

# THE EVOLUTION OF MORAL PROGRESS

A BIOCULTURAL THEORY

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## CHAPTER 9

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### Improvements in Moral Concepts and the Human Rights Movement

Part II showed that cultural innovations can, under certain favorable conditions, bring about advances in inclusivity that seem anomalous if not outright impossible given the simplistic view that evolved human moral psychology is “hard-wired” for exclusion. We have offered in its place a more complex and plausible account of the contribution of evolution to human morality that can better accommodate these apparent anomalies. In this final part of the book, we turn our attention to perhaps the most remarkable cultural innovation for inclusivity: the modern human rights movement and the legal doctrines and moral understandings that undergird it; and we consider how this achievement fits into our biocultural model of moral psychological development.

The first aim of this chapter is to identify and explain six remarkable improvements in moral understanding and one equally significant improvement in the concept of morality itself. It is misleading, however, to describe the changes we will discuss simply as improvements in moral concepts or in the concept of morality itself because these conceptual changes also typically involve improvements in the moral beliefs, moral commitments, and moral sentiments of those who undergo them. And each of these conceptual changes can also contribute to better compliance with valid moral norms by bringing about improvements in

moral beliefs, commitments, and sentiments. Some of the conceptual improvements under consideration are so fundamental that those who have undergone them tend to take them for granted, neither noticing nor appreciating the augmentation of human moral powers they constitute. Here, too, our aim is to restore a sense of appreciation, if not awe, in recognition of how far morality has developed since its origins under the prehistoric selective pressures of the environment of evolutionary adaptation.

For reasons explained below, all of the following conceptual improvements are instances of moral progress in the form of greater inclusion: (1) expansions of the membership of the domain of justice (the set of beings to whom justice, including pre-eminently the recognition of rights, is understood to be owed); (2) enlargements of the territory of justice (the set of behaviors, social practices, and institutions understood to be subject to assessment in terms of justice) in some instances brought about by a shift of the line between what is thought to be natural, inevitable, and beyond human choice and control and what is subject to modification by human efforts and hence potentially within the scope of human responsibility; (3) (relatedly) adjustments in the boundary between what is considered to be a matter of justice and what a matter of charity so that some of what was previously thought to be a matter of charity is now considered a matter of justice; (4) the ascription to all persons of a set of rights that exceeds the small set of "negative" natural rights; (5) a refinement of the concept of basic equal moral status according to which some basic rights cannot be forfeited by even the worst behavior; and (6) the transition from a "strategic" conception of morality to one that is "subject-centered" (a distinction introduced in Chapter 1 and elaborated on in Chapter 5).

For most of these changes, the assumption that they are improvements is relatively uncontroversial, at least for most moral and political philosophers. One notable exception is the transition from thinking of rights as purely negative, as having correlative duties that only require refraining, to acknowledging

that there are positive rights as well. "Negative rights" are those whose correlative obligations require only that agents refrain from doing certain things (e.g., the right against torture); "positive" rights are those whose correlative obligations require the provision of goods or services (e.g., the right to basic education). In contemporary political philosophy, the denial that there are any positive rights is a minority position and one that we believe cannot be defended successfully. There is reasonable disagreement, however, about how expansive the list of positive rights is. For the purposes of this chapter, there is no need to enter that fray. Instead, we will assume that there are some positive rights and that to the extent that the modern human rights movement acknowledges that there are, it embodies a gain in moral understanding over thinking that recognizes only negative rights. We will, however, explain why efforts to show that there are only negative rights fail.

One other item on this chapter's list of improvements in moral understanding might be thought to be controversial as well: the notion of non-forfeitable rights. In another context we would be happy to defend the idea that if a being is properly regarded as having the highest basic moral status—roughly, the status nowadays ordinarily accorded to human persons—then some of the rights that this status involves cannot be forfeited. But we needn't do so to achieve the aims of this chapter. Instead, we can limit ourselves to a more modest claim: that it is morally progressive to reject the previously widespread idea that if an individual commits rather common offenses like murder or theft or treason, he thereby forfeits *all* of his rights, including the right not to be subjected to torture or disfigurement and the right to decent treatment of his bodily remains.

The second aim of this chapter is to show that all six improvements in moral understanding are embodied in modern human rights doctrine and discourse and help shape human rights institutions and practice. Since all six changes can be characterized as instances of inclusion or else as contributing to it, achieving

the second aim will help strengthen Part II's critique of the evoconservative position. In particular, it will show, more comprehensively than the brief discussion of human rights contained in Chapter 5, that modern human rights practice and institutionalization constitute significant moral progress in the dimension of inclusion, thus reinforcing our rebuttal of the evoconservative claim that inclusivist morality is merely aspirational, a fond wish rather than a reality.

### *Expansions of Membership in the Domain of Justice*

Perhaps the most dramatic and far-reaching change in moral understanding in the dimension of inclusion is the recognition that all people are subjects of justice—beings to whom obligations of justice are owed. In the modern era this is often understood to mean that they are beings with rights; but justice, especially if it includes norms of fairness, is not exhausted by the recognition of rights. A key distinction is between beings who are subjects of justice and those that are only objects of charity or of the virtues of sympathy, humaneness, or generosity. For example, in some less inclusive cultures, non-human animals are apparently accorded no moral standing whatsoever, not even as objects of charity. In others, they are accorded a minimal sort of moral standing: it is generally believed that humans should show some concern for their welfare, or at least should avoid the gratuitous infliction of suffering upon them—but they are not thought to be the sorts of beings who can be treated justly or unjustly. They are objects of pity or sympathy or within the scope of the virtues of charity or beneficence or generosity but not beings to whom justice is owed.

Similarly, prior to the transformative work of abolitionists in the late eighteenth and early to mid-nineteenth centuries, many people, especially in America, subscribed to a racist ideology according to which Africans were at best objects of charity, beneficence, generosity, or pity but not proper subjects of justice.

If slaveholders treated their slaves badly, they could be criticized for their lack of humanity or benevolence or for exhibiting the vice of cruelty but not for violating rights. Abolitionists helped to spread a major conceptual change that became prominent in western European culture through the writings of Enlightenment thinkers: the idea that all people, regardless of race, were rational beings by nature and that their rationality conferred certain fundamental general moral rights, so-called natural rights.

