THE BASIC RIGHT TO LIBERTY

George E. Panichas

Undifferentiated rights claims have become so abundant as to be profligate, with persons asserting rights to everything from reproductive freedom to convenient parking spaces. Accompanying this proliferation of rights claims is the phenomenon whereby "I have a right to x" is often used simply as an emphatic or persistent way of saying "I want x," with too few persons showing concern about whether anything can be implied morally when the language of rights is used so carelessly. Psychologically, this carelessness contributes to the overall cheapening of rights discourse so that, rather as economists hold that bad currency drives out good currency, bad rights claims drive out good rights claims. But philosophically, there are arguments which attempt the job more directly, especially with respect to the issue of whether one especially venerable right—the basic right to liberty—remains a piece of moral currency worth keeping.

This paper is an essay in retrieval. It concerns the fundamental questions of how the right to liberty, *qua* moral right, is to be understood and, given that understanding, in what sense the right to liberty is a basic human right. In section I, arguments are offered for believing that if the right to liberty is understood as a general right to license, then it cannot be a basic right in any morally meaningful sense. In sections II, III, and IV, arguments are given for rejecting the view that the right to liberty, as a putative basic right, comprises sets of either unilateral or bilateral liberty-rights correlating with *prima facie* duties of non-interference on the part of others. A new model of the right to liberty is offered, in section V, and then defended, in section VI, as the model for securing the right to liberty as a basic human right which is pre-theoretically compatible with different theories of such rights.

I

When Ronald Dworkin denies the existence of a general right to liberty, he denies that persons have fundamental or basic moral rights to do whatever they want or please.[1] For Dworkin, the objects or content of bona fide basic rights claims are things to which persons are entitled in a sense of entitlement which morally overwhelms utilitarian concerns for the common good.[2] Thus, if it is agreed that utility—sometimes even in the form of simple convenience—justifies restrictions on a broad range of activities which persons are merely at liberty to perform, it follows that persons simply do not have a basic moral right to perform all these

activities. In spite of my wanting to be first in line at the hot dog stand and my being at liberty to push my way to the front, my right to liberty is not violated when I am required to take a place behind others.

Notice that on this view when utilitarian considerations justify limitations or restrictions on certain activities, it is *not* to be inferred that individuals' rights have been suspended, overridden, infringed upon or violated; we should infer rather that there simply are no basic rights to engage in the activities in question.[3] Thus, if the common good suffices, morally, to require that motorists wear seat belts, the motorist errs when she claims that the law requiring that seat belts be worn constitutes a violation of her basic right to liberty. Assuming that the common good does suffice to restrict her acting as she wishes, she simply has no basic right to act thusly.

An important commitment underlying Dworkin's attack on the general right to liberty, conceived as a general right to license, is the belief that if such a right were granted, the degree of moral power appropriate to basic rights could not be sustained. Indeed, thinking otherwise implies that all persons have a basic right to do what they please just because they please and this sort of thinking cheapens the concept of a basic right intolerably.[4] When bad rights threaten to drive out good ones, the former are to be denied otherwise the language of moral rights becomes hopelessly contaminated with its moral and political effectiveness radically undercut.

Setting aside the thorny and serious problem of just how one can tell when utilitarian concerns morally override individual preferences for engaging in various types of activities, Dworkin's position against a general right to liberty as license remains both defensible and important. For if this general right were seen to imply a near infinite number of individual rights to do whatever persons are merely at liberty to do, then the idea of a right to liberty as a *basic* right is not simply cheapened, it is lost. Basic rights claims are distinguishable from other, presumably weaker moral claims in that such rights claims have significant interpersonal impact; that is, these claims count as morally compelling reasons for others to tailor their behavior so as to accommodate activities protected by such rights.[5] This interpersonal impact, ordinarily captured by the idea that basic rights correlate with or engender duties or obligations of various sorts, attends the activities persons are at liberty to perform only if these activities can be demonstrated to deserve the kind of fundamental moral protection which only basic rights claims are conceptually adequate to afford. My doing what I please is often permissible, but this alone is not equivalent to, nor does it entail a morally compelling reason for another's either doing or not doing anything.[6] The putative general right to liberty, conceived or treated as a near infinite number of rights to morally undifferentiated liberties, thus plainly seems

14679833, 1990, 1, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/j.1467-9833.1990.tb00266.x by Lafayette College, Wiley Online Library on [09/10/2023]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License

not to be a basic moral right at all.

Denying the existence of a general right to liberty as license seems even less controversial on recognizing that if there were such a right, it could be exercised so as to perpetrate a near infinite number of moral wrongs. Now while persons may have duties to forbear with respect to others deciding upon their own courses of action—we ought not, for example, brainwash persons so that they will always decide to do what is morally right; still, persons do not have even a *prima facie* duty of non-interference with respect to the actual commission of wrongful acts. Although it may in fact be prudent to do so, a woman certainly has no duty to allow a mugger to take her pocketbook on grounds that to not do so would violate or infringe upon the mugger's general right to liberty.[7] But since some kind of duty or obligation always correlates, *in some way*, with a basic right—elsewise the "right" loses interpersonal significance—there simply cannot be basic rights to do whatever persons are at liberty to do.[8] To this juncture, then, Dworkin is quite correct to deny a general, basic right to liberty. And it will be important to remember that if there is a right to liberty which is a distinct, morally significant basic right, then this right cannot be identified with an arbitrary system of mere liberties.

II

Yet the commonplace commitment to a basic right to liberty may not be, when pushed, a commitment to a right of license, and thus it can be argued that Dworkin directs his attack at a straw man.[9] Rather, common claims such as "But I have a right to dress as I please" express the idea that *because* no one is seriously enough affected by my style of dress, and I do not owe it to anyone to dress in a certain way (for example, to wear a uniform), it follows that no one has a moral right to interfere with my acting as I please. While the content or object of this right might not impress anyone as being important enough to justify its membership in a list of basic human rights—how one dresses surely is not, for example, comparable to one's access to competent medical treatment—still, social policies permitting arbitrary interference with persons' acting on their self-regarding preferences, even if utility might justify such a policy, are a serious business indeed. So there might well be something of indispensable moral value in the notion of a basic right to liberty just so long as that right is viewed as a claim to moral protection from interference in how one conducts one's own (but no one else's) affairs.

This commitment can be captured more formally by affirming a basic right to liberty which morally protects persons when they act in ways which are morally permissible in the sense in which they have neither moral duties to refrain from certain acts nor obligations to perform these acts. Following a classification found in analyses of legal rights, the basic

14679833, 1990, 1, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/j.1467-9833.1990.tb00266.x by Lafayette College, Wiley Online Library on [09/10/2023]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License

right to liberty would be classified as a "bilateral" moral liberty-right.[10] This right cannot be a unilateral liberty-right in the Hohfeldian sense where having a liberty-right entails having the right to do what one has no duty to refrain from.[11] For if the basic right to liberty were unilateral, one might be morally required to exercise one's liberty-right. And this requirement is exactly at odds with a basic right to liberty. If my right to liberty implies a liberty or freedom of religion, for example, it cannot be that I would be duty-bound to practice some religion or other, rather it means that I have no duty to refrain from practicing a religion *and* that I have no duty to practice a religion. Here, then, a liberty-right is a right to do or not to do.

