

Rights: application, utility and law

This handout follows the handout on 'Rights'. You should read that handout first.

PROBLEMS CONCERNING THE EXTENT AND APPLICATION OF RIGHTS

Joseph Raz (*The Morality of Freedom*, Ch. 7) argues that a full specification of a right should tell us

1. who has the right;
2. what justifies their right;
3. what it is a right to;
4. who has the corresponding duties, and what are these duties.

The discussion in the handout on 'Rights' relates to the first three points. Do rights function to protect freedom and choice only, or also other interests? Who can have rights? If rights function to protect interests, which interests? These questions all relate to the extent of rights. This issue of the extent and application of rights can also be discussed by taking up Raz's fourth requirement: what duties do rights impose?

Rights and their corresponding duties must be *practical*. This might limit the rights that we have. There is a distinction between rights of non-interference and rights of provision. 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' (non-interference) – they require that other people don't interfere with me (e.g. the right not to be killed); or 'positive' (provision) – they require that other people do specific action (e.g. the right to be paid if I'm employed).

Some philosophers have argued that the former are easier to satisfy than the latter. Rights of non-interference can be respected just by people *not* doing something, viz. interfering with each other. Rights of provision, however, require some good or service to be provided – and so it is possible that demand might outstrip supply, or that no one has the ability to make the provision. If we interpret the right to life as a right of non-interference, as long as I am not murdered nor prevented from sustaining my life, my right is not violated. But if we interpret it as a right of provision, someone has the duty to keep me alive. But suppose there is not enough food to go around? Is my right violated? By whom? It seems that duties are harder to allocate with rights of provision, leading some philosophers to reject them altogether.

However, this distinction can disappear when we consider the duty of enforcing rights. Against each individual, my right to life involves only the duty of non-interference. But the state has the additional duty of enforcing my right against other individuals who would violate it. This involves a police force and a legal system. These also involve resources (money, people willing to serve as police officers and lawyers) that may be in short supply. In fact, it may be *less costly* for the state to feed everyone than to enforce their rights of non-interference against assault. When it comes to the duties of

enforcement that our rights impose on the state, all rights involve elements of provision. Rights of non-interference are not easier to enforce than rights of provision. This demonstrates the importance of specifying the duties, and who holds them, when discussing the application of a right.

In fact, to stop with the duties of the state may itself be insufficient. Democratic states, for instance, are answerable to their citizens. If the state is failing to perform its duties, we could argue that citizens, individually and collectively, have the duty to attempt to influence the state. So, for instance, while your right to life does not impose on me a duty to save you from attack, it may impose on me a duty to play my part in ensuring that the state meets its duties in preventing such attacks and punishing criminals.

RESOLVING CONFLICTS BETWEEN RIGHTS AND UTILITY

If rights were based on utility, how could we defend rights claims when they conflicted with utility? A utilitarian believes that the right thing to do is what creates the greatest benefit; if violating a right did this, then what reason is there not to violate that right? But a right that can be overridden whenever it is beneficial to do so is not right at all. The possession of a right means that the right-holder's interests cannot be sacrificed in this way.

Basing rights on an appeal to individual attributes explains why. Rights are not a means for bringing about good consequences. For instance, they are necessary to respect the absolute worth of the individual as an end-in-itself. Social utility, if brought about through violating rights, is not good, but bad. Rights constrain the actions that the state, or people generally, are permitted to do in the pursuit of the greatest benefit.

However, what rights we have, their scope and the duties they impose, do take considerations of social utility into account. They 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. Likewise, many people would grant that if the consequences of not violating someone's rights are *really* bad (e.g. it would lead to the deaths of many other people), then it is permissible to violate that person's rights. The force of rights is not absolute.

Mill argues that those who think rights and utility conflict are not viewing utility in the right light. Utility is only a moral standard if it is utility 'in the largest sense'. Rights protect our permanent interests, and thus serve social utility considered *over the long term*. We should establish that system of rights that would bring most utility, and then defend these rights.

But is this the correct defence of rights? If individual freedom is valuable independent of social utility, Mill's resolution doesn't work. We must instead weigh up rights against utility on occasion. We can argue that rights, though not absolute, will *generally* override social utility.

A different approach argues that the right to autonomy is not, in fact, an individual right, but a group right. If I am to be autonomous, i.e. to be able to make meaningful choices about how my life goes, then certain opportunities need to be available to me. But no one is under a duty to provide these opportunities just on the basis of *my* autonomy

alone. My interest, taken alone, couldn't possibly generate such large scale duties. But everyone's interest, taken together, can. So I have a right to autonomy only because all citizens do, collectively.

On this understanding, rights aren't independent of, nor opposed to, social utility. So there is no general rule for how we should resolve conflicts between them when they arise.

RIGHTS, LIBERTY, MORALITY AND LAW

Many core liberal rights function to protect liberty. Choice theories argue that rights in general have this function. On the interests theory, while we can connect rights to various interests, we can still analyse rights so that most protect some type of freedom. The question of whether *all* rights protect freedom is the question of whether there are any claim rights of provision concerned with interests (life, food, medical treatment?) other than liberty. (Even here, a defender of positive liberty may argue that such interests can be understood as necessary conditions for liberty.)

On the relation between rights and the law: If there are no natural rights, only positive rights, rights only exist when recognised by the law (or other systems of rules). But even natural rights relate closely to the law. Many natural rights are already recognised by law, and those that are not are rights that the law *should* recognise. This is because rights impose duties, which need to be allocated and enforced (by the state). More generally, the law distributes the liberties, duties, powers and immunities associated with rights.

Natural rights are moral rights, and appeal to morality to change the law if necessary. Many positive rights have very little to do with morality per se, and are simply ways of regulating behaviour smoothly. Natural rights theories are committed to the view that, in certain fundamental respects, the law should be based on morality, because it should incorporate our natural rights. Positive rights theories can leave open the question of how closely the law and morality should be related.

Finally, theories that justify rights in terms of individuals' attributes make rights the foundation of morality, and argue that these rights constrain the laws that a state may legitimately make. Theories that justify rights by some moral or political goal vary in their accounts of the place of rights in morality, e.g. depending on whether the goal is utility or justice as fairness. They also differ in the kinds of constraints they say rights place on the law. Rawls argues that justice is the most basic political value, so rights place absolute constraints on law. Utilitarians argue that utility is the most basic political value, so rights are not so stringent.