Yet for many, perhaps most, abolitionists the acknowledgment that Africans were members of the community of subjects of justice did not involve a recognition of fully equal status. Instead, they conceived of Africans as inferior in certain respects but as sufficiently rational to possess basic natural rights, including the right to be free and the right to the fruits of their labors. In many cases, those who thought slavery was a great moral wrong because it violated these natural rights did not think that blacks deserved the full range of civil and political rights that whites (or at least white men) enjoyed. This view was held, for example, by Charles Darwin and Abraham Lincoln, both of whom decried the evils of slavery while taking for granted the inherent inferiority of the "lower races."

Conceiving of certain group members as objects of charity, benevolence, generosity, humaneness, or pity but not as subjects of justice did not end with the abolition of Atlantic chattel slavery. In the Indian caste system, for example, members of higher castes sometimes appear to act as if they think of their duties toward the lowest caste members as a matter of benevolence or generosity, of "noblesse oblige," rather than as arising out of those persons' basic moral rights. Other instances of the failure to recognize that all people are full subjects of justice and to that extent beings with basic equal moral status probably exist wherever there are relationships of extreme domination. Nonetheless, the recognition that all people have some basic rights—the same basic rights—is now widespread and surely must count as a major instance of moral progress. The modern human rights movement would

not have been possible without this conceptual revolution but has also served to extend and entrench it in social practice, institutions, and law. Further, the modern human rights movement represents a further moral advance beyond the recognition that all human beings have a small set of natural rights: it extends to all of humanity a much richer set of civil, political, cultural, and economic rights.

### *Enlargements of the Territory of Justice: The Institutional Turn*

Another remarkable morally progressive conceptual change is the expansion in our conception of what features of our world may be judged just or unjust. This change is grounded in another conceptual development: the concept of an institution. For most of human history, most people thought of entities that we now identify as institutions as being inherent parts of nature. And until very recently, many people tended to think of the natural as unalterable, inevitable, and recalcitrant to significant modification by human choice. That is not surprising, given that prominent religious views have regarded nature as God's creation and therefore as something good, or at least to be accepted with gratitude rather than altered.

The etymology of "institution" is revealing: institutions are things that are instituted, created by some agent or agents. In an increasingly secular culture, institutions are assumed to be created by human beings. (It is interesting to note that opponents of same-sex marriage often say that marriage, as a union between a man and a woman, was instituted by God and therefore should not be altered to encompass people of the same sex.)

Thinking of important features of the social world as institutions in the sense of being instituted by humans has momentous consequences. If they are human creations, they can in principle be altered or even replaced with new institutions by human beings. And if they can be altered or replaced, it makes sense to

ask whether they should be—and to ask whether justice demands institutional change. Once the concept of an institution becomes widespread, the conceptual revolution it represents becomes all but invisible.

When institutions such as slavery, serfdom, or other forms of domination are thought of not as institutions but as natural features of human life, they are thereby largely insulated from fundamental criticism. This is especially true in cultures in which the natural is assumed to be good, as is the case when nature is thought of as the creation of a divine and benevolent deity or regarded as a benign teleological system. Even among members of largely secular societies, appeals to what is supposedly natural still function to insulate certain social practices or human behaviors from fundamental criticism. For example, appealing to vulgar or vulgarized sociobiological claims, some people say that male infidelity is inevitable because natural; others say that extreme socioeconomic inequalities are unavoidable or quote approvingly Christ's statement that "the poor will always be with us," on the grounds that it is just part of human nature that some people are lazy and unproductive or the casualties of misfortune. Moral progress sometimes consists in reconceiving the natural as a human creation and, to that extent, subject to moral evaluation and possible revision.

There is an important connection between this "institutional turn" and enlargement of the territory of justice. For example, if property systems come to be regarded no longer as natural facts but as human creations, then the admission that they significantly disadvantage some people through no fault of their own can lead to assessing them in terms of justice. The idea that existing legal property rights may violate some peoples' moral rights can become conceivable, gain currency, and fuel social change. Instead of passively accepting the inequalities generated by existing property systems as "just the way things are" (that is, natural and to that extent unalterable or fitting or at least not subject to fundamental alteration), people come to see them as defective human

arrangements, within the power of human beings to modify or to replace with better ones. Moral progress in such instances is “the colonization of the natural by the just.”<sup>1</sup>

There is another way in which the territory of justice and more specifically that of human rights can be enlarged in a morally progressive way: people can come to understand that the list of rights that all persons should enjoy includes not just “negative” rights, such as rights against physical harm or unjustified taking of property or interference with freedom of expression or religious belief, but also “positive” rights to certain basic goods, services, or conditions of living, including public health arrangements, shelter, adequate nourishment, income support during periods of unemployment, benefits for those with disabilities, and access to basic education.

It is seriously misleading, however, to accept without qualification the common distinction between the former sorts of rights as “negative” and the latter as “positive.” It is not the case that the former require only refraining on the part of the government and citizens, while the latter require positive government actions that involve taking resources from some citizens to secure the rights for others. So-called negative rights also require substantial, sometimes vast positive undertakings by government, and these inevitably involve the redistribution of wealth among citizens. For example, realizing the so-called negative right to freedom from assault and murder as well as the right to protection of one’s property requires a well-functioning criminal justice system, including the credentialing of lawyers; the selection of judges; the training and monitoring of police; the building, adequate resourcing, and supervision of courts and prisons; etc. And at every stage, public funds—that is, funds taken from citizens—will be required.

In other words, if we make the reasonable assumption that governments ought not simply to refrain from killing, maiming, or taking the property of their people but should also take effective measures to ensure that others do not engage in such wrongdoing, then “negative” rights require “positive” actions on the part of government, including the redistribution of wealth through taxes. So, one must conclude either that the most basic so-called negative rights (e.g., rights against threats to physical security) are not really rights, on the assumption that the duties that correlate with “real” rights only require refraining from acting, or that so-called negative rights require “positive” actions on the part of government but then abandon the claim that so-called positive rights aren’t real rights because they require more than simply refraining from acting. The latter is surely the more reasonable response.

