

Chapter 1

Liberal rights: Two sides of the coin

I

The essays collected in this volume address a range of issues raised by the term “rights” in moral and political philosophy. They ask whether a person can have a right to do what is morally wrong. They consider whether rights embody values that may conflict with one another, and if so, whether they can be traded off in a sort of consequentialist balancing act. They explore the changes we would need to make in our familiar ways of thinking if we were to regard charity as a matter of entitlement. They ask about the relation between rights and citizenship. They attempt an answer to the question of whether rights can be held by groups. And they discuss the embodiment of moral entitlements in legal and constitutional arrangements.

I have called the collection “*Liberal Rights*” in order to emphasize, in the first instance, that these essays are grounded in the classic tradition of liberal political theory (a body of thought whose distinctive features I have tried to capture in Chapter 2). It is the tradition of thinkers like John Locke and John Stuart Mill. It is a heritage which prizes individuality, which requires social and political power to justify itself at the tribunal of people’s interests as they themselves conceive them, and which – though it concedes the importance of culture and custom – insists, in Mill’s words, that “[h]uman nature is not a machine to be built after a model” and that it is “the privilege and proper condition of

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a human being . . . to use and interpret the experience [of his community] in his own way."¹

Against this background, the essays explore traditional liberal themes such as religious toleration, the neutrality of the state, the distinction between ethics and politics, and the dangers of moral complacency and communitarian conformism. The picture they paint – and the aspiration, that I hope the reader is left with – is of a society comprising men and women of high spirit and high ideals, each living life on his or her own terms, none of them worrying too much about each others' embarrassment or disapproval as they exercise their powers of practical reason autonomously, creatively, even provocatively. The society envisaged in this brand of liberalism has its radicals, its heretics, its blasphemers, and its deracinated apostates.² It does not ask dissenters to closet themselves smoldering in some cautiously constructed private realm; on the contrary, it expects dissent to blaze out in public to challenge and disconcert those who are taking things on faith or fashion.³ It tolerates all this, not just because it expects society to progress thereby, but because it takes seriously the truism that the world we all share is the world in which each of us must make his or her life. We are social beings, we individuals, and the lives we have to lead must be lived in the light of day, not hidden away to cosset each others' sensibilities.

The essays are also *liberal* in a second sense. In the language of politics, particularly in the United States, "liberal" (the "L" word) means public policies designed to reduce inequality, to raise or at least maintain the level of welfare provision, and to regulate business and industry in the interests of health and safety at work, sexual and racial equality, environmental integrity, and the promotion of public goods. The themes of equality and social justice that underlie such politics are a major concern of mine in the second half of the collection.

The essays are not themselves exercises in public policy analysis, although one of them, Chapter 11 – the piece on homelessness – does address a particular crisis in modern

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American life. For the most part, what I am doing in these pieces is examining some of the theoretical apparatus that is presupposed when we talk about rights to economic welfare as well as rights to civil and political liberty. Thus, for example, I discuss the concept of social citizenship,⁴ the idea of a social minimum, the relation between property and charity, the practicability of socioeconomic rights, and the contractarian arguments of John Rawls. Though the essays that pursue these themes vary slightly in their direction and level of abstraction, the overall aim is to establish that no society can pride itself on respect for the individual if its social and economic structures have the effect of excluding large numbers of people from access to even the most elementary necessities of material life.

The liberal society I described a moment ago comprises, as I said, men and women of high spirit and high ideals, each living life freely and creatively on his or her own terms. But a society in which some are excluded from the means of life, whether or not this is done in the name of "property," does not answer to that aspiration. If we are to enforce rules to govern the use and allocation of resources, they must be rules designed and administered to respect the fact that every person has a life to lead. It is a cardinal principle of liberal thought that no one's interest in power, prominence, or luxury by itself justifies the coercive imposition of a restriction on others. A rule of ownership, however, is precisely such a restriction. Liberalism, then, in the second sense we have identified,⁵ is a determination to apply that cardinal principle as much to rules of property as to other bases of restriction in social and political life.

II

I shall not, in this Introduction, attempt to summarize the chapters that follow. Each is self-contained and, I hope, largely self-explanatory. The essays are organized roughly as I have just intimated: a first bunch pursuing traditional liberal themes of ethical and religious liberty, and a second bunch

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applying liberal principles to socioeconomic concerns. Thus Chapters 3 through 8 address issues of toleration. They ask what attitude should be taken to individuals who pursue ideals or life-styles that conflict with the dominant mores and sensitivities of their community. Chapters 9 through 14 address the relation between rights and social justice. And Chapters 15 and 16 – which stand a little apart from the others – consider the importance of legal and constitutional structures in embodying individual rights.

In the remainder of *this* chapter I want to expand the argument sketched above, the argument connecting a commitment to liberalism in the traditional sense with a commitment to welfare provision and the reduction of economic inequality. I would like to summarize and discuss the various ways in which the idea of socioeconomic rights can be defended, exploring the connections between welfare rights and property, and between rights generally and social justice. Above all, I want to rebut some familiar objections to the idea of extending rights into this area of political concern.