Now a qualified basic right to liberty, conceived as a set of bilateral moral liberty-rights, can be seen as correlative with at least *prima facie* duties of non-interference on the part of all other basic rights holders. Indeed, the fundamental moral value associated with the liberty of persons to develop and execute their own plans of life has long been seen to depend on precisely this sort of rights-protected sphere of personal autonomy.[12] Therefore, it might be argued that persons do have at least *this* qualified basic right to liberty: the basic right of all to act in ways neither prohibited by moral duties or obligations nor required by them. And this right seems to be precisely the sort of good right which ought not be driven-out by the bad right to liberty as license.

Another reason for defending the qualified basic right to liberty is that the exercise of such a right can be shown to comply with some important, purportedly pre-theoretical, constraints associated with the traditional liberal conception of a basic right. An example here is helpful. If two music lovers arrive at the concert hall ticket window simultaneously and the ticket seller slides forth the very last concert ticket, both persons are morally permitted to reach for the ticket. Assuming neither reservations nor previous agreements between any of the relevant parties, each person has the liberty-right to acquire the ticket. Further, both persons have a *prima facie* obligation not to interfere when the other reaches for the ticket; i.e., one party cannot shove the other away so as to prevent him from being the first to reach for the ticket. Finally, assuming a standard, first-come, first-served policy on ticket sales, if the ticket vendor shows favor for one music lover (the ticket is pushed a little closer to assure an advantage), the unfavored person would have a plausible claim that his liberty-right had not been respected.

Four things are worth noticing here. First, each person's liberty-right to the concert ticket implies a duty of non-interference with respect to *access to* the ticket (though not a duty of compliance with respect to acquiring the ticket—neither person is morally obligated to help the other in any way). Each party is permitted (neither is obligated) to try for the ticket and each party is also obligated to allow the other to try. This seems

14679833, 1990, 1, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/j.1467-9833.1990.tb00266.x by Lafayette College, Wiley Online Library on [09/10/2023]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License

to comply with and perhaps gives sense to the liberal constraint on basic rights that, *caeteris paribus*, such rights correlate with duties, at least of non-interference, with respect to the exercise of such rights. Second, the liberty-right, as well as the correlative duty of non-interference, are equally held by all relevant parties thus giving sense to the liberal constraint that basic rights are equally held rights correlative with equally held duties.[13] Third, the possession of a liberty-right, as a right of access, implies no moral guarantee of success and thus the right is neither infringed upon nor violated should the possessor of the right either freely choose not to exercise his right or fail to succeed as a result of another's successful (and permissible) exercise of his liberty-right.[14] Finally, liberty-rights can be asserted, to use Hart's phrase, defensively;[15] that is, if the ticket vendor (as a moral analogue to the state) shows favor to one music-lover over the other, then he effectively denies fair and equal access, and a basic right has been at least ignored, and at most violated.

Thus the qualified right to liberty—conceived as equally held bundles of bilateral moral liberty-rights with correlative duties of at least non-interference—appears, given its initial compatibility with traditional commitments regarding both the nature of basic rights and their value *vis-a-vis* individual autonomy, to be a rather reasonable candidate for inclusion on the list of basic rights enjoyed by persons in a free society.

III

Yet as attractive as the qualified right to liberty might appear, there are good reasons for questioning, then rejecting even the qualified right to liberty as a basic moral right. These reasons emerge when careful consideration is given, first, to the structure and, subsequently, to the moral implications of a right to liberty conceived as a bundle or system of equally held bilateral liberty-rights.[16]

Consider first the issue of structure. An important fact about the qualified right to liberty can be inferred by looking to the structure of bilateral *legal* liberty-rights. And given the structural parallels between legal and moral liberty-rights, one finds that moral liberty-rights, like legal liberty-rights, are second order rights. That is to say, legal and moral liberty-rights are rights which persons have only because of a law (or moral rule) or set of laws (rules) establishing first order rights which enable or permit certain acts (or acts of certain types) and which, by virtue of correlative duties of compliance or non-interference, prohibit interference with these acts.[17] Absent these laws and rights, then, there are no liberty-rights of the relevant, bilateral sort.

As Hart puts the matter, liberty-rights exist behind a "protective perimeter" of rights and duties in the absence of which it makes no sense to regard liberty-rights as rights in any full-fledged sense.[18] One has the

14679833, 1990, 1, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/j.1467-9833.1990.tb00266.x by Lafayette College, Wiley Online Library on [09/10/2023]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License

legal liberty-right to drive at fifty miles per hour on an interstate highway only because the speed limit, which establishes a right to go faster than fifty, permits (but does not require) travel at fifty. Should the speed limit be reduced to forty-five, the legal liberty-right to drive at fifty vanishes. Morally, I have the liberty-right to offer assistance to persons in need (and to whom I have no pre-existing obligations) because reasonable moral rules permit, protect and often encourage such offers. But if I have finite assets and a moral duty to aid my ailing father where providing such aid would exhaust my assets, my moral liberty-right to assist others would also vanish.

As with legal liberty-rights, then, moral liberty-rights function only within the parameters established by sets of constitutive rules which generate rights and duties, and to which a particular bona fide liberty-right can always be traced and validated. Should these rules prohibit certain acts, thereby giving others rights that such acts not be performed, there can be no liberty-rights to perform these acts. You have no moral liberty-right to attack me unwarrantedly, assuming that reasonable moral rules afford persons rights not to be thus attacked. Liberty-rights presuppose other, first order rights and duties which, taken as a network, establish the range of activities with respect to which there are bilateral liberty-rights.

Recall the case of the concert tickets in II, above. Here the liberty-rights of the respective parties, while seemingly basic and independent of other rights, do, in fact, presuppose certain unspoken rights derived from the social convention that the purchase of tickets is governed by the rule of first-come, first-served. Absent this and related rules and the primary rights they imply, the enumerated liberty-rights of ticket purchasers either vanish or are, given different rules and primary rights, quite different. In either case, persons have no claim, in the concert tickets case or similar cases, that their liberty-rights are basic rights even if these liberty-rights share some of the characteristics often attributed to basic rights. While some liberty-rights (or clusters of liberty-rights) may appear to be basic rights, careful examination shows that they are not.

