TWO ORTHODOX JEWISH THEORIES OF RIGHTS: SOL ROTH AND ISAAC BREUER

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Modern theories of rights assume the existence of autonomous individual persons who possess rights by the mere force of their personhood alone. Orthodox Jewish thinkers Sol Roth and Isaac Breuer contest the primitive original character of personhood in this sense. They assert that neither rights nor persons precede a social reality constituted by duties and obligations seeking to ground personhood in moral relationality rather than autonomy. Both thereby negate the modern project of ascribing rights.

This essay examines two attempts by Orthodox Jewish social thinkers to engage the modern concept of rights. Although separated by culture and overall scope and quality of thought, Isaac Breuer and Sol Roth have both addressed the issue of rights directly. Their attempts to develop explicit critiques of modern rights discourse warranted their treatment here.

Before exploring the views of Sol Roth and Isaac Breuer, let us attempt to sort out what is distinctively modern — and therefore troublesome — in the "modern concept of rights" by turning first to the work of A.I. Melden for a suitably modern theoretical statement on rights.

By "modern concept of rights," we refer to the view that human persons, *solely* by virtue of their status as persons, possess some fundamental attributes which order moral, legal and political conduct with respect to them. A.I. Melden traces the modern turn in the philosophical constitution of the concept of rights to Locke. In his view, Locke takes the revolutionary step of rejecting the attribution of rights to persons on the basis of either natural law or "divine ordinances comparable to the statutes of civil society....We need no such principles; we need nothing more than the concept of persons, whose features as the moral agents they are suffice for the possession by them of fundamental moral rights, features which enable them to join their lives with one another as they go about their affairs."[1] (While it is doubtful that Locke sustains this reading [Cf., e.g., *Second Treatise*, chap. II, para. 6], the fact that a contemporary interpreter such as Melden reads Locke in this way expresses what is typically modern in Melden's conception of rights.)

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Human beings have rights because they are persons, not because they have duties (Maritain, Bradley, Kant) or are subject to a law or have a role in some cosmic matrix. Melden shakes the concept of personhood loose from any scheme of natural or divine law, transcendent principle, citizenship in a terrestrial or celestial state, or biological or cosmic teleology in which it could be (and once was) located. Persons per se, stripped of culture, community, history and destiny, are held, by virtue of the "mere" fact that they are persons, to be bearers of rights. These atomic, ahistorical beings make moral claims which are justified not by pointing to any schemata beyond the facticity of their personhood, but by their personhood alone. We might arrive at the same assertion by affirming that man is made in the image of God. That too would ground an ahistorical, universal claim of rights and personhood. Yet Melden would disallow such an appeal to principle. That is precisely the sort of non-empirical move he claims Locke (perhaps unwittingly) freed us from. Personhood is primitive and need not be grounded on some essence, such as "the image of God" in the biblical account.

What is it then to be a person, a rights-bearing being, on Melden's account? A person is one who has the status of a moral agent who can "choose, decide and act for himself as he pursues his interests — in food, clothing, shelter, in work and in play, or in any of the indefinitely many other activities in which he engages — interests that give point and purpose to his very many different sorts of endeavors."[2] Personhood is constituted by performances. One looks at the relevant sorts of things human beings in society do. "Person," as Locke said, is a forensic term or, more broadly, an empirical, social term.

Persons, on Melden's account, are not Skinnerian entities. They have dignity. Dignity however refers not to some esoteric goodness that is intrinsic to human beings and that has its roots in some transcendent realm of which they are members. Nor is it the ability that we have, by deciding how to live our own lives, to achieve that good which, as the scholastics put it, is the fullness of our own being....*Dignity*, as Locke once remarked about *person*, is a forensic term, one that applies to persons in the forum in which they conduct their affairs with each other. The moral dignity of persons is the dignity they have insofar as they show themselves capable of being full and unabridged participants in the life of a moral community, comporting themselves with others in the expectation that they will be dealt with on terms of moral equality, and prepared in a way that anyone can see to hold others to account for the infringement of their rights.[3]

