

OXFORD

A painting of a small sailboat with a person on a river. The sailboat is in the foreground, moving towards the right. The person is sitting in the boat, looking back. The river is calm, and the background shows a shoreline with trees and buildings. The overall style is impressionistic.

ON HUMAN RIGHTS

James Griffin

A person's right to liberty can be infringed only by another agent. If our options are narrowed by acts of nature or by large-scale economic or social events not under human control, no one's liberty is infringed. A young male Inuit living in an igloo in the Arctic a few centuries ago had little choice of ways of life; his and his family's survival depended upon his devoting most of his waking hours to hunting for food. His way of life was determined for him by an extraordinarily exigent nature. But nature cannot be accused of violating his liberty.

Then consider a case at the other extreme. When the Taliban took power, they left Afghan women still able to choose autonomously among available options and freely to pursue the option chosen. The Taliban had simply grossly narrowed the choice, leaving only the options that accorded with their own conception of an Islamic woman's life, and leaving many Afghan women with no option that they themselves considered choice-worthy. The Taliban were, of course, gross violators of liberty; their deliberate reduction of options was coercion.

The same form of coercion can happen on a small scale too. Parents may, for the salvation of their children's souls, settle far from all corrupting society, without modern technology and with no books but the Bible. Here their children's cramped circumstances are deliberately created by their parents. Here, too, the children can still autonomously choose and freely pursue one of the remaining ways of life. It is just that they can not realistically choose to be a research scientist or a philosopher or a painter or a poet or a composer; the resources, tradition, training, and stimulus that one would need would be missing. And if one's own desired choice lies outside what one's parents have left available, one's liberty has clearly been violated.

Most commonly, the restrictions we face are a mix: partly nature-made, partly human-made. One's long-established culture might itself limit one's options, without intentional action on the part of anyone now living. Children might find themselves born into an isolated, technology-free, Bible-dominated society merely because their distant ancestors chose to live that way. Still, a culture typically includes prohibitions and requirements that, if not imposed by the present generation, could still be eased or abolished by it. If a child in the society managed to come up with an informed desire to rejoin the larger society and become, say, a philosopher, and the parents, or the elders of the community, prevented it, that too would be a violation of the child's liberty.

What the *pursuit* of a conception of a worthwhile life largely requires, and what a society might sometimes have some obligation to help provide, are the all-purpose means to pursue any plausible conception of a worthwhile life: that is, education, basic health, minimum material provision, help to overcome lack of key capacities, a fairly rich array of options, and so on. To what level of all-purpose means? To the level needed to live as a normative agent.

Compare the following two forms of impoverishment of options. Suppose all professional football teams went bankrupt, denying to many a major form of enjoyment and to some especially fanatical fans the source of their major interest in life and their primary sense of belonging. In contrast, suppose all firms involved in the circulation of information and ideas went bankrupt. Society, I should say, would have a duty, correlative to human rights, to remedy the second bankruptcy but not the first. That is not to say that there are not other sorts of reasons why society might think it ought also to remedy the first. But without the circulation of information and ideas, one cannot either properly form a conception of a worthwhile life, or effectively pursue it, or satisfactorily live it.

Society does not have an obligation even to ensure equal opportunity in the realization of one's conception. First of all, the job of equalizing opportunity is far beyond its capacity. Every conception of a worthwhile life has its own degree of difficulty of realization. One might have one's heart set on a career as a philosopher, but there may not be many jobs available—many fewer, for example, than in law. It would be within society's power to create more jobs for philosophers, even as many as in law proportionate to aspirants, but the aim of making every conception of a worthwhile life that might crop up equally realizable is as impossible for governments to bring off as it would be economically damaging for them to try to do so. Besides, there are conceptions—say, achieving a mountaineering feat that only a half-dozen persons in the world are physically capable of—in which the low chance of success may lie in an aspirant's physique, which society has scant power to change.

Not only can society not bring about such equality of opportunity, there is also no human right to it. What human rights guarantee is that one be able to live the life of a normative agent. In a society with an ample range of options, if one cannot realize one conception, there are others: other lives that one can also value and that can become fully worthwhile lives for one to live. Some good things in life—for example, enjoyment—characteristically

have many sources; enjoyment can be found in many different directions. And generally one can find fulfilment in various sorts of lives. For the many of whom that is true, there is equality of opportunity on a more general level: not equal opportunity to achieve any particular conception of a worthwhile life that one might choose, but equal opportunity to make a good life for oneself. So long as the various ground floors guaranteed by human rights are in place, the obstacles to making a good life are likely to be deep inside oneself, beyond the reach of others.

In general, we must simply accept, and build our lives from, the range of options with which fortune has endowed us. Society cannot do much to alter it, and the life of a normative agent does not require more than this.