The fact that liberty-rights are second order rights has, as shall be argued below (in section IV), destructive implications for treating the qualified right to liberty as a basic human right. But before considering these implications, it is important to warn against being misled into thinking that bilateral liberty-rights are not second order rights because of what might be called moral or legal rule-silence, that is, a circumstance or set of circumstances where we are inclined to ascribe liberty-rights to persons where there are no apparent rules permitting, enabling or prohibiting certain types of activities. Thus, for example, some are inclined to think that the absence of speed limits always implies the legal liberty-right to drive as fast as one pleases. Or, should there be, in certain circumstances, no good moral reason to refrain from using heroin, one

14679833, 1990, 1, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/j.1467-9833.1990.tb00266.x by Lafayette College, Wiley Online Library on [09/10/2023]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License

might infer, simply on the absence of moral prohibitions, a moral liberty-right to use heroin. In short, the absence of requirements or prohibitions seems to imply permissibility which, in turn, seems to imply liberty-rights.

On the basis of rule-silence, then, the following argument, critical of viewing bilateral liberty-rights as second order rights can be offered: If a person, P, has no explicit legal or moral grounds permitting interference with another person's, Q's, acting in a specific way, x, then P has a duty (of at least non-interference) to Q with respect to Q's doing x. Rule-silence with respect to x just is a condition where there are no explicit legal or moral grounds for P's interfering with Q's doing x. Thus wherever there is rule-silence, P has a duty of non-interference to Q with respect to Q's doing x. But since such duties imply rights, P's duty of non-interference implies Q's right to do x. Therefore, rule-silence implies Q's right to do x.

This argument depends on the view that moral or legal rule-silence *simpliciter* is a sufficient condition of one's having a duty of non-interference with respect to another's performing a specific act. But surely a moral duty of even non-interference cannot be derived from literal rule-silence. For having (literally) no moral or legal reason to act or refrain from acting is to have no grounds for either a duty or a right with respect to anything. Where rule-silence *seems* to imply a duty of non-interference (and thus a liberty-right to perform a specific act) it is because of the applicability of other first order rights and duties. For example, if the city code is silent about whether street vendors can sell their wares in front of department stores, the store owner has a duty of non-interference regarding the vendors' presence such that the owner cannot forcibly remove the vendors or threaten them with bodily harm. But notice that this duty does not imply that the vendors have a right *to sell* wares in front of the store. Such a right—which would imply specific duties of non-interference with respect *to selling*—results only if there is an adjudication or legislative enactment favoring the vendors by granting them the right *to sell*. Without the relevant rule of law, vendors have no right to sell even though they have rights not to be assaulted, threatened or forcibly removed.

The vendors' rights not to be assaulted or threatened are easily confused with the vendors' purported right to sell because prior to rule-creation and rights-specification, the owner (as with all others) has certain duties of non-interference with regard to the vendors. But these duties are correlative with first order claim-rights of the vendors *other* than the right to sell. It is an error, then, to infer that rule-silence alone implies any specific right on the part of the vendors to sell their wares. Thus rule-silence with respect to a specific act or type of act does not suffice to show that a person has a liberty-right to perform that or any other specific act.

The "protected perimeter" within which bona fide liberty-rights exist should not be construed as entailing a liberty-right to perform specific acts

14679833, 1990, 1, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/j.1467-9833.1990.tb00266.x by Lafayette College, Wiley Online Library on [09/10/2023]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License

or types of acts, such as the "right" to frown when one is displeased, simply because there is no specific rule carving-out rights, duties and permissions with respect to frowning. A critical difference exists between having a liberty-right to do x and merely being at liberty to do x in the sense in which there *may* be no immediate, permissible way for another to interfere with one's doing x. As argued above, if liberty-rights are to enjoy status as rights in any morally meaningful sense entailing correlative duties, they cannot be confused with mere liberties. Liberty-rights may seem derivable from a moral vacuum, but in fact, they are not.

IV

Now it has been suggested that liberty-rights' being second order rights has destructive implications for the qualified basic right to liberty. The general argument for this claim is the following: If the qualified basic right to liberty is understood as a system of second order, bilateral liberty-rights, then whenever persons have such rights, there are other, first order rights to which the second order rights can be traced and justified. (Recall that in the absence of first order rights, there are no second order bilateral liberty-rights.) Yet if second order liberty-rights can always be traced and justified to first order rights in this way, then the qualified right to liberty cannot be a distinct basic right. That is to say, it cannot be a right which is neither reducible, exhaustively, to other rights, nor wholly derivable therefrom—the qualified right to liberty cannot be a distinct basic right if, logically or morally, it presupposes other rights which are "more" basic. But, as understood above, the qualified right to liberty just is comprised of a system of second order liberty-rights, and such rights do presuppose other, first order rights. Thus it follows that the qualified right to liberty cannot be a distinct basic right.

As may be obvious, this argument assumes that if there is a distinct basic right to liberty, then this right must be distinguished from the bilateral liberty-rights persons have in virtue of other basic rights they possess. Thus the argument admits that, for example, when totalitarian powers smash printing presses so as to silence the political opposition, they violate the basic right of free expression. And, by implication, the liberty-right to print the next edition of the newspaper (as well as a wide range of other liberty-rights) has been effectively violated as a result of this action. But the argument denies that the basic right to liberty has been *directly* violated just because *another* basic right (and its attending liberty-rights) has been violated.[19] To clarify the point, if the possibility remains that there is a distinct basic right to liberty, then direct violations of other basic rights which form the "protective perimeter" upon which innumerable liberty-rights depend, are not, *ipso facto*, direct violations of the basic right to liberty. It is easy to slip, verbally, from "liberty-right" to

14679833, 1990, 1, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/j.1467-9833.1990.tb00266.x by Lafayette College, Wiley Online Library on [09/10/2023]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License

"right to liberty," but as shall be seen in response to an objection to the above argument, the temptation to make this slip must be resisted.

This objection denies that the right to liberty is a distinct basic right. On this view, the right to liberty is something of an epiphenomenal right—a right which emerges because of the web of liberty-rights generated by the system of basic rights which all persons possess. The "right to liberty," then, is nothing more than a general name for that enormous collection of bilateral liberty-rights derivable from the protective perimeter established by the whole system of basic rights. There is no distinct basic right to liberty, then; rather, the expression, "basic right to liberty," just names the system of liberty-rights which persons have in virtue of the other distinct basic rights they possess. Hence having a basic right to liberty just means having liberty-rights: to vote for Jones in the municipal election, meet with Smith and Black for beers and political argument, publish criticisms of zoning decisions, etc., *ad infinitum*. However, this view has implications with respect to the nature and value of individual autonomy which entail its rejection.

