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Human Rights: Natural or Cultural?

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Shall we conceive of human rights as natural or cultural? I shall answer that they are products of a global culture that gradually emerged in response to a history of violence and horrors. I agree with Michael Boylan that there are certain goods essential for human action to which we have a moral right; but I disagree on how we should describe them. I will contend that human rights are historical products, much like cultural artefacts, and while there may be some overlapping of moral and human rights, they are different kinds of things. The commentary divides into four sections. In the first, I provide a brief sketch of what I will call the Boylan Project; in the second, slightly longer section I consider a historical and then a conceptual point; in the third section I suggest expanding the Boylan Project to include some empirical dimensions; and in the final section I raise the question whether how we describe human rights makes any difference.

The Boylan Project, 2004-2014

Boylan's *Natural Human Rights* is the most recent installment on a project that he began to release with the publication of his 2004 book *A Just Society*.¹ In the latter, he introduces three ideas that comprise the core of the project – first, that all people by nature desire to act (the agency view); second, that action has preconditions or goods that are essential to it (the basic goods view); and third, that everyone has a moral right to the most basic goods of agency (the justice view). In that first installment, *A Just Society*, the justice view is tethered to a world of borders and states and gives priority in the distribution of basic goods to compatriots over worse off distant strangers. A few years later in 2009, in a volume titled *Morality and Justice: Reading Boylan's A Just Society*,² several of us queried why Boylan would restrict the distribution of basic goods to national boundaries:

can he really reconcile the universality of basic goods with a conception of justice fixed to arbitrary national borders? Boylan had anticipated the query, and the project was already taking a broader, cosmopolitan perspective.

The second installment of the Boylan Project came in 2011, *Morality and Global Justice*, and at its core is a cosmopolitan perspective. In Chapter 6, he writes:

The argument for the moral status of basic goods ... seems not to be oriented toward membership in any given state. There is no mention of particular national citizenship in any of its premises. This would suggest that the rights-claim is against all people on the earth subject to their ability to contribute.³

By 2011 the Boylan Project consisted of four fundamental ideas – the three already mentioned (i.e., the agency view, basic goods, and justice⁴) and now a fourth one, a cosmopolitan perspective. Also in this same 2011 book, Boylan introduced an idea that is now fully elaborated in the present volume, *Natural Human Rights*. In the former, the agency view “amounts to something close to human nature” and the most basic goods essential for agency (e.g., food, shelter...) are biological conditions that “apply to any organism that is a member of *Homo sapiens*.”⁵ Finally, in the most recent book the agency view becomes a fully elaborated natural realism, adding a fifth idea to the Boylan Project. He writes:

I take natural law in the ethical/political/legal realm to invoke the existence of a justification for ethics, politics, and the law that is logically separate from and more authoritative than human constructions. This is the essence of the realist, naturalist position that this author endorses.⁶

1 Michael Boylan, *A Just Society* (Lanham, MD: Rowman & Littlefield, 2004).

2 John-Stewart Gordon, ed., *Morality and Justice: Reading Boylan's A Just Society* (Lanham: Rowman & Littlefield, 2009).

3 Michael Boylan, *Morality and Global Justice: Justifications and Applications* (Boulder, CO: Westview Press, 2011), 73

4 Here justice is pluralist but with very strong egalitarian tones. See Boylan, *Morality*, 78.

5 Boylan, *Morality*, 52, 53.

6 Boylan, *Natural Human Rights: A Theory* (Cambridge:

The Tradition of Natural Law & the Doctrine of Human Rights

In the present volume, Boylan connects the agency view he introduced in 2004 with the ancient theory of natural law, specifically in Chapter 2, “A Short History of Human Rights in the West.” The following remarks focus on that chapter.

The expression “natural law” is a translation of the Roman and then Scholastic *ius naturale*, and the relevance of that Latin expression to contemporary rights theory rests in the ambiguity or complications of the word *ius*, which can be, and has been, rendered as law or right, giving us the English-language “natural law” and “natural right.” Boylan will agree that both translations hold that there is an order to human life independent of our wanting and doing that is objectively true and discoverable. In this regard the moral universe is of the same kind as the physical universe. Ulpian long ago expressed this view when he said, “Natural law is what nature has taught all animals.”⁷ Boylan’s rendition of natural law agrees with this long tradition.

But he wants to go beyond the tradition in at least two important ways: (i) by introducing a subjective order (a faculty or powers of persons, a claim-right) that is (ii) independent of human invention. The first would make the theory a modern one, and the second would avoid the well-rehearsed criticism of Western imperialism.

