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# Race, Rights, and Justice



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# **Part III**

## **Rights**

## Chapter 5

# Individual Rights

*For however hard we may try to awaken feelings of love in ourselves, we cannot avoid hating that which is and always will be evil, especially if it involves deliberate and general violation of the most sacred rights of man.—Immanuel Kant<sup>1</sup>*

*By every civilized and peaceful method we must strive for the rights which the world accords to men, clinging unwaveringly to those great words which the sons of the Fathers would fain forget: “We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness.”—W. E. B. DuBois<sup>2</sup>*

*... A right is something a man can stand on, something that can be demanded or insisted upon without embarrassment or shame. When that to which one has a right is not forthcoming, the appropriate reaction is indignation; when it is duly given there is no reason for gratitude, since it is simply one's own or one's due that one received. A world with claim-rights is one in which all persons, as actual or potential claimants, are dignified objects of respect, both in their own eyes and in the view of others. No amount of love and compassion, or obedience to higher authority, or noblesse oblige, can substitute for those values.—Joel Feinberg<sup>3</sup>*

*The rights of each of us in a democracy can be no stronger than the rights of our weakest minority.—Felix S. Cohen<sup>4</sup>*

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<sup>1</sup> Immanuel Kant, “On the Common Saying: ‘This May Be True in Theory, But It Does Not Apply in Practice’,” in Hans Reiss, Editor, *Kant: Political Writings* (Cambridge: Cambridge University Press, 1991), p. 87.

<sup>2</sup> W. E. B. DuBois, *The Souls of Black Folk* (Greenwich: Fawcett Publications, Inc., 1961), p. 54.

<sup>3</sup> Joel Feinberg, *Social Philosophy* (Englewood Cliffs: Prentice-Hall, 1973), pp. 58–59.

<sup>4</sup> Felix S. Cohen, *The Legal Conscience* (New Haven: Yale University Press, 1960), p. 257.

Imbedded in the content of law is a cluster of claims and interests the most powerful of which amount to rights (valid claims or interests). Part I examined theories of legal interpretation as the importance of a viable theory of legal interpretation determines which claims or interests are valid ones. Hence the connection between legal interpretation and the rights found within the content of the law.

One of the most significant and controversial cluster of topics in moral, social, political, and legal philosophy during the past few decades has been the nature, grounding, and value of rights. Among other things, rights are fundamental to a liberal political order. Indeed, they are among the foundational principles of our moral lives. And it is often assumed or argued that political liberalism respects rights, while Marxism does not. In fact, many believe that it is the putative omission of rights in communism that counts decisively against the viability of Karl Marx's moral, social, and political philosophy.<sup>5</sup> But what exactly *did* Marx argue about rights, and what did he *not* argue about them? Does Marx respect rights, or does he condemn them as many believe? What are rights? Why are they important? Is there room for rights in Marx's philosophy? Answers to these and related questions serve as an important way by which to decipher some of the differences between liberal and nonliberal political philosophies.

This chapter examines the traditional interpretation of Marx's critique of rights. Contrary to this view, I shall argue that Marx's critique of rights is limited rather than comprehensive in scope. I shall also set forth part of a foundation of a Marxian theory of rights. The result is that what many philosophers believe separates liberal from nonliberal political philosophies is not, contrary to popular belief, that the former respect rights, while the latter reject them. For both Marxism and liberalism respect certain rights. This means that political philosophies such as these must be further analyzed in order to figure out precisely which rights are respected by each philosophy, and why. By engaging in this kind of analysis, philosophers will be in a better position to properly distinguish these political philosophies from one another.

Prior to describing and assessing the plausibility of the traditional interpretation of Marx and rights, it is important to come to terms with the nature and value of rights in general.<sup>6</sup> If Joel Feinberg is correct about the nature of rights, then to have a right is to have a valid claim against another called for

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<sup>5</sup> These claims are found in Allen Buchanan, *Marx and Justice* (Totowa: Rowman & Littlefield Publishers, 1982).

<sup>6</sup> The following explication of the nature and value of rights is a Feinbergian one, borrowed from Joel Feinberg, *Rights, Justice, and the Bounds of Liberty* (Princeton:

by some set of governing rules (in the case of legal rights) or moral principles (in the case of moral rights). To have a claim is to have a case meriting consideration. And the act of claiming makes for self-respect and respect for others. It provides a rights-respecting society with a partial, though crucial, foundation for human dignity.

