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Review of *Rights and Demands: A Foundational Inquiry*

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Gilbert, Margaret. *Rights and Demands: A Foundational Inquiry*. Oxford: Oxford University Press, 2018. Pp. 320. \$54.00.

Careful attention to the subtleties of everyday interpersonal interaction can yield deep philosophical insight. Margaret Gilbert is a master of such attention. In *Rights and Demands* she turns this attention on the fact that we sometimes have a special standing to demand actions of others. Gilbert describes this standing to demand as having a “demand-right” (57). A rightholder, in this sense, can do more than merely point out that an action is wrongful; the rightholder has the standing to insist that certain conduct is owed to her. Demand-rights thus involve having a kind of authority to address another in a particular, forceful manner. The central question of the book is how demand-rights are possible. The standing to make demands is a striking feature of our interpersonal lives. It is thus very welcome that Gilbert takes up the mantle of Joel Feinberg and his focus on the standing to claim.

Rights and Demands is majestic, nuanced, and provoking. It offers a potentially paradigm-shifting orientation to rights and agreements. Though dense and brimming with argumentation, the book is elegantly laid out in three parts. Part 1 articulates the problem, part 2 offers a solution to the problem, and part 3 suggests that this solution may be unique, that is, that nothing else can solve the problem.

The problem, as already noted, is how it is possible for a person to have the standing to demand that another perform an action. How can we ever have that kind of authority with regard to another? The solution that Gilbert offers, drawing upon her extensive work on plural subjects, is joint commitment. The basic idea is that by forming a joint commitment—that is, by deciding to do something “as a body”—individuals come to owe one another conformity to that joint commitment. Individuals within joint commitments thus acquire the standing to demand conforming actions from one another. So, for example, if you and I decide to dance the samba together, you can demand that I not suddenly stop moving on the dance floor (169). Your standing vis-à-vis me derives from our comembership in a joint commitment to the dance. I cannot slough off your demand as “none of your business” because it is your business precisely insofar as we are doing this activity together. Having committed jointly, we are each subject to the other’s demands to compliance with the commitment.

The power of the joint commitment approach is evident in thinking about promises and agreements, which are a focal point throughout part 2 of the book. Promises and agreements are widely understood to generate demand-rights. Indeed, they seem to generate demand-rights regardless of their content—even heinous promises seem to shift the normative landscape (140–41). Gilbert argues that promises and agreements generate demand-rights not because of any moral principle but rather because they are joint commitments. Only the joint commitment approach, she argues, can explain the “inevitability” of demand-rights in any agreement (113). Gilbert’s account thus flips conventional wisdom, making promises a kind of agreement rather than agreements a composite of individual promises. It is a powerful reorientation. A joint commitment approach can explain various dynamics of promises and agreements, such as the ancillary obligations of a promisee not to interfere with the promisor’s performance (200–201) and the interdependence of obligations within an agreement (191–93).

Part 3 of the book is devoted to what Gilbert labels “the joint-commitment conjecture” (183)—namely, the hypothesis that all demand-rights are grounded in joint commitments. The most contentious aspect of this conjecture is Gilbert’s suggestion that there are no demand-rights whose existence can be demonstrated by moral argument without appeal to a joint commitment (243). She takes as her test case a right not to be physically assaulted. Gilbert grants, of course, that unprovoked assault is morally prohibited, but she argues that, absent some joint commitment, potential victims lack authority to demand that would-be assailant’s refrain from assaulting them. To be clear, Gilbert does not deny the moral force of various requirements or the moral status of persons; her conjecture is merely that the standing to demand compliance requires a joint commitment. This does not mean that a demand-right against assault doesn’t exist. A demand-right might come from joint commitments like “mutual recognition” (227) or a particular moral community. Indeed, Gilbert speculates that our belief that there are moral demand-rights may stem from the ubiquity of such joint commitments, which creates an illusion that demand-rights are inherent (271). So, despite its skeptical ring, Gilbert’s conjecture is ultimately about giving central importance to our social practices. If joint commitments do as much work as Gilbert conjectures, then our task is, as she puts it, “to make them wisely” (347).

In what follows, I raise some challenges, which, though sounding notes of doubt, I hope will suggest to the reader the richness of Gilbert’s account. It is truly provocative in the best sense.

