Reconciling Feminist Politics and Feminist Ethics on the Issue of Rights

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Should feminist ethical theories include rights as a component? There is a tension between feminist politics and the endorsement of the language of “women’s rights,” and feminist ethics and its critique of rights. In this paper I begin the project of reconciling moral theories that include rights as a component with feminist criticisms of rights. There are two parts to this project. First, I must respond to the criticisms feminists have made against rights theories in order to show that it is possible for a moral theory that includes rights to be a feminist moral theory. Answering these criticisms is necessary if I am to establish that moral theories that include rights are among the candidate theories from which feminists might choose. Second, I must develop a feminist moral theory that encompasses rights, and argue for its superiority to other sorts of moral theories in order to show that a moral theory that encompasses rights is a plausible feminist moral theory. Going beyond responding to criticisms and developing a positive feminist rights theory is necessary if feminists are to find rights theories to be attractive candidate moral theories. In this paper I am concerned mostly with the first part of the project, responding to some feminist arguments against theorizing about morality in terms of rights, although in the course of responding to the objections I make remarks that might suggest ways in which some rights theories might be developed as feminist moral theories.

By this point in the paper, it should be clear what the project is that I am undertaking. However, some readers might still be wondering why I am undertaking it. Why should feminists care about reconciling feminist criticisms of moral theories that include rights with feminist concern for the oppression of women expressed in terms of “women’s rights”? Why isn’t it talk of “women’s rights” that ought to be abandoned in light of feminist criticisms of rights? I think that there are both pragmatic and principled reasons for thinking that feminist theorists ought to reconsider rights.

First, the pragmatic answer to this question is that feminist moral theory ought not to abandon the moral and political language of the communities in which we live, if peace can be made with that language. Feminism does not exist in the academy alone and feminist intellectuals risk isolation if we reject the moral concepts that inform political debate. The language of rights is well established both in mainstream political institutions and in progressive political movements for social change. If feminist theorists can rethink rights, rather than reject rights, then there is a role for feminist moral and political philosophers to participate in debates about the content of women’s rights and about what governments and individuals need to do to accord women rights.
Second, the principled answer is that it seems to me that there are independent grounds for thinking that rights are an appropriate moral concept for accounting for the injustice of some central aspects of women’s oppression. Sexual assault and domestic violence, for example, are wrong insofar as they are violations of bodily integrity and the moral rights that protect that integrity. In many instances applying rights to the moral situations in which women find themselves not only gets the right answer, but it gets the right answer in the right way. Establishing that thesis is beyond the scope of this short paper, but I hope to have taken the first small step by responding to some feminist objections to rights theory.

I divide feminist objections to rights theory into three separate areas of concern: structural, psychological, and scope. Although I will talk about these concerns as objections to theories of rights I recognize that many feminist moral theorists are agnostics about rights. I do not mean to suggest that all feminists reject rights or that all of the feminists who do reject rights do so because of the reasons presented here. Rather, my thought is that considerations of the sort I will address are what stop feminists from endorsing rights as part of moral theory.

My answers will generally take three forms. In some cases I will try to show that an alleged vice of rights theory is not an essential part of the theory and hence can be discarded by feminist rights theorists. In others, I admit that the feature of rights theory being criticized exists but then try to present an alternative, positive way of viewing this particular feature of rights theory. And in some cases, I show that there is a deficit in rights theory but that room exists for feminist work in this area to supplement rights theories. For although I think that feminist moral theories can, and ought to, include rights, I do not think that a moral theory that includes rights exclusively would be adequate as a feminist moral theory. Throughout the paper I will be drawing extensively from contemporary work on rights theories, that of others and my own, in an attempt to clear the path for a feminist account of rights by gathering responses to some feminist objections to rights.

It is worth mentioning one important area of concern that I will not be addressing. Some feminists reject rights because of metaethical concerns about the foundations of rights. This is especially true for those feminists who are convinced by postmodern skepticism about the status of philosophical theories. My reason for bypassing this set of criticisms is that its target is much wider, that of all moral theory, or even theory in general. From this perspective there is nothing specific about rights that invites skeptical concerns that cannot also be brought to bear on Kantian, consequentialist, or virtue theories. My focus is on an account of moral rights as a normative theory and so for the purposes of this paper I set aside questions about the foundations of moral rights.