A right is a valid claim to something that in most cases implies a duty of others to refrain from interfering in the exercise or enjoyment of one's right. If I have a right to life, for instance, then others have a duty to not threaten or otherwise take away my life. The valid claim in question is institutional in nature if it is a legal right, and noninstitutional if it is a moral right. Generally speaking, legal rights fall under one of either two broad categories. Primary rights (what Wesley Hohfeld<sup>7</sup> called "substantive rights") are those that control human behavior, as the ones just exemplified. But remedial rights are procedural and arise only subsequent to infringement of a valid claim or interest. In any case, "If people have a right to something, then someone does wrong who denies it to them."<sup>8</sup> Or, as Kent Greenawalt states, "The claim to have a right is the claim that outside interference would be morally wrong."<sup>9</sup>

Moral rights are noninstitutional.<sup>10</sup> Moral rights discourse clearly makes sense, and "any theory of the nature of rights that cannot account for it is radically defective."<sup>11</sup> Feinberg argues that human rights are a subset of moral rights and are "generically moral rights of a fundamentally important kind held equally by all human beings, unconditionally and unalterably."<sup>12</sup> But are there any human rights? Or, is this category a null set? The first thing to notice about Feinberg's definition of "human rights" is that it evades the charge of speciesism, as it does not say that only humans can possess them, "so that a human right held by an animal is not excluded by definition."<sup>13</sup>

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Princeton University Press, 1980). A careful study of Feinberg's theory of rights suggests that, for him, rights are valid claims or valid interests.

<sup>7</sup> Wesley Hohfeld, *Fundamental Legal Conceptions* (New Haven: Yale University Press, 1919). For commentaries on Hohfeld's analysis of legal rights, see George Rainbolt, *The Concept of Rights* (Dordrecht: Springer, 2006), Chapter 1; Carl Wellman, *A Theory of Rights* (Totowa: Rowman & Littlefield Publishers, 1985).

<sup>8</sup> Bernard Williams, *In the Beginning Was the Deed* (Princeton: Princeton University Press, 2005), p. 64.

<sup>9</sup> Kent Greenawalt, *Conflicts of Law and Morality* (Oxford: Oxford University Press, 1987), p. 30.

<sup>10</sup> Joel Feinberg, *Freedom and Fulfillment* (Princeton: Princeton University Press, 1992), Chapters 8–10.

<sup>11</sup> Joel Feinberg, *Social Philosophy* (Englewood Cliffs: Prentice-Hall, 1973), p. 84.

<sup>12</sup> Feinberg, *Social Philosophy*, p. 85.

<sup>13</sup> Feinberg, *Social Philosophy*, p. 85.

This point is apparently not heeded by the likes of some who define “human rights” in speciesist terms, and with not even a slight recognition that their definition is controversial.<sup>14</sup>

A second issue here is whether or not, if there are any human rights, they are absolute in the sense that “no conflicts with other human rights, either of the same or another type, would be possible.”<sup>15</sup> Although there is, Feinberg argues, no principled objection to construing the nature of human rights as absolutely exceptionless, it is quite another question as to whether or not there are any such rights. And it is at this point that a search for the philosophical grounding for such rights must be conducted. For if there are no such rights, then the discourse of human rights becomes nonsense, a rather counter-intuitive result for most working in the fields of international law and justice, such as cosmopolitan liberals as discussed in the previous chapter. To attempt to ground equal human rights on the notion of human worth is dubious, unless it can be explained plausibly how it is that the worth of humans is equal. Nor is it unproblematic to try to ground equal human rights on some other intrinsic moral property:

The intrinsic moral qualities invoked to explain equal human worth must rest, as moral qualities, on some common nonvalue characteristics which are *their bases* or determinants; the question about the nature of the common characteristic arises all over again about them. If human beings have human worth *because* of their “intrinsic pricelessness” or “infinite value,” asks the skeptic, where do those extravagantly dimensioned endowments come from?<sup>16</sup>

Rationality cannot serve as the grounding for equal human rights, as not all humans are rational. To be sure, sometimes it seems as though few are. The qualities of personhood and sacredness fall prey to the problem of why those qualities are sufficient bases for equal human rights. Moreover, not all humans, it might be argued, are sacred, at least not the evil ones. And similarly for their personhood, assuming that there are non-question-begging grounds for personhood. And as Feinberg continues: “. . . it will not do, for similar reasons, to rest the case for equal and universal human worth on ‘our common humanity,’ for we wish to know precisely what it is about our common humanity that makes it so worthy of our respect.”<sup>17</sup> “It may be that

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<sup>14</sup> Consider, for instance: “. . . human rights must (at the risk of banality) be *humanistic*—they must focus on human interests, upon what contributes to human well-being and freedom” [Allen Buchanan, *Justice, Legitimacy, and Self-Determination* (Oxford: Oxford University Press, 2005), p. 130].