First, consider Gilbert’s construction of the problem to which the book is addressed. Gilbert’s demand-rights are closely related to the Hohfeldian idea of a claim. A focus on claims, as opposed to the other Hohfeldian relations, is common and appealing. Hohfeld himself called claims “rights in the strictest sense,” and most rights theorists assume that claims are, in at least some fashion, the paradigmatic form that rights take.

Unlike many rights theorists, Gilbert has an argument for why claims should be regarded as primary. Claims involve assertions of rights (27, 76–77). Naked liberties—that is, Hohfeldian liberties without associated claims to noninterference—don’t seem to be something that one can assert. Thus, insofar as we are interested in asserting rights against one another—that is, in making demands—Hohfeldian claims seem to be the important relation. While Gilbert is hardly the first to notice something like this point, it does suggest a reason that claims—or, if one prefers, demand-rights—are the important relation for rights theory. As a point about where both ordinary people and theorists are focused when they speak of rights, I think that Gilbert is correct.

But we should not confuse this point about salience with a fact about conceptual priority. Hohfeldian claims and liberties are simply logical reflections of one another. Together, they carve up the conceptual space of possible relations. They are like black-and-white space in a monochrome image, each simply the absence of the other. And, as with the monochrome image, facts about our attentional focus say nothing about origins. Whether white constitutes the positive or negative space in a monochrome image is simply a matter of our perception. Nothing can be inferred about which shade came first, let alone about some priority of one shade over the other. Analogously, it doesn’t seem to me that we can infer from the greater salience of claims relative to liberties that claims are explanatorily prior. So I worry

when Gilbert says things like, “the notion of a claim is clearly more basic than that of a liberty, which is understood in terms of it” (19).

Officially, Gilbert declares that her argument for the priority of claims is not essential to the argument of the book (27, 77). But I fear that it inflects her framing of the so-called “demand-right problem”: “How are demand-rights possible? In particular, how—at the deepest level—is it possible for one person to accrue the standing to demand of another that he perform a given action?” (79). This framing implies that demand-rights must be “accrued” or “acquired” (97, 169), as though the world lacks them by default. But why think that? Gilbert’s framing is a bit like the person who looks at the monochrome image and asks how it “accrued” the white parts—when one could just as well ask that about the black. Put another way, why think that the demand-right problem is any more pressing than what we might call the liberty-right problem: How are liberty-rights possible? That is, how is it possible for any choice to be unencumbered from a demand of another? This is not to deny that there is an important question about the foundation of demand-rights. But, to me, it is just as puzzling how we can ever be free from others’ demanding that we do the right thing. I see no reason to assume a blank canvas of liberty on which we draw with demands.

This point about how Gilbert frames the problem matters to the cognizable solutions. If we conceive of demand-rights as something that must be acquired, then the solution will inevitably involve some act of creation. In this light, a joint commitment account will be appealing, as it describes a creation process. But if demands are just a salient feature of the normative landscape, then we do not need to know how they are accrued any more than we need to know how their absence is accrued.

Turning to a second question, even if we accept Gilbert’s formulation of the problem, is her answer convincing? Do joint commitments generate demand-rights? For this central thesis of the book, Gilbert explains, “the core of my argument is an intuitive judgment plus an explanation of that judgment” (169). The intuitive judgment is that members of a joint commitment seem to be able to demand of each other, “Hey, we committed to this! Do your part!” This seems plausible, as illustrated by the earlier example of dancing the samba. Gilbert’s explanation for the intuitive judgment is that the parties to a joint commitment have imposed a normative constraint on themselves. Here Gilbert draws a connection to an individual decision. She says, “Intuitively, one ought to conform to a decision that one has not repudiated, all equal. That is, every standing decision, as such, gives the decision-maker sufficient reason to conform to it” (44). The same principle applies to joint decisions, so once we decide upon something, that decision gives us sufficient reason to conform to it unless we rescind it. Thus, Gilbert’s explanation for the intuitive judgement that joint commitments generate demand-rights is that joint commitments are, like individual decisions, an imposition by will of normative constraints until willfully rescinded.

Gilbert says that joint commitment is “a fundamental everyday concept” (164). A joint commitment involves individuals deciding to act in concert—anything from walking together to full-blown explicit agreements. The commitment involved in a joint commitment is that of deciding; joint commitments are basically just decisions to act together. So, the question is, do all decisions to act together generate demand-rights?