The misleading distinction between “negative” and “positive” rights is typically employed as part of a strategy to deny that there are any genuine “positive” general moral rights (including human rights) or to criticize the existence of “positive” legal rights on the grounds that they necessarily involve forcible redistribution of wealth from some citizens to others. But as we have seen, “negative” rights also require for their realization “positive” government action, including forcible redistribution. Indeed, inadequate public investment in security infrastructure, including a broad range of institutional features and competencies that fall under the general rubric of “the rule of law,” is a key factor perpetuating unjust social conditions, poverty, and economic underdevelopment in poorer countries. This is the vital message of an important book, *The Locust Effect: Why the End of Poverty Requires the End of Violence*.<sup>2</sup>

A very different objection to expanding the list of natural or human rights to include some “positive” rights has been famously

<sup>1</sup> A. Buchanan, D. Brock, N. Daniels, and D. Wikler, *From Chance to Choice: Genetics and Justice* (Cambridge University Press, 2001, chapter 2).

<sup>2</sup> G. A. Haugen and V. Boutros, *The Locust Effect: Why the End of Poverty Requires the End of Violence* (Oxford University Press, 2015).

voiced by the philosopher Onora O'Neill. She states that genuine rights have determinate addressees—that is, that the identity of the bearer of the correlative obligation is specified. But in the case of supposed “positive” natural or human rights, this is not the case. Take, for example, the supposed right to subsistence. O'Neill says that it is simply unclear who is supposed to ensure that all persons have access to resources for subsistence. In contrast, with “negative” rights, there is no unclarity as to the identity of the addressee: all individuals are obligated to refrain (from killing, torturing, etc.). She concludes that while “negative” rights are genuine rights, “positive” rights are not because their correlative obligations lack clearly identified addressees.

To anyone in the least familiar with the modern human rights movement, O'Neill's claim that “positive” rights have no identifiable addressee will seem exceedingly strange. The basic idea of the modern human rights movement is that *states* are the primary addressees of the obligations that correlate with human rights. So, if there is a problem with the apparently progressive expansion of the list of natural or human rights to include some “positive” rights, it is not that the latter somehow don't measure up as “real” rights because their correlative obligations lack clearly identified addressees. This point is even more obvious if one focuses on the fact that it is international legal human rights that are the authoritative standards in the modern human rights movement. As legal rights, the primary addressees of the correlative obligations are states; that is made clear in the legal doctrine of modern human rights and in the wording of human rights treaties. Further, there are very good moral reasons why all states should be held accountable for fulfilling the obligations that correlate with legal human rights, both “positive” and “negative.” It may be that O'Neill is assuming that for something to be a human right, the correlative obligation must fall on all human beings. That is one understanding of a human right, but it is not the one that finds expression in the modern human rights movement. Instead, that movement, in its legal doctrine, its activism, and its institutional

embodiment, assumes that states are the addressees of the obligations that are correlative with human rights. That is compatible, of course, with the view that some human rights (including “negative” ones, like the right against torture) have correlative obligations also falling on individuals.

Apart from the fact that these preceding two most common arguments against “positive” rights fail, there are three good reasons to conclude that the now widespread recognition of positive rights is morally progressive. First, the same general considerations that are adduced to make the case for “negative” rights—the fact that they are conducive to individual well-being and autonomy and to a society in which people can interact in predictably and in mutually respectful ways—are also reasons for recognizing “positive” rights. For example, lack of healthcare, basic education, income support during periods of unemployment, and childcare can undercut individual welfare, autonomy, and opportunity just as seriously as interference with religious liberty, freedom of expression, or private property rights.

Second, attempts by what might be called “deep theory” libertarian or classical liberal thinkers to show that there is a basic moral right to liberty or to private property or to self-ownership that rules out “positive” rights altogether have been dismal failures. It is one thing to say that there is a natural (that is, general moral) right to liberty, property, or self-ownership but quite another to say that the scope of such rights is so broad and the correlative duties so immune to being outweighed by other moral considerations that respecting them rules out any significant system of “positive” rights whatsoever.

Third, some libertarians, including Friedrich Hayek and James Buchanan, eschew “deep theory” concerning natural rights to property, liberty, or self-ownership and appeal instead to the fallibility and abuse of government bureaucracies and to the idea that in recognizing “positive” rights the modern “welfare” state stifles the economic prosperity that markets provide. They argue that any significant attempt to realize a robust set of “positive”

rights will at best be self-defeating (in that most of the resources involved will go to the administrative class or others who are not truly in need), will be unacceptably cost-inefficient, will undercut market-based prosperity, or, in Hayek's dramatic phrase, will propel us down "the road to serfdom."<sup>3</sup>

Libertarian admonitions about the abuses and fallibility of ambitious government programs are extremely valuable as an antidote to uncritical trust in government and overoptimistic beliefs in its efficacy. But as empirical grounds for the rejection of any system of government that takes "positive" rights seriously, they fail conclusively because their dire predictions have been refuted by the facts. There are in fact a number of countries, including most prominently Canada, Denmark, Norway, Sweden, Germany, Switzerland, New Zealand, Japan, and Australia, among others, that have fairly robust systems of "positive" rights and which have achieved the highest standards of living, while maintaining impressive records on individual civil and political liberties and limited government. Further, some of these so-called welfare states currently score higher on credible measures of economic freedoms than countries, including the United States, that are much more restrained (some might say stingy) in the provision of "positive" rights.<sup>4</sup> Of course, even the best so-called welfare states have serious problems, and all of them inevitably make questionable trade-offs among important moral values in the pursuit of their complex policies. But that is not to say that they are greasing the skids for a hair-raising slide into serfdom. On any reasonable measure, they are among the freest of societies and do not seem to be headed for collapse. In fact, some of them—Norway, Denmark, and Sweden in particular—have shown considerable adaptability in the face of the realities of an

aging population and a consequent decline in tax revenues available for social programs.

So, contrary to libertarian doctrine, the broadening of the list of basic rights to include so-called positive rights can be viewed as a genuine instance of moral progress; no good reason has been adduced so far for believing that instituting some "positive" rights always comes at too high a moral price. In effect, this particular expansion of the territory of justice represents a revision in the concept of rights, or at least a rejection of the narrower conception that features only "negative" rights. Natural or human rights, understood as moral rights, as well as general legal rights are now thought not only to involve constraints on actions toward right-holders (prohibitions on doing certain things to them) but also requirements on governments to provide certain goods and services and conditions for living beyond those necessary to support a robust security infrastructure. Except in the ranks of the most extreme libertarians, the debate has shifted from *whether* there are any positive rights to *which* positive rights there are—that is, in which circumstances are positive rights morally desirable and feasible—and to the hard question of how to determine principled priorities among various rights, both "positive" and "negative."