<sup>15</sup> Feinberg, *Social Philosophy*, p. 86.

<sup>16</sup> Feinberg, *Social Philosophy*, p. 91.

<sup>17</sup> Feinberg, *Social Philosophy*, p. 92.

universal ‘respect’ for human beings is, in a sense, ‘groundless’—a kind of ultimate attitude not itself justifiable in more ultimate terms.”<sup>18</sup> This implies that in ascribing human worth to everyone, we may well in effect be showing them respect. And if this is true, then we can say of human rights, insofar as they are based on human worth, that:

It can be argued further against skeptics that a world with equal human rights is a *more just* world, a way of organizing society for which we would all opt if we were designing our institutions afresh in ignorance of the roles we might one day have to play in them. It is also a *less dangerous* world generally, and one with a *more elevated and civilized* tone. If none of this convinces the skeptic, we should turn our backs on him to examine more important matters.<sup>19</sup>

So much for a plausible grounding of moral and human rights in equal human worth. But exactly which such rights are there, if any?

In recognizing that the United Nations Declaration of Human Rights endorses numerous basic positive rights to receive benefits and to provide with the means to satisfy basic human needs, Feinberg notes that these cannot be absolute rights, strictly speaking because they are not necessarily correlated with the duties of any particular individuals. The reason for this, argues Feinberg, is because natural disasters can make it such that no person or group of them could possibly have had a moral duty to prevent such harms, a similar point to the one I raised against cosmopolitan liberalism in the previous chapter. Such “manifesto rights,” as he calls them, actually boil down to claims that compete, all things considered, with other claims. So it is implausible to think that there are absolute human rights that are positive in content. However, Feinberg continues, “The most plausible candidates for absoluteness are (some) *negative rights*; since they require no positive actions or contributions from others.”<sup>20</sup> Examples of absolute and nonconflictible human rights seem to be positive rights to “goods” that cannot ever be in scarce supply, a right to a fair trial, the right to equal protection under the law, and the right to equal consideration.<sup>21</sup> Added to these might be the negative right not to be treated inhumanely, and the right to not be exploited: “That is a right to a higher kind of respect, an inviolate dignity, which as a broad category includes the negative rights not to be brainwashed, not to be made into a docile instrument for the purposes of others, and not to be converted into a domestic animal.” “Rights in this category,” states Feinberg, “are probably the only ones that are human rights in the strongest sense:

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<sup>18</sup> Feinberg, *Social Philosophy*, p. 93.

<sup>19</sup> Feinberg, *Social Philosophy*, p. 94.

<sup>20</sup> Feinberg, *Social Philosophy*, p. 95.

<sup>21</sup> Feinberg, *Social Philosophy*, p. 96.

unalterable, 'absolute,' (exceptionless and nonconflictible), and universally and *peculiarly* human."<sup>22</sup> It is an interesting fact about the philosophy of human rights that while few if any of the contemporary writers seems to acknowledge Feinberg's analysis, neither have they done anything to reach its eloquence nor improve upon it in any significant way.<sup>23</sup>

But why are rights generally important? Rights have been violated by governments and individuals since the beginning of human social life, it seems. Even in the U.S., the self-proclaimed bastion of democracy and rights, various constitutionally guaranteed rights have been suspended (i.e., violated) by the government on account of various scenarios of "clear and present danger" or for reasons of "national security" or in times of war. Within a couple of decades or so, the "founding fathers" of the U.S. rescinded nearly every right that they had declared as inalienable: from freedom of the press and of expression more generally, to the enforcement of the Alien and Sedition Acts against political opponents of John Adams, to the holding of American Indian and black slaves even though Jefferson and many others declared all humans were created by God as "equals." Those U.S. citizens who give pride of place to the special rights they have, such as freedom of expression, might find it difficult to know that particularly (though inexclusively) from 1870 to 1920 the U.S. Supreme Court continually placed tremendous restrictions on freedom of expression, using various judicial former Justice Oliver Wendell Holmes' "clear and present danger" standard, among others. There simply is no unbroken chain of respect for the First Amendment of the U.S. Constitution by either of the three branches of government. And this demonstrated itself in the various "free speech fights" involving the government and the Free Speech League during the period noted, wherein the government via the Comstock Act sought to restrict what Anthony Comstock deemed obscene and where both the Free Speech League led by Theodore Schroeder and the ACLU established by Roger Baldwin challenged such violations of freedom of expression.<sup>24</sup> One would have thought that the words so carefully articulated in the Constitution would have been taken more seriously by those who swore to uphold it.

