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Book Review: A Theory of Rights: Persons Under Laws, Institutions, and Morals. by Carl Wellman.

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The reservations I have about Downs's methods and conclusions, though they are serious, do not negate the book's usefulness as a realistic study of the first amendment in action. The Skokie case is a hard problem, and as Judge Sprecher said, "[E]ach court dealing with [the case has felt] the need to apologize for its result." Downs may not change the results, but he helps us understand the need for apologies.

A THEORY OF RIGHTS: PERSONS UNDER LAWS, INSTITUTIONS, AND MORALS. By Carl Wellman.¹ Totowa, New Jersey: Rowman & Allanheld. 1985. Pp. 225. \$34.95.

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Rights are incessantly being manufactured in the U.S. (and on a global scale by the U.N.) with little thought being given to the nature and usefulness of the product, or the legitimacy of the manufacture. So I looked forward to Professor Carl Wellman's *A Theory of Rights*, thinking that he would scrutinize the process of production. I was disappointed.

Professor Wellman goes back to Hohfeld's distinction among rights, claims, privileges, powers, and immunities, not to speak of the correlative duties—commenting on it, clarifying it here and there and, perhaps, sharpening it. Herein lies his claim of originality, too often reiterated. Although I do not think that Wellman's revisions (some acknowledging the influence of H.L.A. Hart) are world-shaking, his work might have been useful, were it not for his irritatingly repetitive style and a pedantic habit of making distinctions ad infinitum, some without a difference, others conceivably of some use, most unneeded. Sometimes Wellman's writing borders on self-parody: "The core of this right, as I conceive it, is the moral liberty of the pregnant woman to obtain an abortion. For the sake of brevity, I shall use the word 'woman' somewhat loosely to refer to any woman or girl of child-bearing age." Must we be told that the liberty to obtain an abortion pertains to a "pregnant" woman (have others been applying?) only if she is "of child-bearing age" (ditto) or that "woman" may "loosely" refer to "any woman or girl"? Unfortunately this passage is no exception. Although

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Wellman seems well acquainted with contemporary theories of rights and handles them readily, his prolixity makes it hard to read him and the work as a whole bogs down. Despite occasional insights, reading his book is unrewarding.

Consider what Wellman has to say on moral rights. He introduces his argument unpromisingly by stating "it will be helpful to begin by explaining what I mean by asserting the reality of moral rights. Precisely what does it mean to assert the existence of a moral right . . .?" One might reluctantly forgive the habit of saying everything twice, if something were said. But he goes on:

Since a right is a complex structure of Hohfeldian positions, it means to assert the existence of a set of moral positions related in the special way revealed by my dominion model of rights. Moral positions are not entities in the world in anything like the sense in which physical objects or even persons are; they are not even entities in whatever sense points in space or positions in space-time are ontological realities.

Whoever thought that moral rights, or any rights, are like physical objects rather than norms, relations, or imperatives? We are not told. (Surely we all know that customs "exist" without being physical objects?) Wellman concludes: "A Hohfeldian model of rights makes it clear that this sort of ontological commitment is unnecessary." Great.

Wellman attributes the "ontological commitment" to those who believe that moral (natural) rights derive from human nature or are "objectively real but not empirically observable," so that they must have "some sort of being or some existence." He goes on: "What seem to be assertions of the existence of dubious nonnatural objects are, literally, assertions about moral reasons and their bearing upon human conduct." If I understand this passage correctly—and I must be diffident—it means that there are moral reasons for moral rights. Does this amount to more than: there are moral rights therefore there are moral rights? I guess it depends on the "moral reasons." These reasons are, says Wellman, "typically facts, such as the fact that Jones promised Smith to mow his lawn." Surely this is circular if one adds, as one must, that promises must be kept for moral reasons. If one does not, the passage makes no sense whatever.

Matters are not helped when Wellman asserts that "factual statements can rationally justify moral conclusions." I don't think they can, unless they include a moral premise. He rejects as "dogmatic skepticism" based on "inadequate epistemology" the view of those who do not agree that factual statements can, by themselves, rationally justify moral conclusions. Yet in his very next paragraph, he seems to withdraw his rejection, when he writes that one

may "doubt the existence of natural rights on the grounds [sic] that one has yet to find any reasoning of this sort [that would justify them] that is undoubtedly valid" and "[u]nless one can find more persuasive arguments for premises about natural facts to conclusions about moral rights" one may question "the existence of moral rights." Unfortunately I haven't found any (if asseverations are not arguments) let alone more persuasive ones in Wellman's book. Wellman refers to his own doubts as "provisional skepticism" based on "critical reflection," or as "[an] other sort of skepticism" which "is more modest." However, the doubts of others are pejoratively labelled "dogmatic skepticism." No intelligible reason is given for rejecting (and then accepting) the view that moral conclusions cannot be drawn from factual statements alone, nor for calling it "dogmatic skepticism" when held by others, and "provisional skepticism" when held by the author.

Professor Wellman has not helped his readers understand the "existence" of natural and moral rights. (Nobody ever doubted that there are legal rights.) His claim that "I have explained and defended an original model of rights" is unpersuasive and he has not succeeded with me in his attempt "to convince you, my patient reader, that my conceptual framework is both a more accurate and a more useful way to think about rights than the alternatives."