1. The Structure of Moral Rights: Rights as Absolute, Abstract, and Individualistic

Sharene Razack writes: “I experience talking about women’s lives in the language of rights as a cold game indeed, played with words and
philosophical concepts that bear little relationship to real life." What makes the language of rights "a cold game" for Razack and other women? There are three structural features of rights that feminists have criticized. The concern with all three—absoluteness, abstraction, and individualism—is that they render rights theories highly general and practically useless.

The absoluteness of rights makes them unwieldy moral tools indeed. Consider the case of abortion. If the fetus has a right not to be killed and the right not to be killed is absolute, then it is hard to see how any abortions could be justified. Even in cases where the woman’s life is in danger, the fetus is, at worst, an innocent threat and the doctor is a third-party bystander to the conflict. Judith Thomson argues by analogy with the famous violinist example that in some cases women may abort their right-bearing fetuses, however, the analogy with abortion is weakened once we add that in the abortion case, but not in the violinist case, a third party must perform the killing and do so in a particularly gruesome way. Yet if we suppose the fetus does not have a right not to be killed, that women do have a right to make all decisions regarding reproduction, and that rights are the only element in our moral theory, then all abortions, for whatever reason, however far along, will be rendered morally unproblematic. The application of absolute rights to the problem of abortion seems no help at all in that its application yields only extreme positions and fails to account for the moral complexity experienced by many women in choosing whether or not to have an abortion.

The alleged absoluteness of rights also restricts the range of cases to which rights are applicable. For example, mainstream moral theorists, such as Charles Fried, must deny that there are rights against small harms. The example Fried chooses as an example of a right not to be taken seriously, hence not a right at all, is a case of particular interest to feminists: the right not to be pinched. Fried argues that there is no such right, since if there were it would have to be absolute (this follows from his view that all rights are absolute). We might question Fried’s claim that being pinched constitutes only a trivial harm, but more problematic, I think, is his belief in the absoluteness of moral rights.

The problems of absoluteness and abstraction are related, in that once one allows that rights are not absolute, one has to look at specific features of infringement scenarios to see just how strong the rights at issue are. Not all contemporary rights theorists regard rights as absolute and those who have presented accounts of nonabsolute rights also offer accounts that are less abstract and pay more attention to context. Consider Judith Thomson’s account of rights as presented in *The Realm of Rights*. Thomson offers an account of rights with thresholds, rights that can be justifiably infringed when they conflict with stronger claims and when enough is at stake for those who will benefit from the right’s infringement. Once one believes that rights have thresholds and that these thresholds are affected by a variety of factors, then a great many contextual considerations are relevant to questions about rights.

On Thomson’s view the way to determine the strength of a particular right is not by seeing what type of right it is. Instead, we look to how much
the moral agent who possesses that right will be harmed by its infringe-
ment. The strength of a right, according to Thomson, is a function of the
harm to the right bearer were the right infringed. In order to determine the
strength of a particular right we need to look to the facts of that person’s
life. For example, on an account such as Thomson’s, if Arlene and Becca
each own a car and have property rights over their respective cars, it’s not
the case that these rights are equally strong. Suppose that Arlene has only
one car and needs her car to go to work, get groceries and so on, whereas
Becca has, in addition to the one car mentioned, three other cars that she
owns. In this case the right Arlene has regarding her car is stronger than the
right Becca has regarding her car. Why? Because Arlene would be harmed
more by the infringement of her right than would Becca. This judgment is
not based on considerations of the kinds of rights at issue. After all, the rights
are of the same type. What made them have different strengths was facts
about the harm their infringement would cause.

According to Susan Sherwin mainstream moral theory fails to include
context when it does not direct moral agents to make their ethical assess-
ments in terms of particular details of the lives of individuals affected. If
this is what it means for a moral theory to incorporate a concern for context,
then Thomson’s theory passes Sherwin’s test. I am not claiming that
Thomson is in any sense a feminist ethicist, but I do think it significant that
her theory meets this requirement of incorporating context insofar as it
requires us to look to the particular details of the lives of those whom our
actions affect when making moral decisions. Nor am I claiming that as one
of a range of possible theories, rights theory scores the highest on Sherwin’s
test. Other theories may do a better job of accounting for context but we can-
not reject rights theories on the grounds that they ignore context.

