the religious background in which theories of human rights grew, we can see where the problems of the secular theories come from. In the religious theory, the ultimate ground of human rights is each human being's role in the realization of Gods intentions. To the extent that the fulfilment of this role implies some action on the part of the individual, it is crucial that she not be hindered in implementing it. That is why negative freedom is an integral part of the natural rights tradition from which theories of welfare rights emerged. But once the notion of a divine plan is abandoned and replaced by human beings making their own plans, the link between rights and the realization of these plans cannot be sustained. A theory that grants people rights to the realization of their plans would rightly be rejected as absurd. In the religious theory, this link between negative freedom and the ability to realize Gods plan is secured by the knowledge that God has given us the required abilities to carry out our obligations. Discarding the idea that what ultimately counts is the realization of plans, however, makes it the link between rights and negative freedom unintelligible. Even if the objectivity of Gods plan may be replaced by a general sense that people's expectations for their life are 'unreasonable' if they are not adapted to their own capacities, there remains the problem of distinguishing between interferences of other agents and natural obstacles. In the religious theory this problem does not arise, because natural obstacles are already part of Gods providence. Individual actions are of course also foreseen by God, but they may still constitute evil, whereas natural obstacles do not.

I conclude that secularization of the theory of rights to subsistence into theories of welfare rights has generated several insurmountable problems.

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