



Liberty: The Most Basic Right

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Moral, political, and legal thought employs many basic terms, all of which must be defined and systematically related if the thought is to be coherent and sound. Among those basic terms are adjectives like “good” and “right” and nouns like *a* “right.” The former are grounded in the theory of value and hence are subjective: what may be good or right for you may not be for me. By contrast, to have “a right” is to have an objectively justified claim that another person(s) has an obligation to do or not do something. Thus, rights, as claims against others, are adversarial relationships, requiring justification.

There are two basic kinds of rights, general and special, defined by the parties related and, at bottom, by their origins and hence their justifications. Although general or “natural” rights are logically prior to special rights, they are more easily understood by looking first at special rights and relationships—and, more specifically, at contractual rights. Put simply, we do not have contractual rights “by nature” but only through the *consent* that “brings them into being” and hence justifies them—and, as a corollary, disjustifies any later denial of having the correlative obligation consented to. And, of course, such rights are held only against the “special” parties with whom we have contracted.

But if actual consent justifies contractual rights and obligations, something like it also justifies general or natural rights, including the general right to be free to enter into contracts in the first place. Unlike special rights, general rights don’t “come into being.” Rather, we have them “by nature” and, accordingly, they are held “against the world.” Essentially, as rights, they are claims to be left alone, to be free. Philosophers have advanced complex arguments to justify such rights, but a kind of “performative” default argument, invoking equality and consistency, offers the simplest and clearest explanation of how it is that we can be said to have such rights.

Other things being equal, if *A* interferes with *B* by taking something that belongs free and clear to *B*, the “natural” reaction of *B* is to ask for *A*’s justification—in fact, it’s difficult to imagine *B*’s having no reaction at all, however muted or repressed it might be in the circumstances. Thus, in virtue of this natural reaction, *B*, at least implicitly, is claiming a *right* against *A*’s interference. But if *A* has no justification (about which more just below), then the prior status quo of equal liberty—of equal rights to be left alone—is, by default, justified, there being only two relevant states at issue. By default, in other words, it is interference, not freedom, that needs to be justified: for the “natural” instinct to ask for another’s justification for interfering implies that the prior state of equal liberty is the natural status quo—the presumption to which we all naturally consent, implicitly, when we demand justification, a presumption of equal rights, all of which can be enjoyed consistent with those of others.

But *A* may have a justification for restricting *B*’s liberty. As noted above, he may be enforcing a contractual obligation *B* freely undertook. Or he may be seeking a remedy for a prior contractual, tortuous, or criminal wrong. If justified, the parties are then *special*ly related, with special rights and obligations vis-à-vis each other. But in all such cases it is still liberty that is being protected: the basic right to be free; the right to contract; the right to have contracts enforced; and the right to have contractual, tortuous, and criminal wrongs remedied and the prior status quo restored, insofar as practically possible.

In applying those basic principles over manifold circumstances, two factors are crucial. First, insofar as possible, the objects claimed “by right” should be described as *property* held “free and clear”—thus to avoid inconsistent claims. Second, to complete the account, subjective values must eventually be invoked, values about which reasonable people can have reasonable differences. Nuisance, risk, remedies, and procedural rights are classic areas in which value judgments are required to flesh out and apply the basic principles.

Because people do disagree over those values, yet enforcement is necessary if liberty is to be secured, we need public institutions to settle such otherwise private disagreements. To that end, therefore, we create government. But because government itself is a forced association, in the name of liberty it must be kept limited to the basic functions for which it is created—namely, to secure our liberty and to provide certain “public goods,” narrowly defined, that would otherwise not be provided.

Today, of course, governments everywhere far exceed those bounds. Massive redistributive schemes take both property and liberty through taxation and regulation. Through taxation that far exceeds the amount needed to support government’s proper functions, the property of *A* is taken for the benefit of *B*.

Through regulation that far exceeds that needed to fully define and secure our rights, the liberty of *A* is taken for the benefit of *B*. In the most general terms, that is the modern problem, the manifestations of which run as far as the eye can see.

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