Where a theory such as Thomson’s falls short is in offering us an
account of harm. Arguably this is not her job, but if as feminist ethicists we
want a theory that is useful, then we will need to supplement Thomson’s
account of rights with thresholds with a story about the kinds of harms that
matter, both in terms of determining the strength of rights and in counting
toward the overriding of rights. As feminists we will want to pay special
attention to the sort of harms that traditional theories have overlooked: we
need to count in psychological harms as well as physical harms, and group
harms, as well as individual harms.

Thinking about rights as nonabsolute, and as having a close relationship
to harm, also increases the range of cases that rights are suitable to deal
with; rights become more flexible moral tools. Consider rights of free
speech, which are said to block legislation prohibiting pornography, or
rights of academic freedom, which are said to protect racist classroom
speech. If such rights are not absolute, and harms in the broadest sense
count as grounds for overriding such rights, then arguments against censor-
ship, or against campus speech codes, based on rights are not so easy to
make.

The claim in the cases of abortion, harassment, and speech issues is not
that rights alone can solve these problems, it is simply the weaker claim that
they can go further in articulating the problems than we might have
thought. When we conceive of rights as hedges against maximization, rather than as absolute protections, it is true that our theories get messier but they also get more useful. Perhaps the lesson is that morality is less tidy than most moral theorists have thought.

And so rights need not be abstract or absolute, but there is still the charge of individualism to be addressed. “Individualism” can have different meanings depending on how the charge is put. In this paper I discuss three things that can be meant by the charge that rights theories are individualistic. We can distinguish between moral individualism, a view that concerns moral obligations between persons; methodological individualism, a view about the proper unit for moral evaluation; and ontological individualism, a view about the sort of things persons are. I discuss each possibility in turn.

Moral individualism. One thing that is sometimes meant by the claim that rights theories are individualistic is that they do not require moral agents to offer positive assistance to others. And indeed there are rights theorists at whom this criticism is correctly directed. Those rights theorists are rights theorists who are also moral libertarians. Moral libertarians, such as Robert Nozick in *Anarchy, State, and Utopia*, believe that the extent of our obligations is fixed by rights and that all rights are negative in nature. Property rights and privacy or liberty rights are, for them, the central sorts of rights. Hence, moral libertarians believe that all I am obligated to do for others is not infringe their rights. This is hardly the stuff of which feminist moral theories are made. Suffice it to say that one need not be a moral libertarian if one is a rights theorist. There are at least three ways one’s view might deviate from moral libertarianism, while retaining moral rights as a component: First, one might agree with Thomson that even negative rights are not absolute and so give way when the needs of others are great enough and when the harm the right infringement would cause the right bearer is small enough. Second, one might believe that there are positive rights. Third, one might think that there are obligations beyond those generated from rights, the obligation to promote the good, for example.

Methodological individualism. Sometimes what is meant by “individualism” is that it is individuals who are the bearers of moral rights. But individualism, in this sense, need not be a bad thing if it allows that there are important connections between individuals. Rights theories do this in three ways.

First, if we focus on the concept of rights we see that the concept of a right and associated claim(s) requires us to talk about important moral connections between persons. For Jane to have a right not be harassed entails that Stan has an obligation not to harass Jane. Contrast this with rule-centered moral theories where the most important relationship that exists is between moral agents and moral rules. In a rule-centered theory, should Stan harass Jane we can describe the moral wrong he commits solely in terms of his violation of the rule “do not harass.” No mention need be made of Jane. She drops out of the picture. Rights have an advantage in that they name the victim; they answer the question “who is wronged?” Considerations of this sort, about the connections rights theories require between moral agents, prompt John Tomasi to conclude that “individual rights are fundamentally relational concepts.”
Second, if we focus on the practice of rights, we can see that claiming, according, and negotiating rights are activities that go on between persons. I noted at the outset of this paper that rights are the language of political and moral debate in many of our communities. In this way, rights are more than moral concepts: they are a shared activity. According to Richard Flathman, the practice of rights can serve the purpose of connecting individuals. He writes, “Participation in the practice of rights enmeshes individuals in and makes their actions both logically and practically dependent on an elaborate network of shared beliefs, values, assumptions and so on, that an accepted system of rules involves.”\textsuperscript{18} Martha Minnow likewise argues that claiming one’s rights can be an activity that affirms commitment to a community, rather than one that announces a separation from the community. She writes, “Although the language of rights, on its surface, says little of community or convention, those who exercise rights signal and strengthen their relation to a community.” This is so because, on Minnow’s view, [t]hose who claim rights implicitly agree to abide by the community’s response and accord a similar regard to the claims of others.\textsuperscript{19} According to the view articulated by both Flathman and Minnow, we possess rights as individuals but the process by which individuals make claims and get their rights recognized is inevitably a shared endeavor since we need to recognize rules for adjudicating and according claims.