III

According to the Universal Declaration of Human Rights (UDHR), adopted by the United Nations in 1948,

Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing, medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood beyond his control.⁶

Not only that, but everyone has, according to the Declaration, “the right to work,” “the right to just and favorable remuneration, ensuring for himself and his family an existence worthy of human dignity,” “the right to education,” and “the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.”⁷

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In international human rights circles, these socioeconomic claims are often referred to as “second-generation rights.” First-generation rights are the traditional liberties and privileges of citizenship, covered by the first twenty articles of the UDHR: free speech, religious liberty, the right not to be tortured, the right to a fair trial, the right to vote, and so forth. Third-generation rights are the solidarity rights of communities and whole peoples rather than individuals. They include minority language rights, the right to national self-determination, and the rights that people may have to diffuse goods such as peace, environmental values, the integrity of their culture and ethnicity, and healthy economic development.⁸ I shall not say much about third-generation rights in this chapter (they are discussed in detail in Chapter 14). But one way into the discussion of socioeconomic entitlement is to ask about the relation between first- and second-generation rights.

Much liberal thought in the twentieth century has focused on the question of whether it is possible really to enjoy civil liberties and political freedoms as they are traditionally understood, without also enjoying a fair degree of material security. For a while this debate was bogged down as an analytical dispute about the *meaning* of “liberty.” Those who believed that traditional freedoms could not adequately be enjoyed by people who lacked the basic necessities of life were taken to be propounding a “positive” conception of liberty. It was assumed, accordingly, that they ran foul of Isaiah Berlin’s strictures against confusing freedom with justice, or with equality, or with the sum of all good things. Defenders of “positive” freedom were accused of leading us down the road not only to socialism, but to a totalitarianism of “Newspeak,” in which the coercion of the welfare state would be disguised and redescribed as the liberation of the true self from the shackles of its own empirical nature.⁹

That was always a confusion. For one thing, the conception of positive liberty that Berlin was discussing concerned the relation between liberty, on the one hand, and virtue and rationality, on the other, not the relation between liberty and

Cambridge University Press

978-0-521-43617-5 - Liberal Rights: Collected Papers 1981-1991

Jeremy Waldron

Excerpt

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material well-being.¹⁰ For another thing, Berlin made it perfectly clear that the traditional point about the *definition* of “freedom” could be argued without prejudice to the substantive issue of the *importance* for freedom of material well-being. In the text of his original article, Berlin was quite explicit:

It is true that to offer political rights, or safeguards against intervention by the state, to men who are half-naked, illiterate, underfed, and diseased is to mock their condition; they need medical help or education before they can understand, or make use of, an increase in their freedom. What is freedom to those who cannot make use of it? Without adequate conditions for the use of freedom, what is the value of freedom?¹¹

A few years later, in view of what he called “the astonishing opinions which some of my critics have imputed to me,” Berlin underlined his attack on the pursuit of liberty without attention to social justice, on the evils of unrestricted *laissez-faire*, and on the social systems that permitted and encouraged it:

I should perhaps have stressed (save that I thought this too obvious to need saying) the failure of such systems to provide the minimum conditions in which alone any degree of significant “negative” liberty can be exercised by individuals or groups, and without which it is of little or no value to those who may theoretically possess it. For what are rights without the power to implement them? I had supposed that enough had been said by almost every serious modern writer concerned with this subject about the fate of personal liberty during the reign of unfettered economic individualism – about the condition of the injured majority, principally in the towns, whose children were destroyed in mines or mills, while their parents lived in poverty, disease, and ignorance, a situation in which the enjoyment by the poor and the weak of legal rights to spend their money as they pleased or to choose the education they wanted (which Cobden and Herbert Spencer and their disciples offered them with every appearance of sincerity) became an odious mockery. All this is notoriously true.¹²

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And *still*, he said, from the analytical point of view, "liberty is one thing, and the conditions for it are another."¹³

That last conviction was echoed a few years later in John Rawls's insistence in *A Theory of Justice* that "the inability to take advantage of one's rights and opportunities as a result of poverty and ignorance" is not to be counted "among the constraints definitive of liberty." A lack of means, he said, is to be counted as affecting the worth of one's liberty, not the extent of liberty itself.¹⁴ Even so, Rawls did not believe, any more than did Berlin, that a society could pride itself on offering its poorer citizens liberty, in this narrow sense, without paying attention to their material condition. "The worth of liberty" means just what it says, despite the fact that it is regulated by a principle standing second in Rawls's lexical priorities. It binds the two principles of justice together, and indicates the importance of economic well-being in determining whether the liberties governed by the first principle are actually worth having.

In any case, the argument from first-generation to second-generation rights was never supposed to be a matter of conceptual analysis. It was rather this: if one is really concerned to secure civil or political liberty for a person, that commitment should be accompanied by a further concern about the conditions of the person's life that make it possible for him to enjoy and exercise that liberty. Why on earth would it be worth fighting for this person's liberty (say, his liberty to choose between A and B) if he were left in a situation in which the choice between A and B meant nothing to him, or in which his choosing one rather than the other would have no impact on his life?