Central among these implications is the denial of a distinct value or good in individual liberty *per se* other than what can be captured by appeal to quite specific sets of acts (or act types) and which ought to be protected by a basic right. An important insight of "will" theories of rights is that individual autonomy with respect to choices regarding how persons conduct their lives—effectively, choices as to which liberty-rights individuals choose to exercise—cannot be ignored without doing irreparable damage to the moral "separateness" of persons.[20] But this is precisely what is ignored if "basic right to liberty" is treated as nothing more than a general name for that system of innumerable liberty-rights implied by basic rights other than the basic right to liberty. For on such a view it is *not* the liberty of individuals to make autonomous choices as to how they will conduct their lives that deserves rights-protection; rather, it is only the content or scope of other basic rights (understood by appeal to the content of their attending liberty-rights) that deserves such protection.

Notice, the point here is not that basic rights other than the basic right to liberty have a less important content than that of protecting individual autonomy (as understood above), but rather that individual autonomy *per se* is at least as important and deserving of basic rights protection as are other fundamental or primary goods such as free expression and free association.[21] Relegating the basic right to liberty to an epiphenomenal (or "nominalist") status thus implies denying the unique value of individual autonomy as something deserving independent protection by a distinct basic human right.

Holding-out for the possibility of a distinct basic right to liberty which enjoys a moral status at least on a par with other distinct basic rights seems now to demand an account of the basic right to liberty which distinguishes

14679833, 1990, 1, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/j.1467-9833.1990.tb00266.x by Lafayette College, Wiley Online Library on [09/10/2023]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License

it from other basic rights and yet, in so doing, does not reduce the right to mere liberties or a system of bilateral liberty-rights. Just this sort of account is offered below.

V

To this point, legal models of individual rights have been exploited to yield insights into the nature of moral rights. And it is, perhaps, a reasonable hypothesis that because of their precision, legal models of individual rights ought to function as paradigms for understanding the nature and implications of moral rights. But precision in legal analysis can be obfuscation in moral analysis, and although, as shall now be argued, the basic right to liberty *resembles* a kind of right recognized by legal classifications (specifically, the kind of right Hohfeld called a "legal power"), the basic right to liberty differs from such rights both in terms of its foundations and its structure.

For Hohfeld, legal powers, unlike other legal advantages (e.g., claim-rights and privileges), imply an explicit legal (as opposed to mental or physical) position such that when a person(s) who enjoys that position voluntarily acts in certain prescribed ways, there results a specifiable change in the legal relationship between that person(s) and another or others.[22] Thus because Susan owns her automobile, she enjoys an explicit legal position (ownership of tangible property) which affords her the legal power to offer the auto for sale to Joan (or others) who, in virtue of Susan's rule-governed ownership position and voluntary offer, occupies a new legal relationship with respect to Susan. In light of Susan's position and voluntary offer, Joan has the "power-right" to purchase the auto and Susan endures the (self-imposed) liability to sell to Joan.

Now while Hohfeld's theory of legal powers (or legal "power-rights") suffers from certain inadequacies,[23] still, the three elements of his analysis: discernable position, voluntary action and reciprocal consequences, can be exploited in the construction of a model of the basic right to liberty.[24] To accomplish this, it is necessary to do two things: first (in what follows immediately), to give moral sense to Hohfeld's elements, second, (in section VI, below) to argue for the new model by explaining the pre-theoretical moral advantages it affords for theories of basic rights.

Now the legal positions presupposed by legal power-rights are legal artifices which, given the differences in legal systems, vary in nature from place to place and time to time. Further, persons occupy these positions only if they fulfill certain, often arbitrary, qualifications (e.g., Susan is of the proper age, she inherited the legal title to the auto she now offers for sale, etc.) *other than* the mere fact that they fall under the jurisdiction of a particular legal system. And while these qualifications are conditions for one's being in or enjoying various derivative legal positions (being legal

14679833, 1990, 1, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/j.1467-9833.1990.tb00266.x by Lafayette College, Wiley Online Library on [09/10/2023]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License

owner, e.g.), the qualifications necessary for enjoying one position (legal owner) can differ wildly from those necessary for enjoying another (common law spouse). Thus the various positions presupposed by various legal power-rights are not occupied by (and under most legal systems not even available to) all persons, but only those who both fall under the jurisdiction of a particular legal system *and* who fulfill certain, sometimes arbitrary, qualifications. Clearly, then, if the basic right to liberty, unlike a legal power-right, is assumed to be possessed by all members of the community of basic rights holders (and not to only a select number of that group), then not only is possession of the basic right to liberty different, systemically, from possession of a legal power-right, but the relationship of the basic right to liberty to other basic rights which all persons possess may differ significantly from the relationship which exists between legal power-rights and other legal rights and positions.

The hypothesis presented here is that the relationship between the basic right to liberty, as a kind of power-right, and the moral position of membership in the community of basic rights holders is an indispensable moral relationship such that a necessary moral condition of possessing any basic right is the possession of the basic right to liberty.[25] This hypothesis is motivated, in part, by the argument of section IV, above. For if legal power-rights presuppose specific legal positions to which persons have rights of occupancy, as it were, only given the legal rules and rights which establish those positions, then legal power-rights are secondary (or even tertiary) rights and as such are not and cannot be, systemically, precise analogues to a *basic* moral right. Thus to affirm that the right to liberty is a basic right which resembles legal power-rights, but differs from such rights in important respects, implies the need for distinguishing between the nature and order of the basic right to liberty, on the one hand, and that of legal power-rights, on the other. The hypothesis offered above does this by claiming that the relationship between the basic right to liberty and that of membership in the community of basic rights holders is an indispensable and primary moral relationship and not, as in the case of legal power-rights, a derivative relationship based on morally arbitrary, though legally recognized, qualifications.

So on this view of the basic right to liberty, membership in the community of basic rights holders comprises the "discernable position" occupied by all persons who possess this right. The basic right to liberty *resembles* a legal power-right in the sense in which possession of this (the former) right entails that one has the power, via voluntary action, to enable and engender certain rights and duties in others and, in oneself.[26] But it differs from a legal power-right, first, because of the essentially arbitrary legal qualifications which the latter presupposes, second, because of the necessarily derivative (i.e., non-primary) position occupied by those holding legal power-rights within a particular system of legal rights and,

14679833, 1990, 1, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/j.1467-9833.1990.tb00266.x by Lafayette College, Wiley Online Library on [09/10/2023]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License

third, because the possession of the legal power-rights attached to one legal position has no necessary implications with respect to the possession of legal power-rights attached to other legal positions. In at least these ways, then, the basic right to liberty is disanalogous to legal power-rights. And, worth mentioning in passing, because of these differences this view of the basic right to liberty is compatible with the modern commitment that possessing the basic right to liberty does not depend upon persons being of a certain type (e.g., being a white male), or having accomplished certain feats (e.g., owning property), or other morally arbitrary considerations.