If the practice of rights requires relationships between persons, why then have rights acquired their reputation as moral concepts suited for a society of individualists? Annette Baier’s model of rights makes sense of this observation by characterizing rights as the “individualist tip of the iceberg of morality.” Rights, according to Baier’s iceberg model, rest on shared understandings and trust. She writes that the tip of the iceberg “is supported by the submerged mass of cooperatively discharged responsibilities and socially divided labor.” We are aware of rights as individualistic but, on Baier’s view, we misunderstand rights if we neglect to pay attention to the less individualistic moral concepts on which rights are parasitic.\textsuperscript{20} My point is that we see this most clearly when we focus on the practice of rights, rather than on rights only as moral concepts.\textsuperscript{21}

Third, if we focus on the question of who rights belong to we will notice that although individuals are most often the bearers of rights, sometimes they have those rights in virtue of group membership. This is the case for those who believe that women can have special rights as women. Less controversially, many of our political rights work this way: there are rights we have as union members, as citizens of a country, as members of boards of directors, and so on.

Ontological individualism. A third thing that is sometimes meant by the charge that rights theories are individualistic concerns the nature of the selves protected by rights. The claim is that rights are inextricably linked to a conception of the self as atomistic, as independent and separate from other persons, and as completely and utterly autonomous. Talking about a conception of the person that she dubs “Autonomous Man” Lorraine Code writes, “His valued independence is under constant threat from other (equally self-serving) individuals: hence he derives rules to protect himself
from undue intrusion. Talk of rights, rational self-interest, expediency and efficiency permeates his moral, social, and political discourse.”

Caroline Whitbeck writes, “According to the rights view of ethics, the concept of a moral right is the fundamental moral notion, or at least one of preeminent significance. People are viewed as social and moral atoms, armed with rights and reason, and actually or potentially in competition and conflict with one another.”

Feminist theorist, such as Code, Whitbeck, and Baier, contrast an atomistic theory of the self with a relational theory of the self, a self that is essentially tied to the communities, relationships, and histories in which the self is found. According to Whitbeck, “A person is a historical being whose history is fundamentally a history of relationships to other people.”

For Baier, “Persons are essentially successors, heirs to other persons who formed and cared for them.” Similar criticisms of the kinds of selves presupposed by rights-based theories have been made by communitarian critics of liberal political theory. One might wonder exactly what sort of claim is being made here. What is the status of these theories of the self, both the standard theory being criticized and the proposed relational alternative? Are these theories making ontological claims (as Whitbeck’s title suggests) about the sorts of selves there are? Or, are the claims epistemological ones about how selves are best understood? Or, are the claims moral ones about the sort of selves we ought to be?

The above questions suggest a number of different ways of understanding the claims these theories make, but what is important for the purposes of this paper is establishing what the connection is between the theory of the self as atomistic and moral rights. Suppose that it is true that many, or most, theories of moral rights are based on the assumption that the selves protected by rights are independent atoms, not connected in any important ways to other selves through relationships. Does a theory of rights require this assumption? It does not. All that is required by a theory of rights is the possibility that individuals can have divergent interests. It does not require that individuals have interests that diverge, nor need it require that individuals not have a significant degree of connection to others. As feminists we will want to reject theories of rights that have built-in assumptions of complete independence and separation, but it is open to us to develop accounts of rights based upon a relational account of the self.

Obviously further work is required in this area, developing such relational accounts, but there is no good reason to throw out rights along with “autonomous man.”

In conclusion, rights need not be absolute or abstract. Theories that encompass rights need not be the sorts of rights theories that we, as feminists, endorse. Rights are individualistic in a limited sense of that term, but not all individualistic theories rule out connections between persons. Rights theories, I argue, require these connections. In the next section, however, I examine the question of whether rights theories encourage selfishness and conflict.
2. The Moral Psychology of Rights: Rights as Selfish and as the Cause of Conflict

Many feminist complaints about rights are not about rights per se but rather about the ways in which individuals view themselves and their relationships when thinking of themselves as right bearers. Rights, it is claimed, lead individuals to view themselves as independent atoms and to view others as adversaries whose only role is to leave us and our property alone. Here again the communitarian, socialist, and feminist critiques of rights overlap.

