Introduction

Individual rights are a familiar part of the experience of the members of many contemporary societies. Having and exercising, respecting and violating such rights are actions that a great many of us regularly take and encounter. Responses to this experience, moreover, tend to be favorable. Having rights is widely counted among the advantageous, the beneficial aspects of life. Efforts are recurrent to lengthen the list of rights, to deal with additional dimensions of social and political affairs under this apparently comfortable rubric. Societies that accord and generally respect individual rights thereby win a degree of respect and approbation, whereas those that deny or regularly violate them earn disapproval and disrespect.

The aim of this work is to present a systematic account of this familiar aspect of human affairs and an assessment of some of its most salient features. We attempt here to identify, analyze, and assess the patterns of thought and action that make up what we call the *practice* of rights. A number of moderately specialized issues about the grounding and objectives of such a project – that is, issues concerning theorizing about social practices – are discussed in Chapter 1. The primary aim of this brief introduction is to anticipate some of the main substantive questions and themes that figure in Chapters 2 through 10.

A right provides the agent who holds it with a warrant for taking or refusing to take an action or range of actions that he conceives to be in his interest or otherwise to advantage him. Once accorded or otherwise obtained, what we will call the administration of the right (and hence the acting) is in large measure at the discretion of the person who holds it. It is for that person to decide whether, when, and how to exercise it,

whether to alienate it, how vigorously to defend it, and so forth. The actions the right warrants are commonly viewed by other persons as contrary to their interests, as limiting their freedom, or as in other ways disadvantaging them personally or as members of the society in which the right is held.

Despite the approbation it receives, the immediate, one might even say the primitive, question that arises about this arrangement is how it can be justified. Contrary to the impression often given by natural rights theorists from Locke to Robert Nozick,[1] rights are not natural, divine, primitive, or brute facts. Nor are they somehow self-justifying or self-evidently justified. Those who hold particular rights can perhaps be expected to favor the arrangement in respect to the rights they hold. But on what grounds can a society or polity expect those who are disadvantaged by those rights to accept the restrictions and interferences that they entail? How can a society or polity justify imposing those restrictions when the persons affected by them are unwilling to accept them?

As we have formulated them thus far, however, these questions are primitive not only in the sense of being elemental and inescapable but in the sense of being crudely stated. To begin with, there are many distinct types of rights and a large and diverse set of instances of each of the major types. In Chapter 2 we develop some of the important distinctions, a process that indicates why no one justification (or disjustification) can be expected to cover all the cases. It is hoped that this discussion will help to explain why the explicitly normative and prescriptive arguments of the last three chapters are directed primarily to a limited set of rights.

A second respect in which the preceding statements require elaboration concerns the individual and individual action and the relationship between them and the settings in which the individual acts. A brief glance at some familiar moments in modern social and political theory should help to identify the substantive issues and themes that will be of concern in this regard.

The idea of rights, and particularly the idea of rights of the

individual, is commonly associated with the various forms of liberal individualism as they developed in the West (particularly in England, France, and America) in the seventeenth and eighteenth centuries. Although at odds with most versions of liberalism in arguing for a sovereign with all but unlimited authority, the most powerful statement of the theoretical underpinnings of this position was provided by Thomas Hobbes. In Hobbes' view nature herself had supplied the individual not only with the physical attributes that are a necessary condition of the sort of directed, purposive action that exercising rights involves, but with something very close to the sufficient conditions of such action. Moved by powerful inborn passions and desires and guided by powers of reason that owe little or nothing to history, social relationships, or cultural experience, the individual appears not as shaped and formed by his place or role in a social or political order but as an all but self-subsistent agent.

Despite his often acerbic remarks concerning it, Hobbes had no desire to alter man's nature. Man's passionate, self-directed actions are in themselves no bad thing. To have, to act upon, and to satisfy passions and desires, so far from being evil or even unseemly, is the condition Hobbes called felicity – that is, the best condition to which man can aspire. So long as his natural condition remains unaltered, every individual is justified in pursuing the satisfaction of his passions and desires exactly as he sees fit. Indeed every individual has what Hobbes chose to call a right – the "right of nature" – to pursue the satisfaction of his passions without other than prudential regard for the consequences of his actions for other persons.

The difficulty as Hobbes saw it was that exercising the right of nature is self-defeating. In addition to according men the capacity and the right to act in a self-actuated and self-directed manner, nature cast them into circumstances in which they have no choice but to act in company with one another. Because all men have the same capacity and the same right, the result is destructive, indeed deadly, conflict. Because it is impossible (and would be undesirable if it were possible) to alter man's

passionate nature, this result can be avoided only if each person will give up the right of nature and submit to such restrictions and prohibitions as are necessary to allow individuals to "keep company" with one another and yet to satisfy their passions and desires to the greatest possible degree.