The general argument to this effect has been developed by Henry Shue.¹⁵ No one, Shue argues, can fully enjoy *any* right that he is supposed to have if he lacks the essentials for a reasonably healthy and active life. The rights that are most familiar to us, rights to civil and political liberty, evoke images of autonomy, rational agency, and independence. It is our interest in those underlying ideas that explains our allegiance to first-generation rights, but we know that things like mal-

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nutrition, epidemic disease, and exposure can debilitate and finally destroy all the human faculties that such rights presuppose. There is no prospect of an individual living the sort of autonomous life we have in mind when we talk about liberty if he is in a state of abject and desperate need. His condition would be one of lethargy rather than agency, or, at best, action under the impulse of necessity rather than action governed by autonomous deliberation.

As it affects one's agency, desperate need also affects one's relation with others, leaving one open to exploitation, dependence, and coercion.¹⁶ Indeed, famine and disease leave their victims more vulnerable to the forms of attack that rights theorists have traditionally been concerned about, such as state terrorism and other forms of physical violence. Those who are politically oppressed can sometimes flee, but those who lack essentials such as food can often do nothing and are, on their own, utterly helpless.¹⁷

This is a very general line of argument, relating the ideas of agency, autonomy, and independence to the need that people sometimes have for economic support and assistance. It asks rhetorically how anyone can call himself a partisan of liberty, and yet remain indifferent to the plight of those whose very agency is in danger of being overwhelmed by material need. The human autonomy that is at stake when we stop people from attacking or threatening one another is no less at stake when individuals are reduced by hunger or fear of destitution to desperate pleading for subsistence. If we truly respect human agency as an end in itself, we must follow that end where it leads and, in the circumstances of human life, that may well require us to attend to the needs of persons whose ability to function as agents is imperiled by poverty or disease or by the fear of those predicaments.

Particular versions of this argument can also be developed for specific rights. Many feminists argue, for example, that it is not enough for abortion to be a legally secured right, if all that means is that procuring an abortion is not a criminal offense. If a poor woman facing the immediate problem of an unwanted pregnancy is unable to take advantage of this

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liberty because she has no access to clinical services or cannot pay for the procedure, she is about as badly off as she would be if there were no legal liberty at all.¹⁸

Shue's claim was phrased in terms of what is necessary if a person is to *enjoy* some right that he has: "No one can fully, if at all, enjoy any right that is supposedly protected by society if he or she lacks the essentials for a reasonably healthy and active life."¹⁹ This way of putting it may lead to some misunderstanding. "Enjoyment" need not mean taking pleasure in or deriving maximum advantage from the right. What enjoyment means is actually *having* the right, in the substantive sense in which the right is thought to be worth having. A person does not have the right to vote unless there is some reasonable prospect that he can cast his vote on election day and have it counted. He cannot be said to have or enjoy the right in this sense if, for example, there are no polling places nearby or if there is no transportation available to get him to the polls. By contrast, we may not infer from the right to emigrate a requirement that society subsidize trips abroad for anyone who wants them. The point in this case is that emigration be among the legal options a person can work toward (which it is not if there is a ban on leaving the country). But if the point of a given right is to ensure that a certain choice can actually be exercised at a certain time (and this is surely true of both the abortion case and the voting rights case), then it seems clear that facilitating the exercise may sometimes be as important as not obstructing it.

However, although these particular arguments about specific rights are important, we must not allow them to swamp the general issue. Even in the case of those rights – like the right to emigrate – which do not generate an immediate call on social assistance, there is still a background concern about destitution. If some people are kept in absolute penury with no hope at all of savings or of anything other than the most precarious subsistence, it *is* a mockery to say that they have the right to emigrate, for their position even so far as long-range planning is concerned is little different than it would

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be if emigration were banned. One is reminded of the question David Hume posed embarrassingly for the Lockean theory of political obligation: "Can we seriously say, that a poor peasant or artisan has a free choice to leave his country, when he knows no foreign language or manners, and lives from day to day, by the small wages which he acquires?"²⁰ We must think not only about the relation between poverty and the actual enjoyment of the right, but also about the relation between poverty and the reasons for according people rights in the first place. First-generation rights, such as the right to emigrate, are predicated on some notion of respect and human dignity. People are to be treated not as captives in the land where they live, but as free and equal members of a community. Is neglect of their social or economic predicament consonant with that respect? At the moment, whole sections of society live as members of an underclass, left to their own devices in the poverty, hopelessness, and degradation of inner cities; and just as the boroughs in which they live have become "no-go" areas so far as the rest of us are concerned, so their predicament has become a taboo topic in the politics of a country determined to confine economic debate to "middle-class" issues.²¹ I guess that in principle *some* social and economic neglect is consistent with the proclamation that we still take very seriously the autonomy, freedom, and dignity of those who are in such a predicament, the proclamation necessary to make sense of their still being accorded first-generation rights. But the tension can only be taken so far. After a while, the combination becomes unbelievable, and it is increasingly difficult for those who actually *urge* such neglect to maintain with a straight face that respect for the rights of those whose needs they are planning to ignore is still in fact their highest priority.

IV

A second argument for welfare rights is more direct than the one I have just outlined. Instead of saying that economic security is necessary if *other* (first-generation) rights are to be