Individualism leads to rights-based theories, according to Naomi Scheman: “Societies thus envisioned [that is, individualistically] aim at maximally respecting the separateness of their members by providing mechanisms for adjudicating the claims that one member may make against another, while leaving intact as possible the rights of each to be self-defining.”

Worse yet, it is assumed that the interests that individuals will want to pursue in such a society will be selfish ones. Writes Tom Campbell: “Rights are only of importance to those who are seeking to protect their self-interest against the predations of others; they express the ground rules of a type of society which consists of isolated individuals in perpetual conflict with each other in a struggle for wealth and domination.”

Finally, some critics assume that the causal connection between rights and self-interested conflict goes both ways. It is not just that such a society will likely be one that believes in rights. It is thought that these moral beliefs cause persons and their relationships to be fraught with conflict. The following passage from John Hardwig’s paper “Should Women Think in Terms of Rights?” makes the claim in a very strong form:

Thinking in terms of rights does more than reflect an egoistic, atomistic situation; it creates such a situation or reinforces our tendency to move in that direction. Thinking in terms of rights is divisive. It teaches us to think of “I” and “I versus you” instead of “we.” Through accepting this picture and living in it we become more like enemies, antagonists, or traders, at best—less like brothers, sisters, lovers, and friends.

It seems to me that there are at least two different sorts of charges being laid at the door of rights theories here. I approach these criticisms by separating them into two parts and dealing with each separately. First, there is connection between rights and conflict. As we saw earlier some of this complaint derives from one conception of rights: the libertarian idea that the most, or only important, rights are absolute property rights. We can answer the charge to a certain extent by distancing ourselves from that conception of rights. But even on a “friendlier” account of rights, such as that offered by Thomson, one cannot deny that there is some connection between rights and conflict. But spelling out just what the connection is is not an easy matter.

We might begin by distinguishing between rights as being designed to handle conflict and rights themselves as the cause of conflict. Rights do work
as a morality for people whose interests diverge, but in situations where interests are shared, rights do not go away. Rather, individuals are free both not to make claims and to waive their rights. And so from the centrality of rights and the abundance of conflict in this culture, one should not assume that rights are themselves a cause of the conflict. It seems that we notice rights more when claims are being made and contested, and hence the heightened attention given to rights in our society is just as likely a reflection of conflicting interests, as it is to be a cause of that conflict. We can imagine a peaceful society, in which rights are not being claimed or contested, in which rights are still present. This point will be discussed further in the section on rights in personal relationships.

Two facts about rights and conflict are worth noting. First, in some circumstances rights can prevent conflict. Second, not all of the conflict rights cause is negative.

Rights (and their enforcement) can prevent conflict. Two examples should suffice to make this point. First, in the case of property, having rights that are recognized by our community and political system means that it is clear much of the time who owns what. Rights may not prevent arguments over the legitimacy of redistribution but they do at least establish a basis from which to start negotiations. Second, in the case of religion, having rights that guarantee freedom of religion means that we are not engaged in public debates over whose god to worship. Given the absence of these rights and given that both of us would be nervous about the state promoting the other’s god, it would be in my interest to persuade you of the truth of my religious beliefs, and in your interest to persuade me of the truth of your beliefs. Despite the communitarian claims that our lives would all be richer for the discussion, it strikes me instead that life would just be more conflict-ridden.

Also, some of the conflict that rights are said to cause should be reason for feminist celebration and not complaint. If a group in our society is being oppressed, conflict arises when that group is aware of the wrong being committed. An awareness of rights can lead to an awareness of injustice and although conflict may ensue, it seems to me we are better off with conflict than peaceful oppression. To put the point differently, a society without rights might be more peaceful but that does not mean it is morally preferable. The moral climate of Germany under the Nazis would have been improved, not worsened, by more human rights protests. Likewise, we can imagine a feminist version of Joel Feinberg’s Nowheresville (a thought-experimental world without rights) in which women quietly put up with subservient roles because they lack the concepts and language to voice moral complaints. My point is that this world is worse than a world with rights, even if the presence of rights allows people to voice their concerns in particularly pressing ways. Much feminist complaint about rights and conflict seems to be based on the assumption that without rights, individuals would have shared interests. But as the imagined case of Nowheresville shows, people often do not have shared interests. The question of who gets their way when interests diverge ought not to be left for power alone to decide.
Second, there is a claim being made about moral rights and character, in that the way we think and act, when we think of ourselves as right bearers, is less than morally virtuous.

