

Words

Rights

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'A woman has the right to choose', insist the advocates of abortion on demand. 'No', their opponents protest, 'the fetus has a right to life'. We hear of the right to life, the right to die, the right to die with dignity, the right to free medical treatment, the right to refuse treatment, the right to confidentiality, patients' rights, doctors' rights, women's rights, gay rights, even animal rights. Rights are the coin in which moral debates are typically transacted, nowadays, in medicine as elsewhere. But what exactly *are* rights?

Let us see how the word 'right' is used. The concept of a right is intimately connected with two other concepts, that of *justice* and that of a *duty* or *obligation*. A person is treated justly when his or her rights are observed and respected, unjustly when these rights are violated. That is all that is normally meant by 'justice'. This might seem to leave unaccounted for the connection frequently drawn between justice and equality; but it does not. Justice requires equality of treatment precisely to the extent that there is either a right to equal treatment or that people's rights are themselves equal.

How, then, does the concept of a right relate to that of an obligation? Here matters are more complicated, since in common parlance the term 'right' appears to cover two rather different things: what the eighteenth century English philosopher Jeremy Bentham distinguished as 'rights resulting from the absence of obligation' and 'rights correlative to obligation' (1). The American lawyer, Wesley Hohfeld, who makes the same distinction, calls these 'liberties' and 'claim-rights' respectively (2); and this is the terminology I shall use from now on. One has a liberty to do X or not to do Y, if one is under no obligation not to do X or to do Y. Thus, the so-called right to commit suicide is a liberty; it consists in the fact, or supposed fact, that one is under no obligation to refrain from committing suicide. A claim-right, on the other hand, as its name would suggest, involves a claim upon what Bentham calls the 'services' of others—it places on other people an obligation to act in certain ways. A patient's right to confidentiality is a clear case of a claim-right, since it places upon

the doctor the correlative obligation not to disclose what was told him during the consultation, without the patient's permission. Likewise, if a patient has the right to know the truth about his or her condition, then the doctor in charge of the case has a correlative obligation to tell the patient, if asked, to ensure that someone does.

Some writers, of whom Hohfeld was one, think that it is a mistake to lump liberties and claim-rights together, as though they were two species of a common genus, and would maintain that liberties are not genuine rights at all. Is this really a mistake? Well, it probably is a mistake to use the term 'right' for what we might call a *bare* liberty, a liberty in the exercise of which others are under no obligation to refrain from interfering. The seventeenth century philosopher Thomas Hobbes maintained that, in the state of nature, *ie* in the absence of organised society or government, everyone has a right to do exactly as he or she pleases. Here, 'right' obviously means bare liberty in our sense. One has a liberty to do anything one wishes since, in the total absence of laws or stable customs, a person has no obligations at all, and thus no obligation to refrain from any course of action. Of course, Hobbes is making a moral, not merely a legal point, here; and it is highly debatable whether the fact that there were no legal obligations to act or forbear would mean that there were no moral ones either. But that doubt may be waived for the moment. The question is whether this is a correct or useful way to use the term 'right': Do I have a right to do X, if others are under no obligation whatever to refrain from hindering me, in doing X? I suggest not. People have a genuine right to commit suicide only if this is a *vested* liberty, in Bentham's sense, if it is something which others have an obligation to let a person do. In using the term 'right', in this context, one is implying not merely that a person is at liberty, for example, to swallow the entire contents of a bottle of sleeping pills, but also that doctors are under an obligation not then to pump out the person's stomach, at any rate where there is no reason to think that the balance of the person's mind is disturbed, and the person clearly has a sincere wish to die. Since that is *not* the state of the law in England there is no legal right to suicide, even though suicide is no longer an offence; but one could hold as a moral view that people have a moral right to commit suicide.

Thus, we can agree with Hohfeld and others that a *bare* liberty, unsurrounded by any perimeter of protecting obligations, is not a genuine right, without denying that status to those vested liberties we are most inclined, in practice, to describe as rights. Someone remarked on the radio recently that 'in this country a woman has a right to have a child by anyone she chooses'. Strictly speaking, this is false, on the account just given. What is true, however, and what the speaker presumably meant, was that she has a right, *ie*, a vested liberty, to have a child by anyone whose cooperation she is able to enlist!

We must now focus on the crucial distinction between moral rights and legal rights. Someone wishing to contrast American with British medicine might say: 'In America there is no right to free medical care'. But an American politician, making a speech in favour of 'socialised medicine', might insist: 'The people of America have a *right* to free medical care'. These two assertions do not contradict each other. The first speaker is denying that Americans have a *legal* right to free medical care, the second is asserting that they do have a *moral* right to it. Notice that a parallel ambiguity infects the other terms with which 'right' is definitionally connected. 'Obligation' and 'duty' are ambiguous as between moral obligation or moral duty and legal obligation or legal duty. And of course we can speak of 'justice', also, in either a legal or a moral sense.