None of this is to deny that there are important differences between "negative" and "positive" rights. Perhaps the most significant difference is that respecting "negative" rights is typically straightforward and within the control of an agent, whether she be private or institutional: all she need to do is to refrain from acting in order to fulfill the correlative obligation in the case of "negative" rights. In contrast, in the case of "positive" rights, such as the right to primary education or a right to some level of healthcare, fulfilling the correlative obligation will generally require the coordinated efforts of many people, which in turn will depend upon some workable division of responsibilities as well as the availability of appropriate resources. For that reason, the judgment that there is such and such a positive right is more epistemically ambitious and hence more disputable since such a

<sup>3</sup> Friedrich von Hayek, *The Road to Serfdom* (University of Chicago Press, 1944).

<sup>4</sup> *Index of Economic Freedom* (Heritage Foundation and *Wall Street Journal*, 2016).



right can exist only if it is possible—in a sense more demanding than mere logical or nomological possibility (compatibility with laws of nature)—for the correlative obligation to be fulfilled, and this in turn will depend upon complex facts which may be difficult to ascertain. Nonetheless, it is important to re-emphasize that states are now expected not only to respect negative rights, but to promote them and that this requires positive undertakings.

It was noted earlier that although the dominant view in contemporary political philosophy is that there are some “positive” general moral rights, unanimous consensus on that point is lacking. Rather than pretending that anything said in the preceding paragraphs refutes the minority view, it should suffice to observe that even though there are, as we have just acknowledged, significant differences between “negative” and “positive” rights, the arguments given for saying that there are no “positive” rights whatsoever are weak. For that reason, in what follows we precede on the assumption that the recognition that rights can be “positive” is a gain in moral understanding. Diehard “negative” rights-only thinkers, should feel free to focus on the other changes we characterize and will presumably not dissent from the assumption that they, at least, are genuinely progressive.

The point we wish to emphasize is that the modern human rights movement, both in its doctrine and increasingly in its practice, recognizes so-called positive rights and that in itself this appears to be a good thing. Such rights figure prominently in all of the three documents that compose *The International Bill of Rights: the Universal Declaration of Human Rights, the Covenant on Civil and Political Rights, and the Covenant on Economic, Social, and Cultural Rights*. It is mistaken, therefore, to refer to such rights as “second-generation” human rights; they were recognized from the very beginning of the modern human rights movement. Furthermore, human rights activists, domestic courts of countries that have ratified human rights treaties, regional human rights courts, and international organizations are

increasingly taking at least some “positive” human rights more seriously.

There is, of course, an ongoing debate over whether this has been too much of a good thing—whether there has been “human rights inflation” in the sense that the canonical lists of “positive” rights are too long. Elsewhere, one of the authors of this volume has argued that, in some cases at least, human rights conventions have not distinguished clearly between asserting a right and offering “administrative directives” for how the right is to be operationalized, thereby creating the appearance of a surfeit of rights. That same author also has offered concrete suggestions for how the risk of human rights inflation can be reduced.<sup>5</sup> If that is a feasible project, then the gain in recognizing that there are some “positive” rights may outweigh whatever negative consequences the supposed inflation is supposed to have. It is worth noting, however, that even if some human rights conventions do include as rights items that do not in fact belong there, it does not follow that such “inflation” has any serious consequences, outside the conceptual realm. That would only be the case if these doctrinal mistakes were to lead to a misdirection of efforts away from the realization of genuine rights or if they had some other significant bad practical consequence. Those who decry “human rights inflation” have, to our knowledge, so far produced no evidence that either of these negative consequences has occurred. We are aware of no convincing evidence, for example, that human rights activists have dissipated their energies by focusing on dubiously “luxurious” positive rights to the neglect of more vital negative rights. Philosophers may be far too ready to assume that the sloppy inclusion of some pseudo-rights among genuine human rights must have bad consequences in the world—bad enough to negate the gains of affirming genuine “positive” rights.

<sup>5</sup> Allen Buchanan, *The Heart of Human Rights* (Oxford: Oxford University Press, 2013).

*Shifting the Boundary Between Charity and Justice*

Earlier it was noted that one important instance of moral progress is the recognition that all people are subjects of justice, not merely objects of charity (or benevolence or generosity or humaneness or pity). Even after that momentous conceptual improvement occurred, a distinction between two quite different ways of relating to people remained, based on a distinction between two types of duties or moral "oughts." Duties to aid the needy are traditionally said to be duties of charity, not justice. The distinction between justice and charity has typically been drawn by three contrasts: the distinction between perfect and imperfect duties, the distinction between duties that may properly be enforced and those that may not, and the distinction between duties that are correlatives of rights and those that are "mere duties."

First, duties of justice are said to be perfect duties in that they are determinate in two senses: there is an identified duty-bearer and the action or omission that is required is specified. Duties of charity are imperfect in that they are indeterminate in both respects: they are not owed to anyone in particular and what is required of the duty-bearer is only loosely characterized and in such a way as to allow the duty-bearer some choice as to how the duty is discharged. Second, where there is a duty of justice, there is a correlative right: duties of justice are always "directed," that is, owed to someone; in contrast, duties of charity are non-directed—the duty-bearer is obligated to do or refrain from doing something, but she is not obligated to anyone in particular to do or to refrain. Third, duties of justice are in principle enforceable (though there may be practical or moral reasons not to enforce), whereas duties of charity are supposed to be purely voluntary.

These three contrasts are thought to be related in the following way. If one's duties of charity are imperfect, that is, indeterminate as to content and recipient, then it would seem to follow that no one has a right to anything in particular due to my having these duties. For example, if I have a duty of charity or beneficence,

then it is true that I ought to help some of the needy in some way or other or bestow some unreciprocated benefits or other on someone; but it is not the case that I must help this particular person in need by doing some particular thing or that I must show benevolence toward anyone in particular in any specified way. On the other hand, if, for example, I have made a promise to you to do some particular thing, I have thereby generated a special right that you now possess and I am obligated not just to do that thing for somebody but to do it for you.