Some of the numerous and powerful objections to Hobbes' theory will concern us just below. But there are at least two aspects of his argument that any theory of individual rights must take very seriously indeed. First, it is difficult to imagine any defender of individual rights giving up altogether Hobbes' understanding that (1) individual holders of rights are capable of self-directed action and (2) there are at least some respects in which such action is a good or at least an innocent thing. As we will see in detail as we proceed, the practice of rights presupposes point 1 and institutionalizes forms of point 2. Second, Hobbes sees clearly the other-regarding as well as the self-regarding consequences of having a right. As important as it is to Smith himself, Smith's having a right has substantial consequences for Jones. That Hobbes deliberately exaggerates these consequences in order to discredit the notion of a right does not invalidate the point made by his argument – a point not sufficiently appreciated in much later liberal and individualist theory.[2]

As any number of critics have observed, however, there are powerful objections to be made against Hobbes' contentions, objections that have regularly been brought to bear on later formulations of liberalism as well as on the stark and often illiberal pronouncements of Hobbes himself. From Sir Robert Filmer to Peter Winch,[3] commentators on Hobbes have contended that his theory renders the individual incomprehensible. It so abstracts individual persons from a historical, social, or cultural context that, to mention only one point, the passions that are said to animate human action are and must be empty categories, purely formal placeholders. Some of these same commentators have objected that Hobbes' moral latitudinarianism – his insistence on accepting, as far as is consistent with achieving a reasonable degree of security of life, each person's pas-

sions and objectives as that person formulates them – yields a "liberty to do as one lists" in respect to all matters not specifically regulated by the sovereign. Thus life in a society modeled on Hobbes' theory would alternate between all but unquestioning submission to authority and sheer license.

Edmund Burke's polemics against the "metaphysical individualism" of the natural rights theorists of the eighteenth century[4] involve closely analogous objections, as do the charges that T. H. Green, F. H. Bradley, and Bernard Bosanquet leveled against Hume, Bentham, and the two Mills.[5] Slightly later, Emile Durkheim and G. H. Mead put similar contentions at the foundation of the new disciplines of sociology and social psychology.[6] For these theorists Hobbes' all but self-subsistent individual is a meaningless abstraction unknown in the real world of human affairs. The individual is the set of statuses, roles, and other intrinsically social positions and relationships that devolve upon a mere biological entity in the course of the more or less patterned interactions that make up social life. The individual's rights (if any) and duties, indeed his interests and desires, objectives and purposes, are incomprehensible apart from the language, the norms and beliefs, the institutions and arrangements that make up a social order. Bradley's formulation that "man is a social being; he is real only because he is social. . . . The mere individual is a delusion of theory"[7] is only the most unqualified of any number of statements that could be drawn from late nineteenth-century and early twentieth-century theorists.

In our view it would be out of the question to defend liberalism and its commitment to individual rights without taking account of the great force of these objections and the alternative understandings of society and human action on which they rest. At the same time these latter understandings seem to exclude or make it very difficult to comprehend features of individual action that are in fact a prominent part of our experience and that have much to be said for them on normative grounds. It is impossible to study rights without being impressed by the extent to which they presuppose, encourage, and

in fact instantiate *both* an elaborate skein of concepts, norms, rules, institutions, and arrangements that must be called social as a Bradley or a Durkheim would use that term *and* self-directed individual actions that cannot be completely conceptualized as social.

In this perspective the problem is to evolve a conceptualization that (1) is responsive to the genuine difficulties in the theory that has dominated sympathetic discussion of rights, namely, liberal theory as it comes down to us from Hobbes and his successors; (2) accounts for the sort of individual action that in fact is involved in the exercise of rights; (3) provides optimum reasons for thinking that such action and the device of rights that encourages and protects it are desirable features of our social, political, and moral lives. We conclude this introduction by commenting briefly on three features of the conceptualization that we have arrived at in pursuing these objectives.

The first of these is the concept of a practice, the notion of treating rights as forming a social practice. As explained in the following chapter, the concept of a practice is drawn from such ordinary language expressions as "the practice of law or medicine," "we have always made it a practice to . . . ," "I felt I had to do it in the circumstances but I don't intend to make a practice of it." But the notion of the practice of rights is not established in ordinary language. We have adopted it here because its properties as a unit of analysis concept are promising as a way of recognizing and reconciling both the individual and the social dimensions of rights. Rights arise out of and are accorded within a rule-governed social practice. But they are accorded to and exercised by individuals whose actions cannot be analyzed without significant remainder in terms of properties of the practice or the society more generally. We add only that the present use of the concept of a practice is informed by work in the philosophy of language and the philosophy of action, particularly that of Wittgenstein and those influenced by him. Languages are social, rule-governed, and highly traditional phenomena that deeply influence individual thought and action. Yet languages are constantly put to distinctive, un-

precedented uses by those who make up a linguistic community. Thus one can look to the shared, rule-governed, persisting features of a language as a grounding for generalizations about social life and at the same time retain a basis – particularly in the analysis of concepts such as *intention, purpose, reason for action* – for accounting for the kinds of individuated conduct involved in the exercise of rights.