The most noticeable feature of Melden's account is its thorough empiricism. He grounds possession of rights on the status of being a person and constitutes that status out of the observable data of moral interaction. He rejects on principle any transcendental turn. He also rejects a scientistic turn in that his discourse derives from the *Lebenswelt*. It is

in the lived world of moral interaction that the categories of personhood and rights are validly constituted. Metaphysically, however, Melden's account is post-foundational. Exactly how he would sustain the irrefragability of the status of personhood against the vagaries of empirical societies is unclear. For while he is precise about how rights exist over and against their empirical violation, he refuses to anchor the construction of personhood (on which rights depend) in any culturally-invariant, let alone trans-empirical ground. (Locke, with his appeal to God's sovereignty over his creatures and to the natural law of reason, shows greater continuity with pre-modern approaches.) What is clear in Melden, and in modern rights-talk in general, is the insistence on the primitive, pre-contextual character of rights. As soon as we can speak of persons, we can speak of rights. These primitive terms are held to be logically prior to any social context in which they may empirically be located.

It appears then that Melden's conception of rights and persons uncritically presupposes modern liberal culture. Its values of autonomy and rationality, as well as its political mythos of social contract, underlie his entire account. We can sense here the points at which the Orthodox thinkers will apply their critique: the thematization of the autonomous individual, the empirical constitution of the moral sphere, the isolation of rights from duties, and the bracketing out of a transcendent frame of reference.

Sol Roth's recent work, *Halakhah and Politics: The Jewish Idea of a State*, attempts a critical conversation between classical Jewish political values and concepts, and those regnant, in his view, in contemporary America. The formulations on both sides of the dichotomy are ideal-typical, and, in this writer's judgment, caricatured. Nonetheless, the work displays the genuine conflicts between political traditions.

Roth is highly critical of the concept of rights and of the weight it has acquired in modern social and political life. In Judaism, there is a "denigration of rights in the characterization of its conception of freedom [as] a direct consequence of its supreme concern with *duties* or *obligations*."[4] Roth insists (implicitly, contra Melden) that the sine qua non of personhood is the possession of duties. Obligation, not rights, is the primary constituent of personhood.

Roth wants to argue that Judaism is a rigorously deontic system that subordinates the freedom, independence, indeed the individuality of persons to a collective, normative ideal. Thus rights talk, which elevates freedom in the sense of autonomy, individuality, and so on, indicates an inattention to the axiological primacy of duty. Yet, in an unproblematic sense, rights and duties are correlative or coeval. They logically imply one another, so neither should, strictly speaking, have priority. Roth analyses this phenomenon and tries to show why rights, nonetheless, are subsidiary to duties.

Rights and duties are coeval in the sense that one has a duty to do x, if and only if one has no right to refrain from doing x. So, too, one has a right to do x, if and only if one does not have a duty to refrain from doing x.[5] It is also the case that if someone has obligated himself to someone else, then the latter person has rights vis-a-vis the former. If A has promised B that he will do C, B has a right to expect C of A. In these two senses, rights and duty are "naturally" correlated. (Rights, we might also add, appear as "natural" features of any moral landscape where persons have obligations.)

Roth argues that although these terms are logically correlated, there is, in fact, a substantive difference in moral life depending on which term is stressed by a culture. Notwithstanding the correlative character of rights and obligations, there is a considerable difference between deducing obligations from rights and inferring rights from obligations. One major difference is the way in which the notion of freedom is defined in these contrasting perspectives. Those to whom human rights are paramount, and who recognize obligations as legitimate only if they flow from rights, will insist that human freedom is to be construed in terms of the right to do whatever one wishes so long as one does not interfere with others in the pursuit of their inclinations. Indeed, this is the American point of view. If, however, obligations are assigned priority, as is the case in Judaism, acting on inclination receives limited sanction. Freedom, in the Jewish perspective, though it is valued and celebrated, is defined, not in terms of the right to do what we want, but in terms of the power to do what we should, that is, in terms of the capacity to fulfill our obligations.[6]

Roth is arguing that wherever rights are given priority, the individual is thematized and presented as radically independent of his potential deontic entanglements and poised in a critical posture with respect to them. From a rights-oriented perspective, freedom is negative. It is freedom from those interferences and associations which delimit autonomy. From a duty-oriented perspective, freedom is positive. It is freedom to fulfill those obligations which constitute the core of personhood. For the Jew, of course, those obligations — the mitzvot — constitute both personhood and community. Thus, for the Jew, being tightly bound to others in the "community of commitment" takes precedence over atomic versions of personhood.