Now while it must be admitted that no consensus exists (indeed, none may be possible) as to just which conditions are both necessary and sufficient for membership in the community of basic rights holders, still, a relatively minimal capacity for voluntary action, as an indispensable element of human autonomy, can be attributed, fairly non-controversially, to persons possessing basic rights.[27] And just this minimal capacity of voluntary action (which can be understood, for now, simply in terms of the ability to perform or refrain from performing certain acts in accord with rules) serves as a basis for understanding the basic right to liberty as protecting and enhancing that aspect of individual freedom which, though certainly not "natural" in any coherent sense, *emerges* because of the moral relationship which exists among basic rights holders who can voluntarily choose to act (or not act, i.e., to forbear) in certain ways. Thus an essential part of what it means for persons to possess the basic right to liberty—to hold this morally "discernable position"—is that they can exercise their capacity for voluntary action, effectively, exercise an aspect of their autonomy, in accord with moral rules, such that their actions would have interpersonal moral impact upon the liberties to act or not act of all those (including themselves) who comprise the community of basic rights holders. Stated more completely, having this rights-protected freedom means enjoying a moral position or status which, in turn, is enjoyed by all other basic right holders and by virtue of which the basic rights and liberties of all basic rights holders are generated and respected.

In order to explicate this view, it is helpful to begin by exploiting a simple model of morally significant, freedom-generating interpersonal interaction. When two persons, Jack and Rose, exercise their capacity for voluntary action by agreeing to care for a puppy in accord with a certain schedule, both incur new rights and duties in accepting and adhering to new moral restrictions on their activities. Importantly here, Jack and Rose *gain* freedom with respect to each other because of the relationship into which they have voluntarily entered. Furthermore, assuming, for now, that only Jack and Rose are members of this relationship, the new rights and duties which Jack and Rose alone possess emerge not simply because they have exercised their rational capacity for voluntary action, but

14679833, 1990, 1, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/j.1467-9833.1990.tb00266.x by Lafayette College, Wiley Online Library on [09/10/2023]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License

because, more fundamentally, each is treated by the other as a person whose position and capacity for rational action must be morally respected. When Jack and Rose, respectively, say: "I agree to care for the puppy on days x, y, and z, since you (the other party) will care for her on days p, q, and r," the locutions have the moral power to generate new rights and duties on both Jack's part and Rose's part not simply because it comprises part of an agreement, but because Rose's and Jack's respective statuses as persons capable of entering into a relationship from which rights and duties emerge are being respected. If this were not the case, there would be no moral foundation for the new moral relationship wherein new rights and duties—the "emergent rights and duties"—enjoy the moral status as rights and duties applicable to each party. Rather as there are no moral relationships, hence no rights and duties, resulting from "agreements" between persons and machines which "speak," no emergent rights and duties can be generated between or among beings incapable of enjoying the moral positions presupposed by mutual respect.[28]

Although there are both important complications and caveats involved, if one takes the above model and expands it by substituting for Jack and Rose all persons who are putative members of the community of basic rights holders (and, of course, drops reference to the puppy in favor of a variable which can stand in place of a full variety of important goods and interests), then one has a model for understanding the basic right to liberty as a fundamental, mutually held and reciprocally respected, moral power-right enjoyed by all persons who occupy the moral position of a basic rights holder; i.e., who have basic rights. And, further, one can see how, through a system of rights-permitted action and duty-required compliance or forbearance, persons come to have new freedoms, *with respect to each other*, because and as a result of the basic rights they possess. The basic right to liberty, as a mutually held, morally primary power-right, identifies its possessors as beings who, given their capacity for voluntary action, are capable of specifiable moral relationships with all other basic rights holders. Thus, when persons possess the basic right to liberty, they enjoy a position of respect within the community of basic rights holders which, because of their capacity for voluntary action, forms the basis for the establishment and enjoyment of freedom-generating moral relationships. And these morally protected relationships form a network of basic rights which morally link all basic rights holders to each other.

It is on the above reading of a morally fundamental power-right, then, that moral sense can be given to Hohfeld's three elements of discernable position, voluntary action and reciprocal consequences. And it is only in virtue of this reading that Hohfeld's analysis of legal powers can inform the conception of the basic right to liberty as a fundamental moral power-right. In what remains, a set of reasons are offered for believing that this conception of the basic right to liberty has significant pre-theoretical

14679833, 1990, 1, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/j.1467-9833.1990.tb00266.x by Lafayette College, Wiley Online Library on [09/10/2023]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License

advantages for theories of basic rights.

VI

As analyzed above, the basic right to liberty might be resisted for, among other reasons, its neutrality with respect to two important issues. First, on this conception, mere possession of the basic right to liberty does not, in and of itself, entail rights to any specific liberty or set of liberties such as those commonly enumerated in various familiar lists of basic rights. Such lists usually include rights to free expression, association, franchise, equal treatment before the law, privacy, etc. Nor, *a fortiori*, does any particular moral ordering of various basic rights, comprising a system of basic rights, follow from the fact that all members of the community of basic rights holders possess the basic right to liberty. Second, possession of the basic right to liberty does not, in and of itself, entail any specific arrangement of material goods, advantages or powers (as might be derived, for instance, from a particular theory of distributive justice) even if possession of such goods and advantages might be shown, in many ordinary circumstances, to be indispensable means for the effective exercise of specific basic rights. On this view, then, the commitment that persons have the basic right to liberty is not identical with the commitment that persons must enjoy a specifiable wherewithal necessary for the effective exercise of some predetermined set of basic rights. Summarily, the conception of the basic right to liberty offered here might be rejected for saying too little about both exactly what it is for persons to have the basic right to liberty and what follows, practically, from their having this right. While it might be readily agreed that the moral and political significance of having any or all basic rights presupposes recognition of the fundamental and mutual moral respect whereby persons count as morally appropriate subjects of such rights, it can be argued that the only acceptable conception of the basic right to liberty is one which includes a universally specifiable content from which must follow immediate implications regarding the distribution of particular goods, advantages and powers.

But the contention here is that the neutrality of this conception of the basic right to liberty regarding both these issues constitutes its primary pre-theoretical strength, and that the demand for less neutrality prior to, or independent of, an actual theory of basic rights forces the basic right to liberty to do more than it is capable of doing. A defense of this contention will be sketched by considering each of the neutrality issues in turn.

A. Consider the issue of whether mere possession of the basic right to liberty entails rights to any specific liberty or set of liberties (or any just ordering thereof). Now it is easy to understand why one would defend, as an indispensable constraint on any acceptable conception of the basic right to liberty, the view that such a right entails certain specifiable rights of, for

14679833, 1990, 1, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/j.1467-9833.1990.tb00266.x by Lafayette College, Wiley Online Library on [09/10/2023]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License

example, free political speech. To deny any such entailment, it might be argued, would be to render the basic right to liberty vacuous—it would amount to making the right a right to nothing specific and thus a right to nothing at all. And a "right" to nothing at all is no right at all quite simply because it violates a necessary condition of something's being a right, *viz.*, that bona fide rights always carry some moral implications for other persons with respect to certain goods, advantages or powers. Thus, it will be charged, this conception of the basic right to liberty saves the right at the expense of rendering it valueless.