The most common character flaw associated with rights is that of the overly assertive individual. This person never misses an opportunity to make a rights claim and seemingly delights in each opportunity to alert others to an infringement of her rights. She is sharply aware of the boundaries that separate what is hers from what is not, and the language of rights is her usual language of interaction with others.\(^{33}\)

There are several ways that such a person might be going wrong. It may be that this person is missing out on other aspects of morality. She concludes from the fact that others do not have a right to her property that she has no obligation to aid. This may not be the case: likely there is a gap between what we must do for others and what others can force us to do should we fail to live up to our obligations. Rights concern only the latter. Alternatively, it may be that such a person fails in that she does not forge intimate relationships with others. She concludes from the fact that others do not have a right to walk into her house uninvited, and pour themselves a cup of tea, that she ought never to invite them. She neglects that rights are about choices and that we often waive our rights with friends and family.

This selfish right bearer is the figure most often alluded to in feminist writings on rights, but selfishness is not the only character flaw associated with rights. The selfish person takes her rights too seriously, but she has a counterpart, the person who fails to take her own rights seriously enough. Where the selfish right bearer never waives a claim, the selfless right bearer waives her claims whenever asked. Thomas Hill Jr. sketches just such a person in the character of the Deferential Wife.\(^{34}\) The Deferential Wife counts her own rights as unimportant. She says no one is trampling on her rights for she is quite glad and proud to serve her husband as she does. The Deferential Wife appears to have voluntarily waived her rights in consenting to defer to her husband’s demands. But I think Hill is right to argue as he does that Deferential Wife exemplifies a kind of moral failing. She fails to recognize and/or respect her own rights.

Again, there are several different places one might locate the error that the selfless person makes: she might not take her own rights seriously enough; worse, she might not even see herself as a person with rights. To say that such a person is making a kind of moral mistake is not to make the further and stronger claim that we ought to blame her for such failings.

Note that with both the selfish and the selfless right bearer the problem is not with any individual instance of what they have done with their rights, either waiving or claiming. The problem lies in multiple instances of such acts and with the character that we suspect underlies these acts.

What follows from these examples for rights theories? If rights are protected choices, neither the selfish or the selfless right bearer does anything wrong from within our theory of rights. (This is true even if there are limits to waiving our own rights.) One treats herself as well as she’s allowed, the other as badly as she’s allowed. What these examples show is that rights are more than moral concepts; they are also a practice. Further, they show that
the practice of rights can go wrong in various ways. We need an account of virtue and vice, of moral character, to supplement our account of rights. The person who consistently waives her rights, rather than claiming them, does nothing wrong as far as her rights are concerned—this is a legitimate choice—but she is not the best sort of person she could be. Likewise for the selfish person. She may be doing nothing wrong, but that does not mean I would want her for a friend.

What is the connection between moral rights and the vices of the too selfish and the too selfless right bearer? First, one might respond by claiming that these criticisms are not best targeted at rights themselves but at the practice of rights that occurs in the absence of other moral concepts. We cannot ignore moral questions that arise about how we act toward our own rights. Second, the moral psychology of rights is a topic not often discussed. What we do with our rights is an important moral question, and it is true that rights theorists have focused on the “what” and “why” questions associated with rights, rather than the “how.” But the observation that sometimes people use their rights badly suggests we need an account of what it is to use rights badly, rather than dispensing with the rights themselves.

There is also a psychological cost to giving up on rights. We have also to keep in mind the importance of rights in many people’s moral and political lives. In the course of Patricia Williams’s response to the rejection of rights by those in critical legal studies she writes: “In discarding rights altogether, one discards a symbol too deeply enmeshed in the psyche of the oppressed to lose without trauma and much resistance.”

There are interesting questions here about the moral psychology of rights and conflict, but it is not obvious to me that these questions speak in favor of rejecting rights as part of our moral theories as much as they speak in favor of feminist work in the area.

3. Where Rights Belong:
The Question of Personal Relationships

In this section I set out to analyze arguments that claim that rights are inappropriate in personal relationships and that this unsuitability for dealing with personal relationships makes rights unsuitable as a feminist ethics.