The Roman and Scholastic meaning of *ius*, however, has little of the doctrine of subjective natural rights or claim-rights as, say, the right to subsistence and any of the other basic goods essential for agency that Boylan has been advocating at least since his 2004 book, *A Just Society*. It is thus difficult to ascertain whether the new subjective doctrine is compatible with the old objective one, or when the transition from one to the other occurred, rendering the objective order of natural law compatible with the doctrine of subjective natural rights. There is a lively scholarly discussion on the matter of a transition from the old to the new doctrine in which the sixteenth century Spanish Dominican Francisco Victoria figures prominently. Some have it that Victoria was content with the objective sense of *ius*,⁸ while others argue that in his commentary on Aquinas’ theology of restitution Victoria developed a theory of subjective rights, which some considered an act of “treason.”⁹

Cambridge University Press, 2014), 36.

7 Quoted in Aquinas, *Summa Theologicae*, I,II, 57.1

8 See Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979).

9 See Brian Tierney, *The Idea of Natural Right: Studies on Natural Rights, Natural Law, and Church Law* (Grand

Whether there is a subjective order of natural rights in the traditional doctrine of natural law is not a settled matter. But this is a historical, not yet a conceptual point.

I turn to the second point, namely, that by natural law Boylan means an order that is “logically separate from and more authoritative than human construction.”¹⁰ This is a crucial point for him: it provides a rational foundation for rights and avoids the charges of relativism and imperialism. But does it square with the tradition? Consider the following passage from Aquinas:

Something can be said to be according to the *ius naturale* in two ways. One, if nature inclines us to it: such as not to harm another human being. The other, if nature does not prescribe the opposite: so that we can say a man is naked under the *ius naturale*, since he received no clothes from nature but invented them himself ... for the advantage of human life.¹¹

By this account, the *ius naturale* is not “separate from human inventions,” static, ahistorical; it includes both biological and cultural facts that are objectively true, discoverable, and protean, and as such avoid the potential charges of relativism and imperialism. On this account, human rights are cultural phenomena that are “essential components of our worldview”¹² and constitute an “international human rights regime.”¹³

The origin of this “worldview” or “regime” lies in a history of violence, cruelty, and horrors: forced labor, chattel slavery, genocide, refugee crises, mass population transfers, and continues today in child

Rapids, MI: Wm. Eerdmans Publishing, 2001), Chapter 11, “Aristotle and the American Indians.”

10 Boylan, *Natural Human Rights*, 36.

11 Thomas Aquinas, *Summa Theologicae*, I-II, 94.5.

12 Eduardo Rabossi, “La Teoria de los Derechos Humanos Naturalizada,” *Revista del Centro de Estudios Constitucionales*, No. 5 (January-March) 1990: 159. Richard Rorty follows Rabossi in his well-known 1993 Oxford-Amnesty International lecture, “Human Rights, Rationality, and Sentimentality.” There Rorty argues that the transcendental grounding of human rights is “outmoded and irrelevant,” belonging to a distant intellectual world that sought to identify some special and ahistorical feature of human beings on the basis of which a series of important questions, particularly the question “Why should I care about distant strangers?” would be intelligently answered. In lieu of Kantian rationality, Rabossi-Rorty propose a conception of political culture in which human rights are respected as the bare minimum of a planetary morality that over the past two centuries has gradually been adopted by the community of nations.

13 Seyla Benhabib, *Another Cosmopolitanism* (Oxford: Oxford University press, 2006), 27.

slavery, sex trafficking, torture, and more refugee crises. Most histories of human rights look to the French Revolutionary “Declaration of the Rights of Man and Citizen.” But we get a glimpse of the underlying motive, of an earlier frame of a new normative order, in a remarkable event that took place in the island of Hispaniola, in what is now the Dominican Republic, during the first period of globalization. On the Sunday before Christmas 1511, a Spanish Dominican priest named Antonio de Montesinos delivered a sermon before a congregation of *encomenderos*, Spanish “holders” of indigenous people whose labor they were legally entitled to exploit in exchange for care of their spiritual welfare, and who, as Anthony Padgen notes, “resented the [Spanish] crown’s refusal to allow them simply to enslave [them] and appropriate their lands.” Montesinos, Padgen writes,

launched “with pugnacious and terrible words” into an attack on the conscience of the Spaniards, which he likened to a “sterile desert.” They were words ... that made the Spaniards’ flesh creep as if they already stood before divine judgment. Montesinos thundered at them, demanding to know with what right they treated “these innocent people” – the Indians – “with such cruelty and tyranny,” by what authority had they “made such detestable wars against peoples who were living pacifically and gently on their own lands.” Montesinos’ ringing questions culminated in three, which were to become the rallying cry of the struggle against colonial rulers of one kind or another in the Spanish-speaking world and far beyond. “Are these not men?” he asked. “Do they not have rational souls? Are you not obligated to love them as yourselves?”¹⁴