Yet this argument, though perhaps morally well-motivated, rests on a series of errors. First, it falls into the trap of thinking that if a right is, by its nature, not a right to anything specifiable, it must therefore be a right to nothing. But recall that power-rights, by their nature, become rights to something specific only if certain conditions are fulfilled. Prior to or independent of this, a power-right is, as it were, at idle. But a right at idle is as much a right as a machine at idle is a machine. Indeed, it might well be the case that the above argument quite simply begs the question as to nature of the basic right to liberty by assuming that any putative basic right which does not enjoy the structure of a claim-right is not, for that reason, a basic right. Obviously enough, merely pointing out that the analysis offered here is inconsistent with viewing the basic right to liberty as a claim-right does no harm to the analysis.

Second, and crucially, the argument errs in assuming that if the basic right to liberty does not entail rights to specific goods, advantages and powers, then discernable basic rights to such things are not derivable from or consistent with a commitment to the basic right to liberty. Yet it is precisely the pre-theoretical strength of this analysis of the basic right to liberty that it can serve as a basis upon which a particular theory of basic rights can derive a set of quite specific, equally held basic rights. On the view defended here, it is quite simply not the job of the basic right to liberty to assume an arbitrary content just so as to stand in the place of other discernable basic rights whose nature and structure may well be different from that of the basic right to liberty. Such rights, whatever they may be and however their content and relationship to other basic rights might be specified and determined, must be derived by appeal to a theory of basic rights and thus not "defended" by a mere insistence that the protection of certain favored liberties constitutes part of the very meaning of the basic right to liberty.

Furthermore, the neutrality of the basic right to liberty with respect to the moral ordering and detailed content of particular basic rights (such as the basic right of free expression and whether it entails, for example, the liberty-right of offensive speech) allows this conception of the basic right to liberty to enjoy a pre-theoretical openness to different theoretical attempts to show what is entailed by the ascription of specific basic rights to

14679833, 1990, 1, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/j.1467-9833.1990.tb00266.x by Lafayette College, Wiley Online Library on [09/10/2023]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License

persons. This point becomes clear by considering, albeit quickly, the enduring controversy over whether utilitarian considerations can ever function to determine which basic rights persons have and what the implications and limits of these basic rights are.

In recent years, it has become the trademark of those defending basic rights to argue that these rights serve indispensable moral purposes which are ultimately incompatible with, and ought never be sacrificed to utilitarian ends. Thus when Dworkin argues that the point of respecting basic rights is lost if such rights can be overridden by utilitarian gains, he means to emphasize that the moral function of basic rights hinges on respect for an individual person's dignity which cannot be purchased with utilitarian currency.[29] Robert Nozick's position, though developed in slightly more detail and towards significantly different political ends, affirms the same commitment. Here the issue is cast in terms of whether a "utilitarianism of rights" which strives to minimize (but does not prohibit) basic rights violations is morally preferable to a system of individual rights working as inviolable "side-constraints" on achieving any desirable, but collective end or goal.[30] Again, any utilitarian treatment of basic rights is rejected on grounds that it permits unjustifiable sacrifices of an individual's rights "for the sake of others."[31]

On both views, violations of an individual's basic rights for the collective good—even a good as desirable as respect for just laws—are morally unjustifiable, and any acceptable view of basic rights must capture this fact. Undoubtedly, increases in the aggregate welfare are desirable, and the basic rights of individuals may become more valuable as a result of such increases. But unwilling sacrifices of any basic rights can never be morally required to promote the collective good. If sacrifices of basic rights occur, but occur willfully, they might count as acts of moral supererogation, but they cannot be required or coerced if one's moral individuality is to be preserved and protected. Hence if the moral "separateness" of persons is to be properly respected, all basic rights must function as non-utilitarian, *deontic* constraints on even those activities and policies producing the aggregate good.

Utilitarians respond that while positions of this sort are intuitively compelling, they are rife with implications which no morally sensitive person can accept. These implications arise when it is asked, as T. M. Scanlon does, whether basic rights do not, in themselves, require justification in terms of "the human interests their recognition promotes and protects...."[32] If basic rights cannot be violated or "set aside" for substantial utilitarian gains, and if one appeals to a rather typical list of these rights including, for example, the right to associate freely with others, then the position of those maintaining that basic rights are deontic constraints can be shown to be dogmatic at best, morally foolish at worst.

For example, is it to be claimed that the basic right to associate freely is

14679833, 1990, 1, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/j.1467-9833.1990.tb00266.x by Lafayette College, Wiley Online Library on [09/10/2023]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License

always sufficient, morally, to override even extraordinary gains for the social good? If a deadly, fast-spreading virus could be halted by the forced cancellation of a town meeting, is the cancellation wrong on grounds of violated basic rights? Are all basic rights, *qua* basic rights, morally equal or are some, as exercised in some contexts, of greater or lesser moral worth than others? Must not any coherent theory of basic rights rank such rights and the exercises thereof either amongst themselves or against other moral goods? And must not such a ranking invoke, either tacitly or overtly, utilitarian criteria?

Now it is a virtue of the analysis of the basic right to liberty as developed here that the dispute recounted above can be recast in a way such that both utilitarian and non-utilitarian views of basic rights can be accommodated (though not necessarily, depending on the details of the respective views, reconciled). For the insight of the position which sees basic rights as deontic constraints can be preserved in affirming its truth with respect to the basic right to liberty, as a fundamental moral power-right, but not, necessarily, of all the various basic rights and all the exercises thereof. Thus any treatment of a person which entails endangering or destroying his or her capacity for voluntary action or moral position of mutual respect in the community of basic rights holders might well constitute an unjustifiable violation of or infringement upon that person's basic right to liberty. But it would not follow from this that utilitarian considerations are to be systematically banned when questions arise as to whether *some* exercises of putative basic rights (other than the basic right to liberty) are, in some circumstances, of a lower moral rank than others. Indeed, it might well occur that on some occasions respecting the basic right to liberty will imply the setting-aside of the exercise of other basic rights.

Admittedly, what utilitarian views may never be able to justify is the unconditional protection of the basic right to liberty, and the commitment to the basic right to liberty as developed here might well accommodate utilitarianism only insofar as the basic right to liberty is unconditionally protected; however, it is not clearly false that utilitarian theories of basic rights are utterly incapable of approaching this demand.[33] The point remains, however, that the question of whether an appeal to utilitarian reasons for adjudicating disputes regarding which basic rights persons have in various circumstances and how, exactly, these basic rights may be exercised, should, in the absence of a developed theory of basic rights, remain open.