Furthermore, legal scholars note that in times of war or other national crisis, various rights have been suspended or violated in the name of the greater good. Indeed, the current U.S. president G. W. Bush suspends some

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<sup>22</sup> Feinberg, *Social Philosophy*, p. 97.

<sup>23</sup> For discussions of John Rawls' and James W. Nickel's respective conceptions of human rights and whether or not reparations as a compensatory right can qualify as a human right, see J. Angelo Corlett, *Heirs of Oppression*, forthcoming.

<sup>24</sup> David M. Rabban, *Free Speech in Its Forgotten Years* (Cambridge: Cambridge University Press, 1997).



rights to due process, rights guaranteed by the Fifth Amendment to the U.S. Constitution—ironically in the name of national security in the “war against terrorism and extremism.” And while the previous presidential administrations’ suspension of certain rights lasted for relatively brief periods of time, there seems to be no end in sight for the current abuses of civil liberties by the U.S. government. Or so it seems, as a war against terrorism can last forever as it is highly unlikely that the perceived enemies will surrender, and equally unlikely that the U.S. government will give up its pursuit of what it construes—and has persuaded most of its citizens to believe—a just war against the terrorists. So if national security threatened by terrorism is what, according to the U.S. government, justifies suspensions of various constitutional rights, those rights stand to be suspended for the indefinite future.<sup>25</sup> But “national security will be better assured,” argued William O. Douglas, “through political freedom, than through repression. Once we start restraining that political freedom, we evince a lack of faith in the boldest political principle the world has known.”<sup>26</sup> After all, the “acceptance by government of a dissident press is a measure of the maturity of a nation.”<sup>27</sup> The same is true of the acceptance of dissidence more broadly.

So what is the value of rights if they can and are so frequently violated—even by those who have sworn to protect them? The basic value of rights is that they accord to parties certain legal or moral claims that in turn provide a degree of dignity and respect to the rightholder that would not be true if the parties had no rights at all. Moreover, if you have a right to something, then the fact that social utility would be maximized if your right is violated or disrespected is no good reason to do so. For the possession of a right as a valid claim means precisely that your right trumps social utility when the two are in conflict. This was part of the basis of my criticism in the previous chapter of cosmopolitan liberalism’s claims about rights to compensation. Of course, it is not simply the possession of rights that is important, but knowing when it is good to claim and exercise rights. And it goes without saying that a government that continually violates the basic rights of its citizens serves as the grounds for its own replacement by any means necessary, according to the Declaration of Independence: “whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, . . . it is their right, it is their duty, to throw off such government, and to provide new guards for their future security.”

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<sup>25</sup> Alan Dershowitz, *Rights From Wrongs* (New York: Basic Books, 2004), p. 3.

<sup>26</sup> William O. Douglas, *An Almanac of Liberty* (Garden City: Doubleday and Company, Inc., 1954), p. 125.

<sup>27</sup> Douglas, *An Almanac of Liberty*, p. 163.

There seems to be little doubt that rights, especially publicly recognized ones, serve as precedents and trumps against those who would seek to violate them. Indeed, it has been noted that rights are shorthand expressions, clues to predictions of what the courts are likely to respect in the future. Rights are assertions of what courts have done and are predictive of what they will uphold under relevantly similar circumstances. They are “present aids for the guidance of future action.”<sup>28</sup> And of the 1948 Universal Declaration of Human Rights, Douglas states, “This *Declaration* may in legal effect have no binding consequences in any land; it may be only a reaching for the stars. But it lifts the hearts of men the world around. For it states in solemn and dignified terms the aspirations of men and women of good will of every race.”<sup>29</sup> And those who violate basic rights continually may have the most powerful military in the world to ensure the continuation of such rights violations. Even so, rights provide the grounds for the bringing down of tyrants and others who would disrespect the rights and lives of citizens, both domestic and foreign.