John Hardwig offers four arguments against theorizing about personal relationships in terms of rights. In this paper, I will examine only two of them. The first is an argument from motivation. Hardwig claims that we do not want our loved ones to do good by us because failing to do so would violate our rights. Instead, we want people to care for us directly. By this I take Hardwig to mean that we want others to care for us, as a person, not for rights, as moral concepts. Hardwig gives the example of a husband who says to his wife on her deathbed, “My conscience is clear Helen. I have always respected your rights.” Clearly, something is lacking in the husband’s final words to Helen. They are not the words we expect a loving spouse to utter. But does this example show that we ought never to have the rights of our loved ones as motivation for our actions? Does it show that
because such reasons make for lousy motivations, the reasons themselves do not exist?

In response to Hardwig, we might distinguish between the presence of rights and having them as one’s sole motivation. Likely, good acts for our loved ones are overdetermined. It is both the case that we are required to perform some acts to promote their good, and that we would promote their good, over and above the requirement, and even in the absence of such a requirement altogether. That we would not like a person who acted only from the motive of duty does not speak against the existence of rights-based duties in personal relationships. What it suggests is a model where rights form the moral minimum but in good relationships people do more. Further, the contrast Hardwig presents, between caring for persons and caring for rights, does not hold up to scrutiny. Sometimes what is to care for a person is to take on concern for their rights. Concern for the rights of a loved one does not mean that one cares only for an abstract moral concept. One can be concerned about rights because of a direct love for the other person.

In Hardwig’s second argument, he rejects even the moral minimum model of rights in personal relationships. Thinking about the minimum moral requirements in relationships, claims Hardwig, encourages people to do only the minimum. Further, for Hardwig, it is not the case that rights are necessary, but not sufficient, for good relationships. He believes that the rights that govern our interactions with impersonal others are not present in close personal relationships:

If you are my friend, I expect you to do more for me than respect my rights, but there are also many ways in which you do not need to respect my rights. You can invade my privacy, interrupt what I am doing, fail to respect my private property, verbally abuse or perhaps even physically assault me, and it is all right so long as I know that you are my friend. In these situations I do not experience my rights as being violated or myself as waiving or deciding not to claim my rights. I do not conceptualize the situation in terms of rights at all. Precisely because you are my friend and I know that you care for me and will keep my interests in mind, you don’t have to obey the rules that govern more interpersonal relationships.\(^{37}\)

For Hardwig the absence of rights follows from the inability to specify the duties that apply to us in relationships. Sometimes they ask more of us than rights would demand, and at other times less. It seems to me that we are never allowed to treat loved ones worse than strangers. What happens, instead, is that in close personal relationships we waive, or do not claim, many of our rights. That these rights are only waived or not pressed, and not absent, is evident from what happens when relationships start to go badly. We cease to waive rights and become very aware of the rights that we have.\(^{38}\)

I think that there are moral rights at play in our personal relationships and the feminists should reject the “park your rights at the door” model of family, friendship and community.\(^{39}\) Much of the social injustice that
concerns feminists—sexual assault, domestic violence, and date rape, for example—occurs within close personal relationships. On a related matter, I also believe that it is a mistake to assume that feminist moral theories (and not others) have special obligations to account for the moral interactions we have with those close to us. And so the “women” in Hardwig’s title “Should Women Think in Terms of Rights?” seems especially misplaced.

Conclusion

I hope to have gone some distance in responding to feminist concerns about moral theories that include rights as a component. This leaves open room for positive feminist work on theories of rights and I will close by mentioning four issues in particular that would be good places to start. First, much of the feminist criticism of rights seems directed not at rights per se but rather at the role rights play in moral theory. Feminists might usefully be seen as arguing that the “realm of rights” (to borrow a phrase from Judith Thomson) is only a small place in the moral world. As well, feminists might be arguing not just that the realm of rights is smaller than one might have thought, but also that it plays a less important role in moral theory. Moral theories can include rights but need not be rights-based. (For example, consider again Baier’s “iceberg model,” in which rights rest on a whole network of shared understandings and agreements.)

Second, if feminists want to incorporate nonabsolute rights into larger moral theories, we need to know what sort of contextual factors will matter in moral decision making. Judith Thomson argues that harm is the relevant factor but feminists may want to broaden the scope of her concern, asking what counts as “harm” and whether harm is the only such factor. Third, many of the criticisms about rights seem to be directed not at the existence of rights, but rather at what we do with our rights. They are criticisms of the practice or culture of rights, not rights themselves. As has been noted by a number of theorists, there are vices and virtues associated with rights, and a complete rights theory owes us an account of the character ethics involved in making, waiving, and infringing (and so on) rights claims.