It was Bartolomé de Las Casas, himself an *encomendero*, who recorded this remarkable event. Later he would publish several works in defense of the indigenous peoples of the Americas, the most famous of which is *A Short Account of the Destruction of the Indies*, a monument to human rights, we would call it today, chronicling the atrocities committed by Spanish settlers against native peoples – exploitation, mutilation, torture, rape, and murder. The effect upon native populations was almost total devastation. In Mexico alone the population would drop from 25.5 million in 1518 when Cortez arrived to about 700,000 in 1623, a 97% drop in little more than a century.¹⁵ In Cuba and the

Antilles, the Taino population dropped from about eight million in 1491 to about three million just six years later in 1496. Then needing laborers and lacking indigenous people, the Spanish brought the slave. Building blocks of the New World: genocide and slavery. Bartolomé de Las Casas writes:

[In the island of Hispaniola, the Spaniards] forced their way into native settlements, slaughtering everyone they found there, including small children, old men, pregnant women, and even women who had just given birth. They hacked them to pieces, slicing their bellies open with their swords as though they were so many sheep herded into a pen.... They grabbed suckling infants by the feet, and ripping them from their mother’s breast, dashed them headlong against the rocks.... They spared no one.¹⁶

Reports of atrocities such as this stirred up an intellectual firestorm in Europe. Las Casas’ *A Short Account* became, Padgen notes, “a best seller in a number of European languages,”¹⁷ and its influence may be observed in liberal and radical thinkers well into the present, for example, in Montesquieu and de Tocqueville, Simón Bolívar, and Marxist-informed liberation theology in Latin America today.

Within that world we cannot say that the human rights of Amerindians were violated by the cruelty of Spanish imperial colonialism - murderous and evil that it was - for the concept of human rights was a still inchoate doctrine, it was not yet a fact of the world (“*un hecho-del-mundo*”¹⁸). What we see instead is a humanitarian impulse arising out of a basic sympathy for the suffering of others, even distant strangers. It is the same impulse in response to similar atrocities that we find in the 1787 Committee for the Abolition of the Slave Trade, and in more recent documents like the 1948 Genocide Convention, all signaling the spread of a new morality grounded in a doctrine of human rights that takes precedence over material interest or state sovereignty, a movement or progression that today expands over a globalized planet.

An important part of the argument in *Natural Human Rights* is the claim that philosophical attitudes both in the East and West show an important likeness in their efforts to articulate an objective standard for human conduct, and look upon the person as a being that is “naturally ordered.”¹⁹ The argument for natural human rights

14 Anthony Padgen, *Peoples and Empires* (NY: Modern Library, 2003), 66.

15 Charles C. Mann, *1491: New Revelations of the Americas Before Columbus*, 2nd Edition (NY: Vintage, 2011), 147.

16 Bartolomé de Las Casas, *A Short Account of the Destruction of the Indies*, trans. Nigel Griffin (NY: Penguin, 2004), 15.

17 Padgen, *Peoples*, 68.

18 Rabossi, “La Teoria,” 161.

19 Boylan, *Natural Human Rights*, 80.

should then go a long way to establishing a universal, cosmopolitan morality consisting at least of basic goods essential for human action. But it is not clear to me that to establish a cosmopolitan morality and to avoid the charge of imperialism we need to adopt a “foundationalist posture.”²⁰ We can have morality without metaphysics. As historical beings we can and do invent contrivances, artefacts for “the advantage of human life” - clothes that protect us from inclement weather and human rights to secure and promote those goods Boylan correctly identifies as essential for human action.

Our culture of human rights is not to be found in the medieval Schoolmen or even in the tradition of natural law, but in a tradition of documents like the Treaty of Berlin (1878), giving special rights and granting protection to some minority groups under the Ottoman Empire, and especially in the 1948 Universal Declaration of Human Rights. The creation of this culture has all to do with gruesome events in recent history – persecutions, mass killings, genocide – and the attempt by an evolving planetary community to protect individuals against the violence of states. The pressing need at this time is to further that culture of human right. What are its essential institutions? What will promote it? What will improve us morally and socially?

Expanding the Boylan Project

I began these remarks by identifying five core ideas as the Boylan Project. In this section, I want to suggest a possible expansion of the Project.