But of course there are exceptions. I have been emphasizing what society cannot do. But it can and should sometimes enlarge the range of options, even in a society with a large choice already. The elders of the isolated Christian fundamentalist community that I imagined above can allow the child who wants to become a philosopher to move to the larger society. Otherwise, they would violate the child's liberty. Even in our own much larger and more varied society, we have to be sensitive to similar violations of liberty: that is, restrictions imposed by our culture so familiar to us that we scarcely even notice them, but well within society's capacity to remove. Our culture is not any of our doing, nor all of our doing; it has evolved over millennia. But if there are same-sex couples who want to form some sort of union and raise children—who want, that is, to have the rich, stable, recognized, respected relations that are at the heart of most people's conceptions of a worthwhile life—and, because of our ethical traditions, there are no social institutions to allow it, then we should create one or other form of them. This too, I believe, is an issue of liberty. No matter how many options there are already, this one, because of its centrality to characteristic human conceptions of a worthwhile life, must be added.

But if, when jobs for philosophers run out, we may ask the aspiring philosopher to choose an alternative career, why may we not ask the same-sex couple to live without legal recognition of their union? Indeed, why can we not, as some today would like to, return to the social conditions of a century ago: criminalization of sexual relations between members of the same sex, prohibition of their begetting children, and so on? Homosexuals could still find celibate alternatives that would allow them to have fulfilled lives and to preserve their normative agency.

To my mind, our answer should be this. What is at stake for same-sex couples are several of the most important components of a good life available

to human beings. Most same-sex couples could not have rich and deep personal relations in the conditions of a hundred years ago. Their affection would be stifled. They would not have, or raise, children, which for most of us, homosexual or not, is our best chance of accomplishing something important with our lives. Unless one is exceptionally talented, unless one is a Rembrandt or a Mozart, or at least a David Hockney or a Cole Porter, raising one's children well is probably the only great accomplishment available to us. Some persons could no doubt rise gloriously above the restrictions of a hundred years ago; some persons do not want deep personal relations or to raise children. But the great majority of us do, and the restrictions of a hundred years ago would deny same-sex couples some of the greatest, most widely distributed, most deeply embedded—sometimes even genetically embedded—least easily substituted ends of human life that there are. And although these claims about the conditions a hundred years ago apply less strongly to same-sex couples today, they apply strongly enough to support the same conclusions.

The case of my parents' moving me to a simple, Bible-dominated society to prevent me from becoming a philosopher is in crucial ways different from society's telling an aspiring philosopher, in the absence of jobs for philosophers, to choose a different career. If liberty were to demand that a job as a philosopher be created for the aspiring philosopher, it would demand that the same be done for everyone else in relevantly similar conditions. This would turn into an enormous and costly social programme; the opportunity costs for society would be heavy. My parents intended to thwart my philosophical ambitions, though there were jobs for philosophers available in the larger society. But autonomy requires that an individual normative agent be the final arbiter of his or her conception of a worthwhile life. When we think of agency, we have a tendency to think primarily of autonomy (using the term in my way) and to underestimate the importance of liberty—that is, of being able, with normal chances of success, to pursue one's conception of a worthwhile life. Some restrictions on the pursuit are necessary: for example, to ensure equal liberty for all, to accommodate demands of justice, to prevent wasteful, inefficient use of public funds. But restrictions beyond those, and perhaps one or two others, are unjustified. That is why my parents violate my liberty in moving me to the Bible-dominated community, but why society does not violate the liberty of the aspiring philosopher when jobs in philosophy run out and the aspirant must choose another career.

Liberty has a wide application, but one must keep it within sensible bounds.² For example, parents rightly take it as their duty to acquaint their children with the world, to give them sound values. Much of the education they give their children is beyond controversy: the seven-times table, looking both ways before crossing a road. The truth or usefulness of those lessons cannot be gainsaid. But when it comes to passing on a religion or a set of values or good taste, that is not always so. Children are then at risk of indoctrination. Indeed, it sometimes seems that parents cannot help but infringe their child's liberty to some degree; their job, after all, is to encourage certain inclinations and suppress others. On my account, of course, very young children do not yet have any human rights to be infringed. But a parent's influence can be long-term, and the values they inculcate may in time close off certain kinds of life for their mature child.