Arguments may show that under most all circumstances any restriction or setting-aside of certain basic rights, e.g., the basic right of free speech, would constitute an assault on the basic right to liberty and, as such, would be a morally unjustifiable assault on the fundamental moral standing of basic rights holders. But this is not incompatible with the view

14679833, 1990, 1, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/j.1467-9833.1990.tb00266.x by Lafayette College, Wiley Online Library on [09/10/2023]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License

defended here. Insofar as such arguments succeed, they would count as powerful reasons for believing that some basic rights in addition to the basic right to liberty are morally inviolable. However, on this account such arguments cannot be stopped, *a priori*, by dogmatic appeals to the idea that all basic rights are, like the basic right to liberty, inviolable no matter what the consequences.

B. A long-standing tradition on basic rights affirms the distinction between the possession of a basic right and the ability—understood in terms of the social and economic wherewithal of persons—to exercise such a right. Yet persons sometimes claim that the poor and oppressed have *no* basic rights because they lack the socially and economically determined power to exercise such rights. But, of course, if socially and economically disadvantaged persons do not, quite literally, have basic rights, it follows that they cannot appeal to such rights as the basis of complaints against those policies and regimes which are the sources of the injustices visited upon them. Thus such claims seem best treated as hyperbole, for to deny that persons have basic rights just because they do not have the wherewithal to exercise them removes an important moral ground on which to object to the plight of such persons, namely that their basic rights are being infringed upon or violated.

As noted above, the analysis of the basic right to liberty offered here is neutral with respect to the specific arrangement of material goods, advantages or powers which might be required by a particular, even correct, theory of distributive justice. In this way, the analysis of the basic right to liberty respects the above argument for keeping distinct the issue of whether persons have basic rights from whether they have the wherewithal to exercise them.

But there is a danger at this point, because to insist on maintaining this distinction without saying more can amount to the downplaying or even ignoring of two critical and related points. First, the basic rights, including the basic right to liberty, of the socially and economically disadvantaged are, in terms of the received value of their exercise by these persons, of far less worth to the disadvantaged than is the value of such rights to persons better situated socially and economically. Thus a poor woman has the right of free expression even if she cannot afford to make her views known in newspapers or on television. But it does not follow that this right, when exercised by a poor woman, is as valuable, in terms of the good it does her and others similarly situated, as it is when exercised by multi-millionaire owners of television stations and newspapers.[34] Second, there is a strong contingent connection in our culture and society between the lack of willingness on the part of the disadvantaged to identify and exercise their basic rights (given the diminished likelihood of such exercises' having any value to them) and the lessened overall regard actually afforded to such persons (by themselves and by others better situated) as members of the

14679833, 1990, 1, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/j.1467-9833.1990.tb00266.x by Lafayette College, Wiley Online Library on [09/10/2023]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License

moral community of basic rights holders. As irrational and morally unfortunate as it may be, the economically disadvantaged are typically regarded and treated as if they were the morally undeserving. And no manner of insisting that the disadvantaged have the same basic rights as do others, or of informing them that this is the case, suffices to alter the disaffection of the disadvantaged from the exercise of their rights and from society understood as a community of basic rights holders. To lack the wherewithal to exercise basic rights can, and often does, render such rights less valuable and contributes to a climate of diminished respect for those less advantaged, and this point should be of considerable consequence for any general theory of basic rights.

VII

The role and value of the basic right to liberty, as with other basic rights, should not be assumed to be singular and negative; that is, they should not be limited or reduced to the role and value of such rights when they function as the moral foundation for complaints *against* immoral or unjust treatment. The basic right to liberty, as a fundamental moral power-right, demands respect for persons as basic rights holders and, as such, can function as the foundation for a full measure of claims regarding the actual treatment of persons in differing class positions, in different societies and at different times. And in affirming this commitment, the role and value of basic rights, including the basic right to liberty, cannot be understood independent of the actual social and economic context in which their exercise—or non-exercise—effects the dignity and well-being of basic rights holders. To ignore utterly these considerations in the construction of a general theory of basic rights invites the charge that such a theory exhibits a moral disregard for the real life meaning of basic rights.

So while the basic right to liberty is, as it should be, neutral with regard to issues of both what specific basic rights persons have and how these rights are to be morally ranked, as well as issues of distributive justice; no general theory of basic rights which incorporates the basic right to liberty as understood here can afford to neglect the effects of such concerns on the value and meaning of basic rights to the persons who, though they all possess basic rights, may not be able to appreciate or exercise them. Pre-theoretical neutrality should not function as a barrier to theoretical partiality. It may well turn-out, then, that any theory of basic rights which ignores the issue of the total worth of such rights to persons whose dignity and well-being depends on their free exercise is a theory which has defended and saved bad rights while ignoring and losing good ones.

14679833, 1990, 1, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/j.1467-9833.1990.tb00266.x by Lafayette College, Wiley Online Library on [09/10/2023]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License

Notes

1. Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), p. 267.

2. Ibid., see Chapter 7.

3. Ibid., p. 269.

4. This follows, *a fortiori*, from Dworkin's view that rights function as "trumps" (*Taking Rights Seriously*, pp. 91-2) even against powerful utilitarian justifications for various social policies. See also Ronald Dworkin, "Rights as Trumps," in Jeremy Waldron, ed., *Theories of Rights* (Oxford: Oxford University Press, 1984), pp. 153-67.

5. It is unnecessary to defend this position in its strongest form; i.e., as holding the view that basic rights, *qua* moral rights, always correlate with moral duties on the part of other particular persons. For even those who reject the strong correlativity thesis (see Joel Feinberg, "The Nature and Value of Rights," *The Journal of Value Inquiry*, 4 (1970), pp. 243-57, and Richard B. Brandt, "The Concept of a Moral Right," *The Journal of Philosophy*, 80 (1983), pp. 29-45 hold that the function of rights discourse is undercut when a person's claiming or asserting a right does not entail a reason, justification or (in Brandt's case) motivation for others to act in certain ways (or to forbear from certain acts). Relevant to the question of the correlativity of basic rights and duties is George E. Panichas, "Hobbes, Prudence and Basic Rights," *Nous* 22, 4 (December, 1988).

6. See Philip Montague, "Two Concepts of Rights," *Philosophy and Public Affairs* 9 (1980), pp. 372-384.

7. Of course, this is not to say that it would be wrong for the woman to acquiesce—the point is that she has no *duty* to do so correlative with the mugger's alleged right. See Jeremy Waldron, "A Right to Do Wrong," *Ethics* 92 (1981), pp. 21-39.

8. For an account of a model on which basic rights correlate with duties, see George E. Panichas, "The Structure of Basic Human Rights," *Law and Philosophy* 4 (1985), pp. 343-375.