The indeterminacy of duties of charity is also supposed to explain their nonenforceability. Given that the use of coercion is morally problematic in any case and that clarity and predictability as to what is to be enforced is a necessary condition for the use of coercion to enforce moral requirements, enforcing duties that are indeterminate in the way that duties of charity are seems problematic. There is perhaps another reason why duties of charity are not thought to be properly enforceable: given the discretion that the duty-bearer enjoys with respect to who among the needy she chooses to act charitably toward and what sorts of acts of charity she performs, it is hard to imagine how any authority could reasonably determine when to enforce a requirement of any particular act of charity.

Suppose that any plausible morality will include something like the distinction between justice and charity as we have just characterized it. That is quite compatible with recognition of the fact that *where* the line is drawn between justice and charity should not be regarded as fixed, once and for all.<sup>6</sup> One way in which moral progress can occur is when people come to realize that what they had until now regarded as a matter of charity is in fact properly within the domain of justice. In particular, they may come to realize that they should alter their institutional

<sup>6</sup> Allen Buchanan (1987), "Justice and Charity," *Ethics* 97(3): 558–575.

arrangements so that imperfect duties can become perfected.<sup>7</sup> On the other side of the coin, de-collectivization in formerly socialist and communist states may constitute a progressive shift in the justice-charity distinction, only in the opposite direction—where what were thought to be perfect duties become imperfect.

The modern welfare state can be seen as a device for converting some imperfect duties into perfect ones and in that respect for adjusting the boundary between justice and charity. A thought experiment will make this fundamental point clearer. Suppose all duties to do anything to aid other people were duties of charity, imperfect duties. To make matters concrete, consider imperfect duties regarding the health of other people, especially people with serious health needs. A rational and reflective person who sincerely wishes to render aid to people with health needs will recognize that if she and everyone else continues to treat this duty as a duty of charity, an imperfect duty, there will be problems. For one thing, the performance of imperfect duties predictably results in uncoordinated beneficence since the choice of recipients of aid and the form of aid is left to the discretion of the individual charitable person.<sup>8</sup> There will be redundancies as well as gaps, and valuable economies of scale may not be realized because there will be a large number of different beneficent acts, rather than a convergence of efforts on a smaller number of especially important large projects. In addition, the provision of some of the most valuable kinds of healthcare benefits is characterized by threshold effects: unless contributions rise to a certain level, the good will not be achieved. In such cases, the individual who wishes to be beneficent may refrain from contributing because she has no assurance that enough other people will contribute to reach the needed threshold of resources.

<sup>7</sup> Allen Buchanan (1996), "Perfecting Imperfect Duties: Collective Action to Create Moral Obligations," *Business Ethics Quarterly* 6(1): 27–42.

<sup>8</sup> Allen Buchanan (1984), "The Right to a Decent Minimum of Health Care," *Philosophy and Public Affairs* 13(1): 55–78.

Further, some individuals may refrain from helping or from helping as much as they otherwise would because they know or suspect that others are not doing much. While not wishing to be free-riders, they may refuse to be suckers. Moreover, some individuals may suffer weakness of the will and provide less health-related aid to others than they know they should because their own self-interest dominates. So long as one can console oneself with the thought that "I'll do more later," the tendency to weakness of the will may be exacerbated. Imperfect duties are tailor-made for weakness of the will.

Finally, some important contributions to health take the form of public goods, for example, the achievement of herd immunity from infectious diseases through vaccinations. Here, as in other cases, the desired outcome may not be achieved voluntarily through the fulfillment of discretionary, imperfect duties, due to the tendency to free-ride. Without mandatory vaccination, which can only be legitimately undertaken by a government, major improvements in well-being through the reduction of serious diseases may not be possible. Other public goods conducive to health, such as clean water, may also require enforcement of norms and are unlikely to be adequately provided through individuals fulfilling duties of charity or beneficence through discretionary, voluntary acts.

All of these problems can be eliminated or at least ameliorated if society implements a legal right to healthcare (or more broadly a right to some of the most important services and conditions contributing to health). So suppose now that there is a significant institutional change prompted by the widespread acknowledgment that provision for health is not just a matter of charity but instead a matter of justice: democratically elected legislators create a legal entitlement to some set of healthcare services and to some basic public health conditions, with the provision that this system of benefits is to be funded through a predictable, progressive, and not overly burdensome tax scheme. In effect, this new institutional

arrangement perfects a previously imperfect legal duty; more precisely, it creates a new legal duty that falls primarily on the state but which also involves perfect legal duties on the part of citizens to contribute in various ways to the realization of the legal right. Such legislation achieves all of this without eliminating the possibility of citizens engaging in charity with regard to health beyond the fulfillment of their legal duties to contribute resources (in the form of taxes). Human rights treaties include rights to health-related services, goods, and conditions and make it clear that states are required to provide them to all people under their jurisdiction. The attractions of this partial conversion of charity to justice are significant: it can provide coordination that reduces the redundancies and gaps in aid that exclusive reliance on charity involves, it can address the problem of weakness of the will by making contributions enforceable, and, perhaps just as importantly, it can ensure a fair distribution among all citizens of the costs and burdens of helping those in need.

Understood as a device for converting imperfect duties into perfect ones, the modern welfare state is a human creation that achieves moral progress through embodying a significant change in the conceptual terrain of morality—an expansion of the domain of justice into what had been previously thought to be the domain of charity. The modern human rights movement presupposes the existence of the modern welfare state, so far as its authoritative documents include rights that can only be realized through the operations of this institution. It also unambiguously affirms that the benefits of the welfare state are to be provided, without discrimination, to all individuals subject to the state's jurisdiction. In effect, the modern conception of human rights implies that all states are to be welfare states, and in doing so it both reflects and supports a momentous expansion of the territory of justice into what had been the territory of charity.

### *The Transition to a Fully Subject-Centered Conception of Morality*

In Chapter 2 we first encountered the distinction between cooperative group reciprocity,<sup>3</sup> or strategic conceptions of morality, and subject-centered conceptions. We noted that cooperative group reciprocity conceptions have a long pedigree, stretching from the ancient Greeks through Hobbes and Hume to the contemporary philosopher David Gauthier. We also observed that such “strategic” conceptions gel with the standard selectionist explanations of the origins of morality. If morality originated as the standard selection story says it did and if it has remained largely unchanged ever since, then one would expect that morality would now conform more or less to the strictures of cooperative group reciprocity.