Kimberle Crenshaw, a critical race theorist, cautions leftists in their critiques of rights talk that discounting the value of rights may “have the unintended consequence of disempowering the radically oppressed while leaving white supremacy basically untouched” in the U.S.<sup>30</sup> For example, Derrick Bell states, “Slaves did not have rising expectations, and no one told them they had rights.”<sup>31</sup> And Patricia Williams reminds us, after the U.S. Civil War, newly freed Africans were not only unowned but disowned, “outside the marketplace of rights” and “placed beyond the bounds of valuation.”<sup>32</sup> Also, “Although rights may not be ends in themselves, rights rhetoric has been and continues to be an effective form of discourse for blacks. . . . The subtlety of rights’ real instability thus does not render unusable their persona of stability.”<sup>33</sup> Thus Williams and Crenshaw each disapprove of some critical legal studies scholars’ abandonment of the discourse of rights. Williams argues:

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<sup>28</sup> Edwin N. Garland, *Legal Realism and Justice* (New York: Columbia University Press, 1941), p. 42.

<sup>29</sup> Douglas, *An Almanac of Liberty*, p. 120.

<sup>30</sup> Kimberle Crenshaw, “Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law,” in Robert L. Hayman, Nancy Levit and Richard Delgado, Editors, *Jurisprudence Classical and Contemporary*, 2nd Edition (St. Paul: West Group, 2002), p. 633.

<sup>31</sup> Derrick Bell, *And We Are Not Saved* (New York: Basic Books, Inc., 1987), p. 39.

<sup>32</sup> Patricia Williams, *The Alchemy of Race and Rights* (Cambridge: Harvard University Press, 1991), p. 21.

<sup>33</sup> Williams, *The Alchemy of Race and Rights*, p. 149.

For blacks, then, the battle is not deconstructing rights, in a world of no rights; nor of constructing statements of need, in a world of abundantly apparent need. Rather the goal is to find a political mechanism that can confront the *denial* of need. The argument that rights are disutile, even harmful, trivializes this aspect of black experience specifically, as well as that of any person or group whose vulnerability has been truly protected by rights.<sup>34</sup>

Perhaps critical legal studies scholars by and large enjoy a position of white privilege such that they can afford to jettison rights talk in favor of some abstract notion of deconstructing rights. But for those of us persons “of color” who enjoy little or nothing of white privilege, Williams’ words speak loudly to the fact that rights discourse is valuable, and one reason it is valuable is because it signals failures of those who disrespect or violate rights.

I concur with these points by Crenshaw and Williams, and I believe that this is part and parcel of the Feinbergian account of rights from which I draw my account of rights. As I shall demonstrate below in refuting a fundamental and widespread misunderstanding of Marx’s view of rights, it is not rights *per se* that serve the aims of oppression and hegemonic racism, for example, it is the misuse of rights for those kinds of wrongful and harmful purposes. The solution to this rights abuse is not the discarding of rights, but rather the very strong assertion of them in the face of their procurement for wrongful and harmful ends. This is precisely what happened in the case of Martin Luther King, Jr., and others in their constant assertion and reassertion of the basic rights guaranteed to all by the U.S. Constitution. And I submit that it is that sort of rights claiming—even in the face of some of the harshest forms of racist oppression—that won great victories against racist hegemony in the U.S. And Crenshaw insightfully adds, lest some not realize that racism is still a major part of U.S. society, that

When segregation was eradicated from the American lexicon, its omission led many to actually believe that racism therefore no longer existed. Race-neutrality in law was the presumed antidote for race bias in real life. With the entrenchment of the notion of race, neutrality came attacks on the concept of affirmative action and the rise of reverse discrimination suits. Blacks, for so many generations deprived of jobs based on the color of our skin, are now told that we ought to find it demeaning to be *hired* based on the color of our skin.

... It is demeaning not to be promoted because we’re judged “too weak,” then putting in a lot of energy the next time and getting fired because we’re too strong.<sup>35</sup>

Some of Crenshaw’s words are reminiscent of those of Williams as she describes her feeling of being demarcated racially by the dominant racial

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<sup>34</sup> Williams, *The Alchemy of Race and Rights*, p. 152.

<sup>35</sup> Crenshaw, “Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law,” p. 636.