The second is the *liberal principle,* a normative principle according to which it is a prima facie good for individuals to have and be in a position to act upon and satisfy their interests and desires, objectives and purposes. *If* there is a historical antecedent for this principle (and we certainly do not claim that it is common to or characteristic of all liberal thought), it is what we earlier called Hobbes' latitudinarianism. Unlike Hobbes (and natural rights theorists in respect to alleged natural rights), however, we will attempt to derive this principle not from unmediated nature but from conceptualizations that are well established in ordinary language. We will defend it in part in terms of its derivation and in part in terms of the advantages of reasoning from it to conclusions about various questions concerning the practice of rights. The latter part of this task will be implicitly and sometimes explicitly comparative in character. It will concern the advantages of reasoning from the liberal principle as compared with reasoning from various alternatives to it – especially principles generated by natural rights and contractarian theorists. It might be added that we do not view this principle as merely negative. As the place of the term *good* in the principle might suggest, actions and arrangements that accord with the principle are a positive achievement for which liberals should work and from which they can and should take satisfaction. Contrary to numerous critics, liberalism need not be "essentially negative," need not be limited to "a series of denials."[8]

Derived in part from analysis of the practice, the liberal principle will also form a vital part of our attempt to assess that practice and to justify certain aspects of it. But the liberal principle is by no means a sufficient basis for an assessment and

justification that can meet the objections to liberalism and to individual rights. Owing to the encouragement and protection that the practice of rights affords individual action, anyone who accepts the liberal principle will have grounds on which to be favorably disposed to the practice. But these grounds must be supplemented by reasoning that takes account of the wider consequences of establishing and maintaining the practice, particularly the consequences for other persons who are directly or indirectly affected by rights and their exercise. A justificatory theory of rights is part of political and moral theory. The liberal principle, as important as we think it is, is not a sufficient basis for such a theory.

We hasten to add that this work does not pretend to offer a fully developed political or moral theory. It does attempt to use the study of rights as a vehicle for presenting elements of such a theory. To this end the final chapters make use of three encompassing concepts or understandings of political society, concepts that yield contrasting perspectives on the practice of rights. The three are private individualism, communitarianism, and public or civic individualism.[9]

Theorists of the first two of these models agree that liberal individualism in general and individual rights in particular divert the members of a society from shared activities, values, and concerns, particularly those that theorists of civic individualism have thought to be the essence of the specifically political role known as citizenship. Private individualists, however, welcome this result and have defended individual rights precisely or at least largely on the ground that they constitute limitations upon and offer protections against the collective aspects of social life. The rights of citizenship are valued in large part as a way of limiting the scope and significance of the role of citizenship. We will suggest that this construct cannot yield a satisfactory answer to the primitive question about rights that we noted at the outset of this introduction.

Communitarians are typically no great defenders of citizenship. But in this case skepticism about citizenship and the rights associated with it stems from a desire to maximize the

scope and the intensity of other commonalities of social existence (together with the belief that the practice of rights privatizes the individual and diverts him from those commonalities). The construct is not a promising source of justifications for the practice. We take it up primarily because it poses a challenge that any defense of the practice of rights must meet and in order to argue that the most valuable aspects of that practice are in fact compatible with achievement of the defensible objectives of a communitarian understanding.

Civic individualism is the conception in terms of which we will develop a positive argument for crucial aspects of the practice of rights. This choice is rooted in three considerations: first, the conception is genuinely a form of individualism and can be formulated so as to be consistent with the liberal principle; second, it is capable of locating the individual and individual actions in the sociopolitical context in which we in fact find them; and third, it gives suitable emphasis to those aspects of the practice of rights that we have found to be the most important and the most defensible, namely, those that bear directly on the role of the citizen and the citizen's place in what has traditionally been known as the *vivere civile*. In this last regard use of this concept contributes importantly to an objective of this work: to restore to theorizing about rights a primary concern for their political value and significance.

This last objective is a part of the explanation for some of the significant limitations on the present effort. Chapters 2 through 7 attempt to analyze the distinctive characteristics of the major types of rights. But the more explicitly and insistently normative arguments of Chapters 8 through 10 bear primarily on rights of citizenship such as freedom of speech, the press, and association. The justifiability of a host of important and highly controverted rights or alleged rights – such as to welfare, to various forms of compensatory preference, to protection when accused of a crime – is not explicitly addressed in the present work.

We hope to take up some of the latter topics in future work. But given that practicalities dictated inclusions and exclusions,

a focus on rights of citizenship was suggested by a growing (and understandable) uncertainty whether, or if so why, citizenship can or should be a meaningful and valued role or dimension of life in contemporary societies. For reasons central to the notion that rights form a social practice (see Chapter 1), such uncertainty all but necessarily foreshadows a further weakening of the commitment to those rights that warrant and protect the activities of which citizenship consists. Hence there seemed to be more than a theoretical point to an attempt to fashion, or rather to contribute to the effort to revive and adapt to present circumstances, a conception of human society that gives us reasons to value those activities and the rights that protect them. Such a conception leaves many important questions about rights unanswered. But its acceptance would contribute to a society in which the answers to them could be pursued in a manner worthy of us all.