When that happens, have the parents infringed their child's liberty? If what the parents have done amounts to indoctrination or brain-washing, then yes. If, on the contrary, the parents were only trying to equip the child properly for life and the closing off of options was an unintended consequence, then it is harder to say. Respect for one's children's liberty requires that parents also teach them open-mindedness, high intellectual standards, and proper scepticism. It is not that the parent's intention is decisive; a well-intentioned parent might still have been heavy-handed and should have known better. What is decisive, I should say, is that at a certain point moral criticism of parental education becomes inappropriate. Such education generally aims at the good of the child; if the child's liberty is at stake, it is not all that is at stake. We should have, at the least, to weigh the gains from the education against the possible losses of liberty. And children's education is a complex and poorly understood process. Moral criticism, even mild moral criticism, is appropriate only if agents have a greater degree of control over outcomes than is present here. Contrast the case of education with this case: when a government justifiably detains suspected terrorists without trial, it does not *violate* the liberty of the innocent persons unintentionally detained among them, though it does clearly *infringe* it. That is the distinction that these two words have come to mark. But cases of responsible education of children are different from these cases of detention. A government knows perfectly well how to avoid infringing people's liberty: charge and try suspects and release whomever it cannot prove to be guilty. But beyond a certain point parents do not know how to educate their children without risk of permanently closing off options for them. Parents do not now, and may never, understand the

processes of education well enough for that. If the term 'infringe' implies any moral disapproval, it is then inappropriate. The same applies to criticism, blame, punishment, psychotherapy, and so on; if well done, they do not infringe liberty.

9.4 NEGATIVE AND POSITIVE SIDES OF LIBERTY

Liberty is often said to be a negative right, and thus easily complied with. One can respect the liberty of the whole of humanity at a stroke, it has been said, simply by minding one's own business.³ But the picture is not so simple when one recalls paucity of options. Then liberty may also include positive duties.

Does liberty really have a positive side?⁴ I am sure it does, for the following reasons. Suppose my family had blocked my wish to become a philosopher by the crudest means imaginable: they locked me in my room at the first sign of my wish. This is what I called 'constraint'. But suppose that my parents were less crass and, with the same end in mind, moved the family when I was young away from all society, leaving me only the Bible to read. This is what I called 'paucity of options'. Both the constraint and the deliberate impoverishment of options would have been merely different ways of achieving the same end: stopping me from becoming a philosopher. My parents, I should say, should no more have deliberately impoverished my options than they should have locked me in my room. Now suppose that I grew up in a similarly impoverished setting but that it was not shaped by any recent generation. My parents, say, were content to live in it because its restrictions happened to fit the simple pious life they sought. Suppose, also, that I had somehow developed an informed wish to become a philosopher and already felt deeply alienated from the few ways of life possible in my society. My parents, let us say, could meet my wish (they had money to send me away to university) but for my own good, as they saw it, chose not to. Here too, I should say, my parents would have violated my liberty. Unlike the previous case, they do not have to reverse an earlier illiberal act of their own; here they have a positive duty to make the options wider. This example throws doubt on the sharpness of the distinction between positive and negative rights.

There is also a more general argument, which I used earlier, that does the same.⁵ The content of a right defines the content of its correlative duties: to put it roughly, what one person has a right to demand, some other agent has

a duty to supply. I called these the primary duties correlative to rights. But there are also secondary duties: duties to promote human rights, duties to monitor their observance, and duties to ensure compliance with them, when that is indeed feasible. Certain of these secondary duties are so close to their related primary duties as to be treatable, for all practical purposes, as one. The primary duty to follow fair procedures in taking decisions about people's life, liberty, and property is, in our actual circumstances, indistinguishable from the secondary duty to create and maintain a fair judicial system. My conclusion earlier was that it would be artificial to regard a right to procedural justice and a right to the social institutions needed for any realistic hope of procedural justice as other than the same human right. Similarly, the primary duty to respect people's liberty is, in our circumstances, indistinguishable from the secondary duty to protect people's liberty. That some secondary duties merge in this way with their primary duty undermines the belief that there are purely negative rights.

9.5 HOW DEMANDING IS THE RIGHT?

How demanding is the positive side of liberty? To answer, let me begin by listing the constraints to which its correlative duties would be subject.

First, the formal and material constraints mentioned earlier in connection with the negative side of liberty apply as well to its positive side. The formal constraint would say here: one person cannot claim a broader range of options than is compatible with an equally broad range for others. If my conception of a worthwhile life turns out, even for the best of reasons, to be so expensive that its being made available to me would close down options equally important to you, then the positive side of liberty gives me no right to it.

Second, the material constraint would say here: liberty applies to the final stage of agency, namely to the pursuit of one's conception of a worthwhile life. By no means everything we aim at matters to that. Therefore, society will accept a person's claim to the protection of liberty only if the claim meets the material constraint that what is at stake is indeed conceivable as mattering to whether or not we function as normative agents. The obvious danger with this constraint is that society might find conceivable only what it finds congenial. Still, a group of people who, citing liberty, insisted on being allowed to have sexual intercourse in public would rightly be met with

scepticism. Is that really an issue of liberty? Is public nudity? Are even some practices that one might think society should allow, such as public suckling of babies?

