

Second, a right protects the individual's interest against what may compete with it, e.g. the greater good. If I have a right to freedom of speech, then even if it would be better for everyone if I did not express my objectionable views, I may not be prevented from doing so. But if the ground of rights is utility, this protection seems insecure. If my rights are justified by general utility, then doesn't the general utility of overriding my rights justify violating them?

Other theories that appeal to moral or political goals to defend rights do not all face these objections. For example, John Rawls argues that we have certain rights as a matter of justice. What defines justice is not respect for the natural attributes of individuals, but fairness. Assigning and respecting rights, then, secures justice as fairness.

Marx's objection

Marx argued that talk of rights – liberal rights, to liberty, property and so on – should be abandoned. When we consider the function of rights, we see that the idea of rights derives from a view of human beings as separated from each other, not communally related. It assumes that individuals have interests which can be defined as *their own*, independent of other people. Liberty rights assume that they are always potentially in conflict with each other, property rights that they may do whatever they wish, so long as they don't harm others, ignoring the desperate need for resources elsewhere. These assumptions will create a society of isolated egoists. And the idea of equal rights creates an illusion that there is equality, when in reality there is not.

These are important considerations, but we can question whether the concept of rights must itself be given up. It may be that we should place more emphasis on group rights and less on individual rights.

grounds for depriving you of freedom of speech. Third, we must be able to impose (and enforce) duties to protect it.

Which interests meet these criteria is a matter of debate. It could even be that our interest in an area of negative freedom is the only one!

The justification of rights

Appeal to individual attributes

We can argue that we are morally required to assign and respect rights because of something about individuals. One version of this claim, deriving from Locke, argues that people have natural rights bestowed by God. Another argues that to have rights is to be part of a moral community that agrees to live by certain rules.

A third version, from Kant, is that individuals are 'ends-in-themselves'. In brief, Kant argues that autonomous choice is the basis of morality itself. It is also the source of all value; everything else has value only because it is adopted as an end by someone. So we cannot weigh treating people as ends-in-themselves against any other end, as no other end has as much value. To ascribe rights recognises individuals as 'ends-in-themselves', it respects their autonomy. We don't ascribe rights to someone because it is in their interests, but because it recognises what they are.

We can object, however, that our rights, even our fundamental rights, are shaped by many conditions that seem to relate not to ourselves, but to other people and social goods. My freedom of speech does not extend to saying 'Fire!' in a crowded cinema. My right to my property doesn't entitle me to do *whatever* I want with it. If my rights were grounded just my autonomy, how can we explain this?

Appeal to moral or political goals

A second approach justifies rights by their role in securing some moral or political good. Mill argued that we could derive a theory of rights from utilitarianism. Certain of our interests, he argues, should be protected as rights. Society may use the law to regulate conduct that consists in 'injuring the interests of one another, or rather certain interests which, either by express legal provision or tacit understanding, ought to be considered as rights'. (*On Liberty*, p. 141)

Mill argues that utility is 'the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of a man as a progressive being'. (p. 70) Rights relate to these 'permanent interests' we have as 'progressive beings'. Singling out these interests for protection will contribute most to utility. For example, Mill argues that freedom of thought and speech will help us to discover and understand the truth; and that 'the free development of individuality is one of the leading essentials of well-being'. (p. 120) On the other hand, we do not have a right to protection from economic competition, because economic competition contributes to the common good.

We can object, however, that if it proved that freedom of thought etc. did *not* contribute to utility, then we would no longer have these rights. We only have rights that contribute to greatest utility. Mill's defence of rights rested on his belief that we progress through having freedom. But after two World Wars and the rise of religious violence, we may doubt whether Mill is right about this. Do utility and rights conflict?

The function of rights: choice v. interests

Choice

Many rights relate to freedom – freedom of thought, speech, movement, freedom from murder and torture. Rights, we can argue, have the *specific* function of saying when freedom may or may not be limited. A different argument is that to have a right is to have a choice – either a liberty right to do something or not; or, for a claim right, the power to claim or waive another's duty. These claims recognise the special place that freedom and choice have in our lives. Rights protect that area of negative freedom necessary for us to live our lives according to our conception of what is good.

However, this theory disallows many apparent rights. We cannot ascribe rights to beings that do not make autonomous choices, so infants, animals and comatose patients do not have rights. If to have a right is to have a choice, this limits rights even further. For example, in Australia, it is compulsory to vote. Yet don't Australians also have the right to vote? Or again, many people think that certain rights, e.g. to life or freedom, are inalienable. An inalienable right is one that you do not have the power to waive or transfer, e.g. you cannot sell yourself into slavery. But if rights are choices, no rights are inalienable.

A second objection is that rights do more than just protect *freedom*. They tend, simultaneously, to protect other interests, such as not being physically or mentally harmed. If all, or most, rights do both, why pick out freedom as what rights protect?

One defence comes from the theory that claims rights are justified on the basis of autonomy.

Interests

If the function of rights is to protect individual interests, a person has a right because that will make them better off in some way. Having freedom, of course, is very much in our interests, but other interests also generate rights. Health, food, shelter and education all make us importantly better off. And beings without choice, such as infants and animals, nevertheless have their interests, and these interests may generate rights. There may also be inalienable rights, as some interests may be too important for a person to exercise choice over.