A complicating factor, here, is that we would often judge that a person had a moral right to something just because he or she had a legal right to it. This would be parallel to judging that something was immoral because the law prohibited it, and because there is a general moral obligation to obey the law. If one considers the law to have a certain moral *authority*, then one is likely to think that the effect of legislation is often to confer on people *moral* rights that they would not otherwise have possessed. Nevertheless, it is perfectly possible, even in a democracy, to think that, in a particular case, a person does not have a moral right to something to which he or she has a legal right. Thus in many circumstances a woman may have a legal right to an abortion. But a great many people would deny that this is something to which she has a moral right.

Some philosophers have thought that legal rights are the only rights that there are, so that in the 'state of nature' people would have no rights at all, though they would, as we have seen, have bare liberties in profusion. Such was the opinion of Jeremy Bentham, who regarded the talk, so fashionable in his day, of 'natural rights' (as in the writings of John Locke) or the *Rights of Man* (the title of a book by the American pamphleteer Tom Paine) as so much empty rhetoric. 'Bawling on Paper' was his description of the American Declaration of Independence, with its talk of 'inalienable rights' to 'life, liberty and the pursuit of happiness'. 'Natural

rights', declared Bentham, 'is simple nonsense: natural and imprescriptible [*ie* inalienable] rights; rhetorical nonsense—nonsense on stilts' (3).

This wholesale repudiation of extra-legal rights has to be seen in the overall context of Bentham's *utilitarian* moral theory. Any philosophy which, like Bentham's utilitarianism, sees morality as being wholly directed towards collectively conceived, maximising goals will be hard put to it to find a place for moral as opposed to legal rights. And the 'greatest happiness of the greatest number' is just such a goal. A conception of morality which makes that, or something akin to it, the touchstone of right action is a conception according to which one could do anything to anyone, provided only that it conduced to some increase, however, tiny, in overall happiness or welfare. To credit someone with a right, on the other hand, is to place a moral check on what, in the pursuit of collective goals—whether it be maximising total happiness, or winning a war, say—one could be morally entitled to do to that person, or on of what to deprive him. This does not mean that a moral right, if it exists, has to be *absolute*, in the sense that no one is ever entitled to violate or override it, no matter how much good would come of so doing, or how much harm would thereby be avoided. No, it just means that a right, if it is to be a right, has to be something that cannot lightly or automatically be overridden, for the sake of the collective welfare, say; the reasons for doing so would have to be morally substantial (4).

None of this, of course, prevents the utilitarian from holding, as Bentham himself held, that legal rights are, morally speaking, a thoroughly worthwhile, or even necessary institution. Such rights serve to protect an individual against all manner of ills, they engender stable expectations, and they foster a general sense of security. All these things contribute to the happiness of the individual citizen, and are therefore good from a utilitarian standpoint. But in saying this, one falls far short of ascribing to these legal rights any independent moral authority; independent, that is, of the greatest happiness principle itself. And from this it follows that the mere fact that someone has a legal right to something can never, by a Benthamite utilitarian, be allowed to outweigh the demands of collective welfare.

Are there, then, such things as natural rights, moral rights that a person possesses regardless of what law or custom may happen to dictate? This question cannot be answered without taking up a substantive moral position. What one can say, however, is this. Anybody, whether he recognises it or not, is implicitly committed to the existence of extra-legal moral rights, if he thinks:

- a) that there are moral duties or obligations, the existence of which is independent of law or custom, and

- b) that some of these duties are ones from which specific individuals stand to benefit.

For then these potential beneficiaries have 'rights correlative to obligation'. If, for example, one thinks that a mother, even in the hypothetical state of nature, has a moral duty to protect and care for her children, then one would have to admit that her children had, reciprocally, a right, a claim-right, to their mother's care and protection. Bentham *may* be correct in maintaining that 'rights without law are nonsense'; but there is nothing in the dictionary to say so.

References

- (1) Bentham J. *An introduction to the principles of moral and legislation*. London: Athlone Press, 1970.
- (2) Hohfeld W. *Fundamental Legal Conceptions*. London and New Haven: Yale University Press, 1919; 3rd reprint 1964.
- (3) Bentham J. Anarchical Fallacies. In: Bowring J, ed. *The Collected Papers of Jeremy Bentham*. Edinburgh: William Tait, 1843; Volume 2, as reprinted in Melden A I, ed. *Human Rights*. Belmont, CA: Wadsworth Press, 1970; 32.
- (4) Dworkin R. *Taking Rights Seriously*. Cambridge, Mass., Harvard University Press, 1977: 96-97.

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