So: A perspective in which rights are assigned priority is one which fosters self-directedness, a paramount concern with oneself. In such an emphasis, importance is assigned, not to *relations* that attach person to person, but to the person himself, that is, the individual. It is true that, even in such an ambience, people respond to obligations; but they do so because they recognize that the assumption of obligations will serve to secure their rights, and this is their essential thrust.

Those, however, for whom obligations are prior are other-directed. They perceive themselves primarily as the bearers of obligations, and even their rights are understood to be functions of the obligations of others to them.[7]

So far forth, Roth's critique is based on the charge that an emphasis on rights engenders self-orientation rather than a social orientation. (Why one is better than the other, Roth does not say.) A further, and devastating, consequence, in his view, of an emphasis on rights is that the theorist is not able to argue why an individual should not have unlimited rights over his or her own body. "[I]n a rights-oriented, self-centered society, a human being has no obligations with respect to himself that are not subservient to his interests as he understands them, and that when he perceives an action, on balance, as in his interests, there is no reason for him to refrain from undertaking it: that is, his rights with respect to his own person are unlimited."[8] From the point of view of rights, Roth sees no counterargument to abortion or suicide. If obligations are primary, of course, then rights are construed within a normative framework which has already ruled out certain choices.

The force of this critique is to decry normative status to the idea of a right altogether. Rights are, as Roth says, "interests on which legitimacy has been conferred," yet the very concept of an interest indicates something empirical or psychological, while the notion of conferral suggests something arbitrary. Ultimately, for Roth, it is impossible for modern philosophy to establish primary, valid rights, say, in the sense of human rights. Attempts to derive such rights from nature or human nature run aground on the fact/value distinction. Attempts to derive them from the empirical observation of moral practices as Melden or H.L.A. Hart have done turn putative human rights into "sociological fact rather than...ethical norm."[9] Roth's reply to the perceived failure of rights-oriented philosophy to accomplish its own objectives is to speak about universal, divinely ordained obligations (in the form of the *sheva mitzvot b'nei Noach*) from which universal, human rights might be derived.

Roth's critique has emphasized the dangers of self-orientation, relativism, and an anormativity implicit in rights discourse. As to self-orientation, it is worth pointing out that Mill, whom Roth presumably has in mind, argued that individuals ought to be maximally free to pursue their own interests in part *because* of the probable benefit of that freedom, in the aggregate, to society. The very notion of the "greatest good for the greatest number" is social to its core. Indeed, the classic anti-utilitarian argument ("how would the utilitarian disallow the sacrifice of an innocent man if it were to promote the greatest good...") is an argument over social good. So, too, Melden's work locates

rights at the place where persons join their lives together in mutual endeavor, not merely in the egoistic pursuit of private objectives. Roth deals here in caricature.

The depiction of American society as a democracy based on a radical libertarianism is also a form of caricature. The libertarian tradition which emphasized personal freedom from the state is balanced by a civic tradition, where public activism insures "ordered liberty." Roth systematically ignores those elements of the American tradition (those "habits of the heart") which make for a "community of commitment." While it is true, according to Robert Bellah, et al, that the civic tradition in American culture has lost ground to the individualistic, libertarian strain, Roth does a disservice by not even mentioning the dialectical quality of the phenomenon.

Roth's charge that rights discourse is ultimately non-normative is the most serious. Deprived of either natural law — a tradition Roth himself finds incompatible with his revelational positivism — or divine revelation, philosophy has painted itself into a corner. It is left with deriving "ought" from "is," which it, of course, knows that it must not do. Thus it is left with reminding itself of what is, unable to argue for or defend what ought to be. Against what he takes to be the limits of empiricism, Roth asserts a full-blown religious faith. It is because God requires of us, e.g., that we do not steal (universal obligation) that we may be said to have a right to private property.[10] Without divinely revealed duties, rights lack all foundation.