I'm not sure. Imagine that, at a restaurant, someone stands up and declares to the room that it is his companion's birthday. A stranger at another table happily shouts, "Let's sing!" and a couple dozen people around the room simultaneously strike up the opening notes of "Happy Birthday." This would seem to be a paradigmatic joint commitment as Gilbert explains the concept—like dancing together (169) or a standing ovation (218).

Now suppose that, midway through the song, one of the people who joined in the first line stops singing and returns to his table's private conversation. Do the other singers have a demand-right against this fellow? I don't think so. If they have any demand, it would seem to be a demand based on the reasons to participate in the first place ("Be a good sport!"), which would apply with equal force against the idle bystanders. It seems odd, however, to think that demand-rights arise from the fact that someone briefly participated, as though you're free to sit on the side, but once you join in, you're bound until everyone releases you. Perhaps Gilbert just needs more robust entry conditions on joint commitments, but it's not clear that one can get this robustness without introducing a kind of commitment beyond the commitment involved in deciding.

Decisions involve *commitment that* one will do something. But this commitment seems too monadic for demand-rights. Consider again the fickle singer. He decided to act as part of the group. He was, for a moment, part of a plural subject, which decided to sing. Then he failed to follow through. There may, indeed, be a failure of commitment here. But it's not clear that his commitment amounts to a *commitment to* the others. There was no agreement, no promises, no assurances, no reliance—just a moment of enthusiasm.

Gilbert, however, thinks that she can get commitment to others out of the commitment involved in deciding as a group. As already noted, Gilbert adopts the strong view that standing individual decisions give one sufficient reason to conform. Many philosophers would disagree, seeing the relevant requirement as merely wide-scope. But, when introduced (43–45), even Gilbert's strong view seems relatively innocuous because an agent can always just revise her decision. It's a commitment, but it's not too constraining. A hundred pages later, however, the import for joint decisions becomes clear (161–69). Joint decisions will require joint revision. And this has enormous bite. Just by volunteering to participate, one then needs everyone else's assent to become unbound. I'm skeptical that relatively benign constraint on individual action can, when ported over to joint decisions, suddenly have such massive import.

In particular, even assuming that decisions generate commitments, it's not clear that they are the relevant kind of commitments. The worry is that the commitment that one will do such and such (the commitment of deciding) is fundamentally different from commitment to another (the commitment involved in something like promise making). It's a relation between an agent (individual or plural) and an action; however, what one needs is a commitment between two persons. Perhaps the fickle singer did fail in a commitment in the former sense. But the case feels quite different compared to a full-blown agreement. In an agreement, each individual doesn't merely express a willingness to act as a group (the "commitment that" of decision), but each offers up a promise (a "commitment to" another). Any exchange of individual "commitments to" is what seems to me to be missing from the singing example. The "commitment of" decision doesn't seem

to be the same kind of commitment as that which gives rise to demand-rights. But it is the linchpin of Gilbert's argument that "commitments to" one another can be understood in terms of—indeed, explained by—the "commitments that" we shall act as a body. I fear that this just conflates two different ideas of commitment.

This brings us to the locus of a third set of questions: Gilbert's account of promises and agreements. For Gilbert, agreements are joint commitments, with promises being a particular subspecies. Thus, agreements are not composed of two separable individual commitments; rather, "it is best not to think of [them] as having separate parts" (164). One of the signal virtues of this account is that it explains why the obligations within an agreement are interdependent (191). Typically, breach by one party to an agreement will excuse performance by the other. If Red and Jade agree that he will cook dinner and she will do the laundry, her declaration that she will not perform excuses Red from having to cook dinner (201). "This point is not well explained by the common idea that an agreement is a pair of promises" (201). Gilbert's joint commitment account, however, has a neat explanation for the interdependence. When a party breaches an agreement, this party "can reasonably be taken to have expressed her personal readiness to rescind the constitutive joint commitment" (201). The counterparty can then choose to embrace this readiness to rescind and thereby become free from the obligation to perform. Red can say, "Okay, clearly you're willing to call our deal off, and I'll take you up on that." This is a potentially powerful argument, and one that resonates with contract law, which explicitly treats contractual obligations as mutually dependent.

But I'm not sure that this interdependence, when examined closely, supports Gilbert's account. Imagine a run-of-the-mill contract according to which Supplier and Buyer agree that Supplier will deliver widgets to Buyer on Wednesday and Buyer will pay a fixed sum that same day. Come Wednesday, Supplier notifies Buyer that she has sold all her widgets to somebody else. As Gilbert suggests, this breach by Supplier relieves Buyer of his duty to pay. Gilbert's explanation of this fact is that Buyer may choose to treat the breach as an offer to rescind the agreement, canceling the joint commitment. And, indeed, contract law would likely allow rescission in such a case.