In his 2004 book, *A Just Society*, Boylan presents the basic goods essential for action in the form of a Table of Embeddedness, a “nested hierarchy of goods” ranging from the most deeply embedded that are “absolutely necessary for human action (Food, Clothing, Shelter, Protection from unwarranted bodily harm)” to those that are “remotely related to effective action” (luxury goods that though they may be pleasant to have one can live without, say, a vacation in Cuba).²¹ The Table of Embeddedness and particularly the basic goods have a strong likeness to other approaches that aim to identify what people may claim as a human right – e.g., those of Alan Gewirth, James Griffin, Amartya Sen, and Martha Nussbaum. Sen and Nussbaum are particularly interesting as they tie the concept of right or opportunities to realities on the ground and are thereby able to compare and rank their realization. This important empirical dimension in Sen’s and Nussbaum’s work is absent from Boylan’s account.

So I wish to suggest what I will call the Boylan

Empirical Project that should focus on the following question: What is the actual level of satisfaction in the world today of the full range of the basic goods in the Table of Embeddedness? If we can fill in the details, two important things might follow: first, we might come to know whether we are moving towards or away from justice; and second, whether the Table of Embeddedness provides better knowledge than its competitors to determine the moral status of the world.

A few brief remarks on the latter point. For some time, the standard measurement in development economics has been GDP per capita, and often development practitioners assumed that as GDP per capita increases in a society the wellbeing of all its members is positively affected. Not true. We have become increasingly aware that a single measure cannot reflect the distribution of wealth and income or capture the complexity of human wellbeing. Today, the capabilities approach associated with Sen and Nussbaum carries great promise and is widely employed. Boylan has noted some striking similarities between the capabilities approach and his Table of Embeddedness. So comparing what they are able to measure, and when they overlap what the measurements tell us about the world, can help us determine whether one is preferable to the other because it provides us information useful for moving towards a better world. Boylan’s approach has a feature that might make an important difference: it distinguishes between the most basic necessities and what contributes to but is not essential for effective action (e.g., luxuries).

Whether Boylan’s approach turns out to be preferable, an important question remains: What is to be done about those whose rights are deprived? There’s a powerful body of empirical literature claiming that attempts to aid the poor of the world have failed terribly and are doomed to do so – think of *The White Man’s Burden*, *The Road to Hell*, *Lords of Poverty*, among other works. So it is with caution that we should read the following:

We all must do as much as possible to satisfy these valid claims first before all others ... The claim is against all *Homo sapiens* living on earth. This is what it means to ascribe rights that are viewed as natural human rights ... Because of the argument for the moral status of basic goods, a strong duty is incurred by everyone on earth to all others to provide level-one basic goods ... Those souls around the world who are dying every minute of the day have a right to minimum nutrition, protection, lodging, sanitation, and health care. By setting the argument at the species level, the ensuing duty is against everyone else on earth.²²

20 Rabossi, “La Teoria,” 160.

21 Boylan, *A Just Society*, 53-54.

22 Boylan, *Natural Human Rights*, 193-194.

In her recent book, *Distant Strangers: Ethics, Psychology, and Global Poverty*,²³ Judith Lichtenberg provides a sobering response to the question, “What is to be done about global poverty?” Incorporating insights of social psychology she gives us reason to think that what is possible is less than or different from what is desirable, and suggests scaling back our expectations. Even if all of us have a duty to the poor of the earth, as Boylan maintains, we need to know whether giving will aid or harm the poor, and if aid does turn out to benefit the poor of the world, then we need to know how much one is morally required to give. Boylan’s new book, however, is silent on these two points.

A Concluding Observation

What difference, if any, would it make to the human rights activists on the ground? Which view – the natural or cultural – would likely be more persuasive? Briefly, two reasons the human rights activist is likely to be persuaded more by the cultural than the natural view on human rights. First, it is far from clear that developments in moral theory and knowledge have much, if any, effect on moral progress. We should then look to other places for an account of how our moral sentiments might expand beyond the interests of tribe and nation, and make life much better for all. Rorty’s suggestion of “sentimental education” is quite compatible with Boylan’s work on fictive narrative and the effectiveness of literature as a form of moral education.²⁴ And second, in a world of uncertainties and disagreements the most we can reasonably say is that, at least for now, the global community has expressed its agreement on human rights in a Universal Declaration that seeks to protect individuals and their communities from the violence and horrors of the past, and to declare a hope that we shall never again commit such evils.

23 Judith Lichtenberg, *Distant Strangers: Ethics, Psychology, and Global Poverty* (Cambridge: Cambridge University Press, 2014).

24 Boylan et al., “Using Fictive Narrative to Teach Ethics/Philosophy,” *Teaching Ethics*, 12.1 (Fall 2011): 61-94.