Roth's argument for the non-groundedness or anormativity of rights is based on a prior acceptance of the fact/value distinction. Yet, while analytic philosophy more often than not does not abandon that distinction, there is no reason for Roth to accept it. Within the framework of his own theism, he could have argued in a way that made rights primary rather than obligations. He might have said that because the world has been created by God and because God has pronounced the world good, value is implicit in the world qua creation. There is no fact/value distinction, because there are no natural facts without natural values. One such putative fact, personhood, is necessarily value-laden. If personhood is a value, then persons must be treated in a manner commensurate with their value. Persons have, therefore, valid claims — rights — to receive treatment commensurate with the fact and value of their personhood.

Judged from such a perspective, the interests of persons are not merely empirical, arbitrary promptings of their will, but expressions of an order of value implicit in the createdness of the world. That Roth had avoided this argument indicates, on the one hand, an apologetic motif, and, on the other, a deep-seated suspicion of the critical and anthropological implications of taking rights seriously.

A similar line of argument is found in the thought of Isaac Breuer

(1883-1946). An Orthodox scholar and political leader trained in neo-Kantian philosophy and law, Breuer developed a comprehensive philosophy of Judaism and a critique of modern epistemological, legal, moral and political values.[11] While Breuer, like Roth, deprecated the concept of rights due to its thematization of individuality and autonomy, he does not dismiss human interests as brusquely as Roth does.

Breuer does not restrict the normative dimension of social life to that sphere of obligations derivative of the Noahide commandments and the Sinaitic revelation. Building on the work of the neo-Kantian legal philosopher, Rudolph Stammler, Breuer argues that sociality is intrinsically normative. That is, the very decision to found a society, be it a family or a polity, is a value-laden decision. To live together is to take a moral stand. Any social judgment — from the judgment to establish community to judgments about how to live in community — is answerable to the categorical imperative. Unlike animal societies where social life flows from causal necessity, human societies are grounded on the intention to realize human freedom. That is, human societies are not products of causes but of goals: they express an inherent moral teleology and may be judged over/against their performance with respect to the realization of their inherent ideal (i.e., they may be judged according to the categorical imperative).[12]

Stammler believed that law — the rules which order social life — aims by nature toward a telos, which he termed "right law" (*richtige Recht*). Breuer adopts this perspective and believes that all human societies, when viewed from the vantage point of their legal systems, aim at realizing core values such as freedom. Given such a value-laden perspective, Breuer is not able to assert, as Roth does, that "natural" human interests are merely factual unless coordinated with supervening, divinely revealed obligations.

On the other hand, Breuer does not believe that persons — on the basis of their "mere" personhood — possess a catalogue of basic human rights which they might assert against the claims made upon them by God in the form of the Noahide laws and the Torah. Following Stammler (following Kant), Breuer is convinced that the basic problem of human life, both in its individuated and in its social dimensions, is freedom. How are persons and societies to be truly free? Breuer believes that a rights-oriented perspective, although aiming at freedom, necessarily fails to provide its adherents with freedom. Only submission to Torah, which subordinates rights to the acceptance of divinely imposed duties, secures that freedom for which our created nature longs. Why?

Throughout his corpus, Breuer develops epistemological and metaphysical approaches to this basic question. Here we will discuss only his jurisprudential approach. In 1911, Breuer published a weighty legal essay, "Die Rechtsphilosophischen Grundlagen des jüdischen und

des modernen Rechts," in response to a contemporary controversy.[13] A Russian Jewish woman, living in Germany, sought a divorce from her husband. The husband refused to give the wife a *get*, and the wife brought her case to a civil court. The German judge ruled that the husband's defense — that under *halakhah* he did not have to grant his wife a divorce — was worthless. German law supersedes Jewish law because Jewish law, since it denies the wife a right to petition for divorce, enshrines immoral inequalities and is therefore inferior to German law. German law (Breuer takes this to be typical of all modern law) does not recognize sex-based inequality in matters of basic rights. Jewish law offends the good morals of German law. It is a kind of tribal law which must give way before the superior morality of modern, rights-based jurisprudence. While the implications of this judgment greatly distressed German-Jewish *Bürgerlichkeit*, it provided Breuer with an opportunity to attack modern law and its fundamental values head-on.