Finally, it is not enough to limit the scope of rights (by making them nonabsolute, a smaller part of moral theory, and nonfoundational) while leaving the development of an account of what rights there are to mainstream moral theory. Feminists need to work within the realm of rights to articulate an alternative account of the content of our rights.

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Notes


2 Developing a thorough response that includes a positive account of a feminist theory of rights is a longer project. It is also the topic of a manuscript in progress for Broadview Press, entitled *What’s Wrong with Rights? Toward a Feminist Theory of Rights*.

3 Thanks to an anonymous referee for this journal for pointing out the distinction between the two parts of the project, between making a rights theory “acceptable” to feminists and making it “attractive” to feminists. My main goal here is to make a rights theory acceptable, though I also too have gone a small distance toward showing why feminists might find rights theories attractive, as well.

4 This is true in North America but it is even more so the case on the international political scene, where feminist activists rely on the recognition of human rights (as in the Universal Declaration of Human Rights, United Nations Document A/810, 1948) and the extension of those rights to women.


6 For any readers unfamiliar with Thomson’s analogy, we are to imagine being hooked up to the violinist without our consent in circumstances like those of pregnancy. The violinist needs one’s support for nine months and if that support is withdrawn the violinist will die. Judith Jarvis Thomson, “A Defense of Abortion,” *Philosophy and Public Affairs* (September 1971), 47–66.


8 *Right and Wrong* (Cambridge: Harvard University Press, 1978), 31. Fried writes: “There does indeed seem to be something absurd about wheeling out the heavy moral artillery to deal with pinching.”


10 It is worth noting that Thomson’s is not the only account of rights in which contextual factors play a large role. For any version of rights that has consequentialist foundations it will also be the case that the strength of rights will be determined by facts about what a world in which the rights strength was set at a particular level would be like. Such an account arguably does not pass Sherwin’s test, since context plays a role in setting the rights thresholds, but once set, agents do not get to use contextual factors in their deliberations. For an account of rights with consequentialist foundations, see L. W. Sumner, *Foundations for Rights* (New York: Oxford University Press, 1987).

11 For an examination of Thomson’s view that the strength of a right is determined by the harm caused by its infringement, see “How Is the Strength of a Right Determined? Assessing the Harm View,” *American Philosophical Quarterly*, 32, no. 4 (October 1995), 383–92. Frances M. Kamm criticizes Thomson’s view about how stringency is determined in her *Morality, Mortality. Vol. II: Rights, Duties, and Status* (Oxford, UK: Oxford University Press, 1996), 123. Kamm argues that Thomson’s view does not take enough factors into account, for example, the origin of the right in question.


I find it useful to distinguish moral libertarianism from political libertarianism. Moral libertarianism is the view that persons have no moral obligations to assist others. Political libertarians believe that whether or not persons have moral obligations to assist, there are good moral reasons that forbid the state from enforcing such obligations. Defining just what makes a moral theory “feminist” is a difficult matter but if we assume that, at a minimum, such a theory must begin with a concern for women, it is hard to see how a moral libertarianism could be consistent with feminism. Although most feminists are not political libertarians, I take it that no such inconsistency exists between feminism and political libertarianism.


On p. 242 Baier describes the practice of rights as a “cooperative practice,” in which cooperation is required to specify the content of rights, allow the expression of claims, and see that rights are met.


Ibid., 77.


Martha Minnow undertakes this project for the case of children in Making All the Difference, chap. 9.


In writing about the case of rights in the family, Minnow observes that “[t]o believe that rights, when claimed and recognized, create conflict and adversarial relations between children and adults, is to presume that there would otherwise be community and shared interests.” Making All the Difference, 291.

Michael Meyers distinguishes between two different sorts of overly assertive right bearers, “the bumptious man” and “the hopeless dependent.” According to Meyers, the bumptious man is offensive and pushy about his rights because of his worry that others do not respect him, whereas the hopeless dependent presses his claims too strongly out of a fear that others will renege on their obligations. See “Dignity, Rights, and Self-Control,” Ethics, 99 (April 1989), 520–24.


36 “Should Women Think in Terms of Rights?”

37 “Should Women Think in Terms of Rights?” 56–57.