But then, does *any* interest generate a right? We clearly think not. It is in my interest to be given money, but I have no right to this. Michael Freedman argues that

a human right is a conceptual device...that assigns priority to certain human or social attributes regarded as essential to the adequate functioning of a human being; that is intended to serve as a protective capsule for those attributes; and that appeals for deliberate action to ensure such protection. (*Rights*, p. 7)

So not all interests generate rights. First, the interest must be closely connected to what we think it takes to live an adequate human life. Second, we must want to protect against other considerations that might conflict with it, such as preferences. I might prefer you not to have freedom of speech, if I don't like what you are saying. But if you have this right to freedom of speech, then my preferences do not provide good enough

right to my books. However, my right is not absolute, the duties and liberties are limited, e.g. it does not give me the liberty to throw my books at other people, or give them permission to throw them. And if I refuse to pay taxes, my books may be seized and auctioned off to cover my debt. So to accept a system of rights is to accept a distribution of liberties and duties.

The distinction between natural and positive rights

‘Natural rights’ are rights people have simply in virtue of their nature, e.g. rationality, autonomy, or certain needs. They are moral rights, and do not depend on being recognised by law. Instead, laws that violate people’s natural rights can be condemned for that reason. They are universal, not relative to a particular society or set of laws. For this reason, many people think that whether there are any natural rights depends on whether there is a universal, objective morality.

By contrast, ‘positive rights’ are rights recognised and established in a system of rules. (This is usually the law, but also applies to religious rules and even games.) If all rights are positive rights, then rights only exist when recognised, e.g. in law. We can argue that a right imposes duties, which must be recognised and enforced. Rights appeal for *authoritative* recognition and *legal* enforcement. ‘Natural’ rights therefore do not make sense.

But surely we can say that a law fails to recognise someone’s rights. In response, we can argue that first, a law may violate someone’s rights because it contradicts another law which has established those rights. For instance, UK law is required to conform to European law on what rights we have. Second, we can criticise laws for failing to recognise what *ought to be* (but is not yet) a right. Laws which do not establish the rights that people ought to have are morally wrong. But it is a confusion to say that people *have* the right before the law bestows it.

If we say there are natural rights as well as positive rights, we defend two types of right. It is simpler to reject natural rights, and talk about what rights should be established in law. Many people equate ‘human rights’ and natural rights, and take a rejection of natural rights to undermine human rights. But we could argue, instead, that human rights are created by national and international law. The debate continues in the next section.

THEORIES OF HOW RIGHTS ARE GROUNDED

In arguments about the basis of rights, there are two distinct issues. The first is the function of rights. Do rights exist to protect individual choice and freedom? Or to protect individual’s interests more generally? The second is what justifies rights. Are there deontological restrictions on how we treat individuals, based on individual worth or attributes? Or do rights serve some further moral or political goal, such as happiness, justice or equality?

Answers to the two questions *tend* to align, with choice defended by deontology, and interests defended by appeal to some goal. But this alignment is not necessary (e.g. we can defend the choice theory by appeal to happiness), and it is important to keep the two issues separate.

Rights

THE NOTION OF RIGHTS

The idea of rights extends widely. I have a right to go to the cinema, a right not to be killed, a right to teach students at Heythrop College, a right to be paid, a right to have children, a right to the exclusive use of my house. Some rights are moral rights, some are legal, some are the results of contracts. We can also categorize rights by who has them (animal rights, workers' rights) or by what they are rights to (freedom of speech, job seekers allowance). In general, a right can be understood as an entitlement to perform, or refrain from, certain actions and/or an entitlement that other people perform, or refrain from, certain actions. Many rights involve a complex set of such entitlements

Wesley Hohfeld (*Fundamental Legal Conceptions*) provided a four-fold analysis of the 'structure' of rights that is generally accepted. The first two are:

1. Privilege/liberty: I have a privilege/liberty to do x if I have no duty not to do x. I have the right to go to the cinema because I have no duty not to go to the cinema. But I have no right to steal, because I have a duty not to steal.
2. Claim: I have a claim right that someone else does x in certain cases in which they have a duty to me to do x. Claim rights can be 'negative' – they require that other people don't interfere with me (e.g. the right not to be killed); or 'positive' – they require that other people do specific action (e.g. the right to be paid if I'm employed). (I shall refer to negative v. positive rights as rights of non-interference v. rights of provision respectively.)

While every claim right entails a duty, not every duty entails a claim right. I may have a duty to give to charity, but I have not violated anyone's rights if I don't. Some duties are based on rights, but some are not. Talk of *rights* should not be confused with talk of what is morally *right*.

Liberties and claims are the core of most rights. The rest of our discussion of rights involves rights that are, or at least involve, claims.

Powers and immunities

Many rights relate to being able to alter duties.

3. Power: I have a power when I have the authority to alter my own or someone else's rights and duties. Judges have the right to set prison sentences, someone who is promised something has the right to enforce or waive the promise.
4. Immunity: I have an immunity when someone else does not have the power to change my rights and duties. So I have the right to freedom of religion, because no one has the right (power) to impose a particular religious practice on me.

Many 'everyday' rights have a complex structure that involves all four of these aspects to a right. My property right to my books gives me the liberty to use them, a claim that no one else uses them, the power to waive that claim (lend my book to them) or transfer it (sell my book to them), and the immunity from anyone else waive or transferring my