Breuer argues that modern law seeks to achieve the social ideal of maximal freedom for each, compatible with maximal freedom for all. On the surface, it appears that attributing equal rights to all serves this ideal. Indeed, the Jewish system of enshrining *prima facie* inequalities seems to fly in the face of this ideal. Yet Breuer argues that the discovery of such fundamental equality occurred within the experience of ancient Israel. Israel's truth that man and woman are made in the image of God first made known the radical equality the German judge claims to protect. Why then does Israel's law seem to ignore its own presupposition? Breuer argues, in an apologetic manner, that while modern law *aims* at protecting equal rights for the sake of freedom, Jewish law *presupposes* equal rights and then moves on to dispense unequal duties for the sake, not of freedom, but of holiness. The "social ideal" of Jewish law is holiness (gained through obedience to *mitzvot*). Rights culminating in secured freedom is presuppositional, not determinative, for Judaism.

Of course, this answer simply begs the question. Breuer's general approach is to first offer a rather apologetic answer and then, sensing the inadequacy of his answer, to offer a more subtle line of argumentation. He proceeds as follows: In fact, modern law is condemned to fail in its attempt to secure freedom through its postulation of equal rights. What is freedom? Freedom refers to the will's determination of itself according to the categorical imperative. The free will is the will that achieves the status of a universal legislator (of *Allgemeingültigkeit* in Kantian terms) when it composes its maxim.

Breuer argues that this is actually impossible in modern law. In modern law, law and ethics are fundamentally alienated from one another. Ethics, and consequently the possibility of freedom, has to do

with the internal state of the will and the private, albeit universalizable, action. Law has to do with general classes of actions, with balancing interests to maintain the highest degree of social freedom. There is a phenomenological gulf between ethics and law. Ethics applies to law at the boundaries. That is, ethics becomes a kind of criterion, inter alia, for legality, but ethics and law are not identical. Ethics functions as a check on law at the level of the judge's or legislator's conscience. Ethics is the conscience, but not the essence of modern law. Additionally, the mere fact that modern law relies on the state's coercive power undercuts the law's claim to "good morals." How can a moral agent freely will law-abiding and law-affirming behavior when the quite heteronomous motive of avoiding sanctions constitutes a ubiquitous element of his will?

Breuer thus claims to have deflated the pretensions of modern law to possess a higher morality than does Jewish law. It remains to be seen, however, why Jewish law better integrates law and ethics such that freedom is a real possibility under Jewish law (and only under Jewish law). In the essay here under consideration, Breuer reverts to an apologetic argument for the unity of ethics and law in Judaism, based on the nature of the law as God's will. The argument moves into a metaphysical vein, as Breuer relates Jewish law to "creation law" (*Schöpfungsgesetz*). Jewish law mirrors the implicit logos/telos of creation. Thus action, according to Jewish law, expresses the innermost dynamic of creation, i.e., freedom.

Breuer does not invalidate the concept of rights. He seems to agree with Kant that freedom "is the only one and original right which belongs to each man by reason of his humanity."[14] Breuer's argument centers on the fatal inability of legal systems outside of Judaism to secure the freedom to which that original right entitles human persons. One might argue that Breuer's critique of non-Jewish legal systems is the critique of a *Gesinnungsethiker*. That is, Breuer assumes that freedom is primarily an inner state of the will. The purity and goodness of the free will is a necessary, though not a sufficient, condition for genuine ethics. To construe ethics in this manner necessarily divorces the ethical from the legal. The difference between the two is simply categorical, though not necessarily invidious.

In another work, *Die Welt als Schöpfung und Natur*, Breuer advances a more historical argument for the rise of rights discourse, which avoids the problem of *Gesinnungsethik*.[15] In this study, Breuer is concerned to contrast the historical career of the "Torah State" with that of the Power State (*Machtsstaat*). Essentially following Hegel, Breuer sees secular history (as opposed to Jewish counter- or meta-history) as the history of states conceived as virtually divine entities. The State does not arise out of covenant or contract: it is not an

expression of its individuals. Rather, the State is the highest integral expression of reality. It is its own Idea. On this view, individual rights are merely privileges given by the State.