The distinction between strategic and subject-centered moral conceptions also applies more narrowly to conceptions of justice and more specifically to rights. Cooperative group reciprocity conceptions of justice hold that relations of justice obtain only among those who can contribute to cooperation or disrupt it—that is to say, those who possess strategic capacities for benefiting or harming some cooperative scheme. On this view, beings who lack these strategic capacities are not subjects of justice: nothing that can be done to them is unjust; they have no rights to violate. Subject-centered conceptions of justice hold that membership in the community of subjects of justice depends not upon strategic capacities but rather upon some inherent property of individuals, such as sentience, rationality, or the ability to form, revise, and pursue a conception of the good while participating in a practice of giving and accepting reasons for acting and refraining. According to subject-centered conceptions, being a subject of justice does not depend upon one's ability to contribute to or disrupt cooperation or on one's membership in this or that group.

The modern idea of human rights is clearly a rejection of cooperative group reciprocity understandings of who qualifies as

a subject of justice, that is, of the domain of justice. But it does not follow that everyone who endorses the idea of human rights embraces a subject-centered conception of the domain of justice or, more generally, of the domain of morality. Some of the founding participants of the modern human rights movement, like many of the abolitionists who were their predecessors, were motivated by their Christian religious beliefs. In some cases, they believed that what conferred high moral status and grounded human rights was a relational, rather than an inherent, property of human beings: their being the children of God or being created in his image. Arguably, that is not a subject-centered conception. If one believes that the only reason that slaves ought to be freed or that all people ought to enjoy human rights is that they are made in the image of God or are all his children, then there is a sense in which one's conception of moral status, though non-strategic, is relational or etiological rather than subject-centered. One believes that it is not simply by virtue of what human beings are like that they possess rights; instead, they have rights because God made them in his image or because they are all his children.

Some abolitionists, like many current supporters of human rights, had an understanding of what makes an individual a being with high moral status and of what grounds rights that makes no reference to God. Following the lead of secular natural rights theorists, they believed that rationality matters for moral status and rights, independently of whether being rational is part of what is involved in being made in God's image or being his children. For them what mattered was that people, all people, are rational, not their relationship to God, even if they believed that God made them rational.

It is worth noting that there is something deeply problematic about the idea that rationality confers moral status or grounds rights only because being rational is part of what it is to be created in God's image. What makes the idea that rational creatures have high moral standing and possess rights plausible is that there are important connections between being rational and having high

status and possessing rights, connections that in no way depend on the assumption that we are created in God's image.

For instance, one can argue that the lives of rational beings are of great intrinsic value because they are able to form, revise, and pursue a conception of the good and create value through such pursuits, while engaging in mutually respectful, reciprocal relationships with others in which all participants are regarded as equally subject to the requirements of a practice of reason-giving. One can then argue that if human beings are to be reliably able to live such a life, they require the benefits and protections that certain rights provide. In other words, such rights are a necessary condition for human beings to live morally, and they *explain* how morality is possible. In rebuffing the criticism that rationality or psychological personhood is an arbitrary basis of moral rights, Joel Feinberg puts the point this way:

The characteristics that confer commonsense personhood are not arbitrary bases for rights and duties, such as race, sex or species membership; rather they are traits that make sense out of rights and duties and without which those moral attributes would have no point or function. It is because people are conscious; have a sense of their personal identities; have plans, goals, and projects; experience emotions; are liable to pains, anxieties, and frustrations; can reason and bargain, and so on—it is because of these attributes that people have values and interests, desires and expectations of their own, including a stake in their own futures, and a personal well-being of a sort we cannot ascribe to unconscious or nonrational beings. Because of their developed capacities they can assume duties and responsibilities and can have and make claims on one another. Only because of their sense of self, their life plans, their value hierarchies, and their stakes in their own futures can they be ascribed fundamental rights. There is nothing arbitrary about these linkages.<sup>9</sup>

<sup>9</sup> Joel Feinberg, "Abortion," in Tom Regan et al. (eds.), *Matters of Life and Death*, 2nd edition (McGraw-Hill, 1986).

Saying that it is because they are created in the image of God that human beings are rational and hence are owed respect and protection adds nothing of substance to this line of argument. Indeed, excluding some beings from the moral community who meet this subject-centered criterion (e.g., dolphins or intelligent extraterrestrials) simply because they do not bear the relevant contingent relation to God is a morally arbitrary exclusion, and to hold that all beings that possess these morally relevant properties ipso facto bear the relevant relation to God is ad hoc and has zero explanatory value. Further, and setting the Euthyphro problems aside, if it were the supposed fact of being created in God's image that mattered, then it would be hard to explain why this fact confers certain rights rather than others (or no rights at all). The best explanation of why certain rights are appropriate for human beings is that, given what humans are like—and regardless of how they came to be that way—they need these rights to have a form of life that is of exceptional intrinsic value, indeed the highest intrinsic value there is.

Consider now the claim that human beings have human rights because they are all the children of God. This view shares a liability of the view that what confers human rights is being made in God's image: namely, it is incapable of telling us which rights we have by virtue of our fortunate parentage. Perhaps more importantly, there is something odd, indeed morally unseemly, about thinking that one only has moral obligations to one's siblings. Cognitively and affectively, the "all of God's children" appeal functions in effect as a "fictitious kin" device that encourages the extension of other-regard beyond one's family and ethnic group. Nevertheless, it is one thing to say that one has special obligations to one's siblings, quite another to say that one has obligations *only to them*. Thus, attempts to show that a commitment to human rights is irrational unless there is a God with respect to which all humans are uniquely related fail. So, they provide no reason to believe that people whose understanding of human

rights is rooted in a subject-centered understanding of morality are somehow deluded.

If this line of reasoning is sound, then it follows that a fully subject-centered conception of the domains of morality and justice is a case of conceptual change that counts as moral progress. When people come to believe, as many now do, that human rights are grounded in intrinsically valuable, respect-worthy properties of human beings, they have thereby gained a better understanding of why people, all people, have rights. By coming to have this understanding, humans have improved their ability to conceptualize morality and to reason more skillfully about some of its most important features. That is moral progress.