But most contracting parties in Buyer's position would not want to rescind the agreement. That would let the breaching party off too easily. Most parties would want to demand compensation for breach—the lost profits they expected to receive from the widgets or the costs of obtaining replacement widgets at a potentially higher price. That is, rather than rescind the agreement, Buyer would typically want to insist upon his rights under the agreement.

Still, even while insisting upon his rights and demanding compensation, Buyer would not want to stick to the deal, performing his side as planned. Indeed, Buyer should not have to choose between rescission—that is, simply calling off the deal—and paying the sum as specified in the contract. For its part, contract law relieves a party like Buyer from performance while simultaneously still allowing demands based on the agreement, and this hardly seems to be only a matter of positive law. In general, a party may legitimately insist upon rights under a breached agreement while at the same time escaping performance. If so, the interdependence of the performance obligations—the fact that Buyer doesn't have to pay when Seller doesn't deliver—can't be explained in terms of rescission as Gilbert proposes. In fact, reflection on this kind of case may press toward precisely the view that Gilbert

opposes, namely, that agreements are composed of two separate promises. So I worry that one of the supposed major advantages of the approach—its ability to explain interdependence—begins to look more like a liability.

Fourth and finally, *Rights and Demands* leaves some questions about the connection, or lack thereof, between demand-rights and other ideas. As Gilbert acknowledges, talk of “rights” captures many different thoughts about interpersonal life. Rights can safeguard important interests. They can operate as “trumps” or “side-constraints,” meaning that no amount of aggregate good can justify their transgression. Rights can give their holders a certain kind of control—allowing a choice to waive the right and release others from their correlative duties. Gilbert is clear that she is not talking about any of these ideas; her focus is demand-rights. Her conjecture that there are no moral demand-rights is compatible with there being moral “rights” in these other senses.

Gilbert’s arguments pull demand-rights and moral requirements apart in both directions. On the one side, even if it’s true that other people are subject to a moral constraint, she argues that it wouldn’t follow that I have a demand-right. And, on the other side, it seems like there can be demand-rights to violate moral constraints, as evidenced by the normative significance of even heinous agreements. Gilbert’s arguments have to be taken seriously.

But even if she’s correct, is there truly no connection at all here? It would be surprising if there were no connection between these various ideas. Consider just the idea that morality includes deontic constraints. It is impermissible for anyone to take my organs without my consent, even if doing so would maximize aggregate good. We might describe this feature of morality by saying that I have a right to my organs. It seems quite natural to think that deontic constraints are bound up with some things being inviolably ours. But Gilbert makes our claims, in this sense, appear unrelated to our having claims, in the sense of demand-rights.

Though she is careful to distinguish demand-rights from these other senses of rights, Gilbert is less careful about the relationship between demanding and rebuking. At various points, Gilbert talks about the “standing to rebuke” in a manner that assumes that it is equivalent to having the standing to demand (7, 23, 102, 114, 137, 147–49, 178, 196, 266–68, 313). As she explicitly puts it, “Rebukes can be thought of as demands that acknowledge their own past frustration—‘after-the-fact’ demands” (63). She notes that, in certain institutional contexts, standing to demand and standing to rebuke may come apart, but she assumes that they are equivalent “outside the institutional realm” (75–76).

I’m inclined to think that one can have standing to rebuke even if one does not have, and never had, standing to demand the performance whose failure one now rebukes. Consider some examples. I have argued that the intended third-party beneficiary of a promise has the standing to rebuke breach, even as she lacks a demand-right to performance. We might also think that one has the standing to rebuke a failure to give easy aid even as one lacks the standing to demand such assistance. Or one might have the standing to rebuke ingratitude even though one does not have a demand-right to gratitude. It thus seems at least worth countenancing the possibility that standing to demand and standing to rebuke come apart. And I wonder whether drawing such a distinction might help with the relationship between moral constraints and demand-rights. Here is a conjecture of my own: contra Gilbert, no-

body has the authority to demand immoral conduct, but we may still have the standing to rebuke people who follow morality and breach their commitments to us.

As I hope these varied challenges have illustrated, Gilbert's *Rights and Demands* is immensely rich. It will prompt philosophical investigation on many fronts and play an enduring role in shaping rights theory.

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