In Breuer's view, Roman law created individual rights by drawing a legal distinction between the home and the State. The law allowed for a private space in order to allow the State uncontested domination of the public space. The personal, private freedom of the Roman citizen expresses a fundamentally false consciousness: what one does in one's private life provides an illusion of freedom. Individuality then is a product of the Roman *Machtstaat*. Far from serving as a check on state power, it is a willing accomplice to it. Breuer writes a history of individuality as a political concept. He traces Christian otherworldliness ("render to Caesar what is Caesar's") and its contemporary secularized successor, bourgeois philistinism, from Roman antecedents. In this account, the political and legal language of rights expresses the fallenness of history. Secular history is a "slaughter bench," a "*Golusgeschichte*." It is the history of states in estrangement from God and the divine law. Individuality and rights are pseudo-ethical concoctions which indicate the unrestrained pretensions of the power state. Jewish history, on the other hand, indicates a different concept, indeed, reality of statehood. The Torah constitution empowers neither state nor individual. It creates both ideal community and ideal personality through a harmonious dispensation of duties.

Ultimately neither Roth nor Breuer can abide a concept of rights with critical implications. Roth can accept a descriptive, phenomenological use of rights. Breuer can accept a Kantian concept of a basic right to freedom and then put the emphasis on how freedom is really to be achieved. Neither accepts rights-discourse as a mode of critique, however.

Both Roth and Breuer engage in a full-orbed critique of modern political or legal systems from their own fideistic vantage points. Neither, however, would accept as valid a critique of Jewish law from the perspective of rights. They both believe that the law of the Torah is, in some sense, perfectly just and that the sort of critique and reform which taking rights seriously has enabled Western civilization to accomplish is simply not required. Absent the conviction that critique and reform are valid projects, rights discourse appears as a sublime error, a persistent nuisance, and a wrong turn. Whether critique and reform are possible without an appreciation of the language of rights is a possibility that requires further reflection.

Notes

1. A.I. Melden, *Rights and Persons* (Berkeley: University of California Press, 1977), p. 231.
2. *Ibid.*, p. 46.
3. *Ibid.*, pp. 25-6.
4. Sol Roth, *Halakhah and Politics* (New York: Ktav Publishing House and Yeshiva University Press, 1988), p. 97.
5. *Ibid.*, p. 118. Roth draws this thesis from the work of Roderick Chisholm. Cf. his *Theory of Knowledge* (Englewood Cliffs: Prentice Hall, 1966), p. 11.
6. Roth, *ibid.*, p. 118.
7. *Ibid.*, p. 119.
8. *Ibid.*, p. 120.
9. *Ibid.*, p. 124.
10. "Murder and theft are prohibited; therefore, there are human rights to life and personal property." *Ibid.*
11. For a thorough treatment of these themes, cf. my *Between Kant and Kabbalah: An Introduction to Isaac Breuer's Philosophy of Judaism* (Albany: State University of New York Press, 1990). Cf. especially, Chapter 4.
12. Isaac Breuer, *Moriah*, (Jerusalem: Mossad Ha-Rav Kook, 1982), pp. 3-7 (Hebrew).
13. Cf. the Hebrew translation, "Mishpat ha-eshah, ha-Eved veha-Nokri," *Tsiyyunei Derekh* (Jerusalem: Mossad Ha-Rav Kook, 1982).
14. Kant's "Einleitung in die Rechtslehre," in *Metaphysik der Sitten, Werke*, VII, 30ff. quoted in Carl Joachim Friedrich, *The Philosophy of Law in Historical Perspective*, 2nd. ed. (Chicago: University of Chicago Press, 1963), p. 127.
15. Isaac Breuer, *Die Welt als Schöpfung und Natur* (Frankfurt/Main: J. Kauffman Verlag, 1926), pp. 19ff. Cf. also Mittleman, *Between Kant and Kabbalah*, p. 158.