9. Yet this is an unfair charge historically, for as Dworkin correctly notes (*Taking Rights Seriously*, p. 267), Bentham's view of liberty is such that any legal restrictions on individuals interfere with their liberty. Thus *if* Bentham were to allow for a basic right to liberty, it would seem to be a basic right to liberty as license. And as argued elsewhere (George E. Panichas, "Hobbes, Prudence and Basic Rights," *op. cit.*) Hobbes affirms a basic right of this sort.

10. H.L.A. Hart, "Bentham on Legal Rights," in David Lyons, ed., *Rights* (Belmont, CA: Wadsworth Publishing Co., 1979), p. 129.

11. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions* (New Haven: Yale University Press, 1919), pp. 38-50.

12. The *locus classicus* here is Mill's *On Liberty*. For an important recent discussion of Mill's position, see Fred R. Berger, *Happiness, Justice and Freedom, The Moral and Political Philosophy of John Stuart Mill* (Berkeley: University of California Press,

14679833, 1990, 1, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/j.1467-9833.1990.tb00266.x by Lafayette College, Wiley Online Library on [09/10/2023]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License

1984), especially Chapter 5.

13. Relevant to the idea of basic rights as mutually held rights is Hillel Steiner, "The Structure of a Set of Compossible Rights," *The Journal of Philosophy* 74 (1977), 767-75.

14. See Judith Jarvis Thomson's discussion of the distinction between infringing a right and violating a right in "Some Ruminations on Rights," in Judith Thomson, *Rights, Restitution and Risk* (Cambridge: Harvard University Press, 1986), pp. 49-65.

15. H.L.A. Hart, "Are There Any Natural Rights?" in Lyons, *op.* cit., p. 23.

16. Dworkin allows that there is a general right to liberty in the "weak" sense of "right" (*Taking Rights Seriously*, p. 268-9), a sense which he believes to be of little political value since it can be morally overwhelmed by utilitarian considerations and is thus not a fundamental or basic right at all. But insofar as the qualified basic right to liberty is viewed in the strong sense, I believe that Dworkin would reject even this right as a basic right to liberty.

17. Here and in the remarks which follow, I am indebted to Hart's critical discussion of Bentham's analysis of liberty-rights. (H.L.A. Hart, "Bentham on Legal Rights")

18. Hart, "Bentham on Legal Rights," p. 132 *et passim.*

19. This is not to say that the basic right to liberty has not been infringed upon, endangered, or made less valuable, for the conditions necessary for a persons having an effective and valuable basic right to liberty can be possession of just those powers protected by other basic rights which, once violated, undermine the value of the basic right to liberty. This issue will be considered, albeit briefly, below (section VI).

20. In *Making Sense of Human Rights* (Berkeley and Los Angeles: University of California Press, 1987), James W. Nickel defines "will" theories of rights as those which " . . . assert that the function of rights is to promote autonomy by conferring and protecting authority, discretion, or control in some area of life. In this kind of theory, the alleged role of rights is to guarantee a specified scope for people's wills, their decision-making capacities" (p. 19). Nickel offers an especially useful overview of various types of rights and theories (pp. 19-35); however, his emphasis on the "function" of rights, especially with respect to will theories, glosses over the traditionally non-consequentialist justification of rights in such theories. As a result, Nickel's argument (p. 22) that "interest" and will theories are compatible—in terms of their sharing certain common goals—side-steps the issue of whether the rights derivable from the respective theories will be, in fact, compatible in the sense of having equivalent moral power *vis-a-vis* other moral goals and goods.

21. Historically, it has been argued that the basic right to liberty as a basic right to autonomy is inalienable. See Arthur Kuflick, "The Inalienability of Autonomy," *Philosophy and Public Affairs* 13 (1984), pp. 271-298.

22. Hohfeld, pp. 50-1.

23. See Carl Wellman, *A Theory of Rights* (Totowa, New Jersey: Roman & Allenheld, Publishers), pp. 42-52.

24. Hohfeld, pp. 50-1.

14679833, 1990, 1, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/j.1467-9833.1990.tb00266.x by Lafayette College, Wiley Online Library on [09/10/2023]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License

25. This hypothesis differs from Hart's thesis " . . . that if there are any moral rights at all, it follows that there is at least one natural right, the equal right of all men to be free" ("Are There Any Natural Rights," p. 14) in at least two respects. First, my hypothesis makes no claim that the basic right to liberty is, in any ordinary sense, a natural right. Second, and more important, my hypothesis does *not* hold that the basic right to liberty is a presupposition of there being *any* moral rights, but rather is a presupposition only of those moral rights which are basic rights. The issues of whether all moral rights are, in any morally significant way, linked or even whether they have the same moral basis remain open, and the hypothesis offered here is constructed with this in mind.

26. However, legal power-rights and the basic right to liberty, *qua* power-right, are similar in that the exercise of both entails complex rule-governed consequences (in the former legal, in the latter moral) which are more than just simple legal or moral effects. See Wellman's discussion of this point (*A Theory of Rights*, p. 45) as it pertains to legal power-rights.

27. For an argument for a more controversial foundation of basic rights consistent with, but not limited to a minimal capacity of voluntary action, see Loren Lomasky, "Personal Projects as the Foundation for Basic Rights," in Ellen Frankel Paul, Fred D. Miller, Jr., and Jeffrey Paul, eds., *Human Rights*, (Oxford: Basil Blackwell Publisher, Ltd., 1984) pp. 34-55.

28. This point is intended to be consistent with the interpretation of Kant endorsed by Rawls (John Rawls, *A Theory of Justice* [Cambridge, MA: Harvard University Press, 1971] p. 256), but raises complicated issues concerning the criteria necessary for the ascription of basic rights to persons which are beyond the scope of this paper.

29. Dworkin, *Taking Rights Seriously*, p. 193.

30. Robert Nozick, *Anarchy, State and Utopia*, (New York: Basic Books, 1974), pp. 28-9.

31. Ibid., p. 33.

32. T. M. Scanlon, "Rights, Goals, and Fairness," in Stuart Hampshire, ed., *Public and Private Morality* (Cambridge: Cambridge University Press, 1978), p. 93.

33. See John Gray, "Indirect Utility and Fundamental Rights," in Ellen Frankel Paul, *et al.*, pp. 73-91.

34. Relevant here is Rawls' distinction between basic liberties and the worth of these liberties (John Rawls, "The Basic Liberties and Their Priority," in *Liberty, Equality, and Law, Selected Tanner Lectures on Moral Philosophy* (Salt Lake City: University of Utah Press, 1987), pp. 39-46.

14679833, 1990, 1, Downloaded from https://onlinelibrary.wiley.com/doi/10.1111/j.1467-9833.1990.tb00266.x by Lafayette College, Wiley Online Library on [09/10/2023]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License