Once again, the modern human rights movement both reflects and affirms this momentous conceptual shift: it recognizes and promotes certain rights for all people, without assuming that the ascription of these rights depends upon the relationship between human beings and God. Instead, the preambles of some of the key documents state that these rights are inherent in the human person. In fact, the history of the human rights movement includes several episodes in which representatives of some countries attempted to tie human rights to God in the texts of human rights documents, but these efforts were defeated.<sup>10</sup> For these reasons, the modern conception of human rights constitutes a remarkable break from the long-standing tradition of grounding moral standing and status in relational and genealogical properties.

It is important to caution against a misunderstanding of these remarks about subject-centered views of justice and morality. The latter is a view about what makes one a subject of morality, a being with moral standing; the former is a view about what makes one a being to whom justice is owed. To espouse a subject-centered

<sup>10</sup> Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press, 2000).

view of morality is not to deny that reciprocity is important in morality. Similarly, to embrace a subject-centered view of justice is not to deny that some obligations of justice, or some rights, are grounded in relationships of reciprocity. Subject-centered justice is (only) a view about what makes one the kind of being to whom justice can be owed and likewise subject-centered morality is (only) a view about what gives one moral standing. Both views are compatible with a cheerful recognition that many moral obligations, including some obligations of justice, are grounded in reciprocity.

### *The Deeper Significance of Disability Rights*

The recognition of the rights of people with disabilities also has a strong claim to be included in the list of important instances of inclusivist moral progress. The idea of disability rights, which is now an important part of the modern human rights movement, can be understood not only as an implication of the shift to a subject-centered conception of justice but also as an expansion in the territory of justice—the domain of items that are subject to evaluation as being just or unjust.

The idea that we have duties to those with disabilities is not new, but the belief that we owe them duties of *justice* is. On its deepest interpretation, the idea of disability rights amounts to the claim that everyone who is a being of high moral status, and hence a possessor of the commonly recognized human rights, also has a right to access to effective participation in what might be called the dominant cooperative scheme of their social world.<sup>11</sup> The dominant cooperative scheme encompasses the totality of the most important forms of social production, broadly conceived, as well as the more significant social and political institutions, whether they are concerned with production or not. With the advent of the idea of disability rights, for the first time significant

numbers of human beings are coming to understand, if only implicitly, that social justice pertains not just to fair terms of cooperation among participants in cooperation but also to effective access to resources necessary to participate in cooperation, even when the barriers to participation are due to individuals' congenital cognitive or physical limitations. Understood in this way, disability rights imply a major expansion of the territory of justice: judgments of justice or injustice now apply not just to relations among cooperators but also to the terms of access to participation in cooperation.

It is tempting to see disability rights as less revolutionary than they are. One might view them as simply a matter of removing obstacles to the effective exercise of the familiar civil and political rights that many now regard as human rights. This reformist understanding ignores a crucial motivation of the struggle for disability rights—the conviction that persons with disabilities, because they are beings with the same high basic moral status as the “abled,” have a “positive” right to be effective participants in the dominant cooperative scheme—something that may not be achievable by the unhindered exercise of civil and political rights alone. On its deepest interpretation, the notion of disability rights is the radical idea that individuals who lack strategic capacities have a right to develop them, even where their exclusion from the dominant cooperative framework is not due to any individual or social wrongdoing.

Being able to participate effectively in the dominant cooperative scheme is extraordinarily important from the standpoint of inclusion and human flourishing: it means that one can see oneself and be seen by others as a reciprocating contributor to social life, rather than as a dependent being, an object of charity or pity, or a beneficiary of the largess of others. Instead of characterizing social justice as being only concerned with achieving a fair distribution of the burdens and benefits of social cooperation, as Rawls phrases it, the idea of disability rights recognizes that access to effective participation is itself a matter of justice—one that

<sup>11</sup> Buchanan et al., *From Chance to Choice*, supra note 1.

arises prior to the question of how to distribute the benefits and burdens of cooperation fairly.

A related progressive development can be seen in some contemporary feminist understandings of what equal rights for women entail. On these views, recognizing the equal high moral status of women requires taking into account special barriers to effective participation in the dominant cooperative scheme that women face by virtue of their special situation. For example, it is argued that because women bear children and tend to play disproportionately large roles in caring for them, equal rights for women require special social arrangements, such as legal rights to maternity leave and childcare support.

Of course, the idea of disability rights is complex and contains more than the notion that a proper recognition of human moral status mandates social efforts to ensure that all people have effective access to the dominant cooperative scheme in their society. It also encompasses, among other things, the insight that individuals should be seen as whole individuals, not viewed as “the blind” or “the mobility-impaired,” as if their disabilities were their only or defining characteristics. In addition, it includes the recognition that, for some people, their disabilities are implicated in their identities and in that sense are not viewed as misfortunes to be lamented. Our key point, however, is that the disability rights movement is also morally progressive in another way: it involves nothing less than a radical revision in understandings of the territory of justice. Access to the dominant cooperative scheme is seen to be a matter of justice, not a matter of charity or “noblesse oblige” on the part of the abled.

Until recently, disabilities were thought of as unalterable, natural limitations. Nowadays, thanks to the successes of the disability rights movement, people are beginning to realize that in many cases being disabled is in fact a social artifact: a consequence of contingent features of the dominant cooperative scheme that pose obstacles to participation for some but not for others.

In other words, there is a growing recognition that whether a given cognitive or physical condition is a disability—whether it bars the individual from effective participation in some aspect of the dominant cooperative scheme—can depend upon the nature of the cooperative scheme and the demands it places on participants. For example, in a preliterate society, dyslexia would not be a disability because effective participation in the dominant cooperative scheme does not require the ability to read. Conversely, in a literate society that lacked corrective eyeglasses, myopia would be a serious disability. Within broad resource constraints, it is human choices that constitute the particular features of dominant cooperative schemes and thus constitute the contingent existence of disability. These social choices will, in effect, determine who is disabled (though, of course, there are some extreme cognitive and physical conditions that would be disabling in virtually every feasible dominant cooperative scheme).<sup>12</sup> Further, as technologies develop, obstacles to participation may be overcome without changing the basic features of the cooperative scheme, as with brain/computer/body interface technologies for “artificial” vision or the mental manipulation of robotic surrogate limbs.

Recognizing that “disabilities” are sometimes social artifacts and can be removed either by enhancing the individual’s abilities or by modifying the social environment is an important form of moral progress. It is at once an expansion in our understanding of the nature of rights and of what is involved in the recognition of equal basic moral status and a further instance of the colonization of the natural by the just. Only quite recently, through ratification of the International Convention on the Rights of People with Disabilities (2008), has the human rights movement incorporated this conceptual improvement.

<sup>12</sup> Allen Buchanan (1996), “Choosing Who Will Be Disabled: Genetic Intervention and the Morality of Inclusion,” *Social Philosophy and Policy* 13(2):18–46.



*Justice to Future Generations*

One final expansion of the territory of justice, noted in Chapter 1, is worth mentioning here: some people (though not nearly enough) now understand that actions and omissions that will affect future generations can be subject to evaluation in terms of justice. The concept of justice to future generations is thus an expansion of the territory of justice. But it also includes an expansion in the domain of justice, that is, an enlargement of the set of beings to whom obligations of justice are owed—namely, an expansion to include future generations of people who will come to exist long after existing people are gone. This conceptual change appears to be less widespread than the other inclusivist moral-conceptual changes we have described in this chapter—and certainly less embodied in social practices and institutions. And in its case the gap between conceptual change and change in motivation seems especially wide. In particular, if the idea of justice to future generations had been taken seriously, some of the most serious environmental problems, including global climate change, would not have occurred or at least would not have reached their current state of apparent intractability. Either a conceptual change has occurred but without significantly affecting people's motivation and behavior or for many people the acknowledgment that justice extends intergenerationally is merely a kind of epistemically empty and conatively idle social signal motivated by social desirability effects, such as the desire to be viewed as politically correct or morally enlightened—not evidence of an actual conceptual change. We suspect that the second alternative is more plausible, but for present purposes it is not necessary to make this case.

*The Concept of Unforfeitable Rights*

We have emphasized that moral progress often consists of including those who previously were excluded from the class of

beings thought to have basic equal moral status. That progressive moral innovation is compatible with the belief that basic moral status can be completely forfeited if the individual commits sufficiently serious transgressions. The last conceptual change we wish to consider is the shift to a nuanced understanding of basic moral status that rejects the idea that all of the rights associated with that status can be forfeited as a result of wrongdoing.

It appears that, until quite recently in human history, the dominant view, at least as it was expressed in practices of punishment in many countries, was that by committing certain offenses an individual could forfeit all of his or her rights—even those that define basic equal moral status—and indeed could become a being with no moral standing whatsoever. Further, the list of offenses that were thought to result in the complete loss of moral standing was not restricted to the most heinous offenses. Thus, for example, individuals convicted of killing members of the nobility or of attempting regicide or of blasphemy or apostasy were not only deprived of their liberty and condemned to death but also subjected to the cruellest punishments and to mutilation of their corpses, even deprived of religiously sanctioned burial.

The idea that there are some basic rights—including the right not to be tortured—that an individual cannot forfeit, no matter how reprehensibly he behaves, is a relatively recent development in the tradition of natural rights thinking. For many people today, the belief that certain basic rights are immune to forfeiture extends not only to the right not to be tortured or mutilated or deprived of proper burial but also to the right not to be subjected to capital punishment, even in the case of those who participate in or instigate war crimes, genocide, or mass-scale terrorism. It is true that much opposition to the death penalty, especially in the United States, is motivated by concerns about the error rate (wrongful convictions) or racial disparity in sentencing, rather than by the notion that the right to life can under no circumstances be forfeited. But many people seeking the abrogation of

the death penalty, especially in Europe, would include among their reasons the non-forfeiture rationale.

Whether or not capital punishment is ever justified is a matter of debate and perhaps of reasonable disagreement, so perhaps the rejection of capital punishment cannot serve as an uncontroversial candidate for moral progress—though reducing the error rate and racial disparities in its application would seem to count as moral progress. The more basic idea that not all rights can be forfeited is a less problematic candidate for moral-conceptual improvement—a progressive change in how the concept of moral status is to be understood. In effect, the idea that certain basic rights cannot be forfeited amounts to the claim that one cannot wholly lose one's basic equal moral status: that although one may forfeit some rights (such as the right to complete freedom of movement when one is imprisoned for a crime or, on some views, the right to vote), there are other rights, other elements of basic equal status, that remain intact. Of course, there remains considerable disagreement over the circumstances in which certain rights may or may not be forfeited. The point, however, is that the persistence of certain unforfeitable rights means that the individual still has moral standing, even if it is of a partially diminished sort.

The modern human rights movement embodies this significant conceptual change. At least those human rights that have the status of *jus cogens*, including the right against torture and enslavement, are understood to be constituents of a basic moral status that no human being can forfeit and which, consequently, must always be respected. The modern human rights movement therefore includes a significant refinement of the concept of basic moral status, not only extending it to all human beings but also proclaiming that no human individual is ever to be treated as if he or she lacked any moral standing whatsoever.

Recent debates about the ethical status of torture have called into question the assumption that nothing an individual could do could ever result in forfeiture of the right not to be tortured.

Some philosophers have argued that there could be circumstances in which it would be permissible to torture an individual, if there were sufficient certainty that doing so would prevent many deaths for which that individual would be responsible and if torturing him were the only way to avert those deaths. Even those who find such arguments compelling would presumably agree that rejecting the previously widely held belief that moral standing can be completely forfeited by much less serious offenses is a moral improvement.

### *Conclusion*

This chapter has identified several momentous instances of conceptual moral progress in the dimension of inclusion and has shown that all of them are embodied in the modern human rights movement—not just in the ways in which people think and talk about human rights but also in human rights practice and its institutional manifestations. The next chapter shows how the naturalistic theory of moral progress outlined in Chapter 6 helps to explain how the human rights movement and its forerunner, abolitionism, could have been created by beings whose fundamental moral capacities evolved in the environment of evolutionary adaptation. Applying our naturalistic theory to core aspects of the modern human rights movement will help not only to confirm the theory's explanatory power but also to clarify the theory itself.