Third, liberty may not require broadening options restricted entirely by nature. Remember the Inuit. Besides, no agents in that case were able to change what so limited their options—the Arctic climate—and *ought* implies *can*. Even in the case of an isolated, narrowly pious community, it is not easy, and often not possible, for someone single-handedly, or even with others, to ease a deeply embedded cultural prohibition or requirement, let alone abolish it.

Fourth, liberty is not a right to a worthwhile life itself, but merely a right to pursue it with no more impediments than those imposed by mother nature, including, prominently, human nature.

Fifth, liberty seldom requires the availability of the very particular form of option that a person has settled on. Most individual conceptions of a worthwhile life have alternatives, as good or nearly as good, and a person may reasonably be asked to find an alternative, if the form first chosen is costly and reduces options for others.

Finally, there is an important general constraint. Our options are provided by nature and culture and economic growth and scientific and technological advance. Human beings are then given to restricting them. A positive duty that liberty imposes is that some of us sometimes do something to remove some of these restrictions. But many think (I among them) that there is a sizeable area in which partiality to one's own family and chosen institutions and aims is permitted. That there is an area of permitted partiality restricts the impartial claims that can be made on us, including even the claims of human rights.

In the light of these constraints, how demanding is liberty likely to prove? One can easily satisfy the negative side of liberty by not poking one's nose into other people's business.

The demands of the positive side, of course, are not so easily met. In a deliberately severely restricted society, such as Taliban-run Afghanistan, the duty that falls on those Afghans capable of effective resistance will be heavy but, in compensation, their natural motivation to resist is also likely to be great. Still, self-interest and permitted partiality impose powerful limits on the duty even then.

At the other extreme, in a liberal society like ours with quite a rich array of options, the demand would be light. It is not that liberal societies do not fail

in the positive duties of liberty. Remember same-sex marriage. But do I, then, as things stand now, have a duty to work for the introduction of same-sex marriage? I can improve my society in many different ways, and I have leeway as to whom I choose to benefit. I also have my permitted domain of partiality. What is needed is for *some* people to work for the introduction of same-sex marriage; not all are needed. And some of the most directly interested parties are, in the form of gay-rights organizations, already at work to that end. It is natural to leave much of the job, if they will do it, to those with the greatest motivation.

It is ironic that the potentially most demanding side to liberty was originally thought of as purely negative: non-interference. If our primary duty of non-interference is best treated as absorbing our secondary duty to protect one another from interference, then liberty may require police, lawyers, courts, armies, navies, and nuclear deterrents. In any case, the defence of our liberty would require at least some of that costly protection. To know how much, we should have to decide the actual ends that this massive defensive shield serves: it clearly serves more ends than just the liberty of individual citizens.

9.6 MILL'S 'ONE VERY SIMPLE PRINCIPLE' OF LIBERTY

Most anglophone philosophers believe that John Stuart Mill has given us a near definitive account of liberty.⁶ Mill's principle of liberty, what he calls his 'one very simple principle', is that society (i.e. not just the government with its legal sanctions, but also churches and other powerful shapers of public opinion with their social sanctions) may forcefully control public (other-affecting) actions, but not private (self-affecting) actions.⁷ What I suggest as the protected area is not the *private* sphere, but the sphere of *personhood*, and they are not the same. Whether or not I wear a necktie now and then will have no effect on my choosing and pursuing my idea of a worthwhile life. It is too trivial for that. So I should say that necktie wearing falls outside the protected area of liberty. My college requires everyone, willy-nilly, to wear academic gowns at certain dinners in Hall, but on my account of human rights it is not thereby infringing anyone's liberty, even a very minor one. Yet, whether or not I wear a gown falls within my private sphere: I do not harm others by dressing, within limits, as I please. So it seems to me implausible to take 'privacy' as definitive of liberty. We do not attach value to the private

as such. If I could not care less whether I wear a gown at dinner but in fact do not do so, my being made to by my college is an intrusion into my private sphere, but it is hard to see any ground for my minding. The grounds that one might plausibly advance for minding, Mill's own perhaps, are really covert appeals to personhood. Stopping me from wearing the clothes I want, as inessential as any particular set of clothes may be to my human standing, will, if it goes far enough, touch my self-respect. To deny me freedom to express my own taste may eventually threaten my status as a self-determiner. Exactly which clothes I choose may be trivial, but my status as an individual centre of taste and choice is not. This is beginning to sound like something valuable in a way that might just attract the protection of liberty because it is getting close to an appeal to personhood.

Consider this example. Our legislators are debating a ban on smoking in all indoor public eating places. Previous legislation had already required smokers to eat at some remove from non-smokers, but now the swell of opinion is for an outright ban. The smokers protest, invoking Mill. They are not harming anyone, they say, so a ban will violate their liberty. Now suppose they do indeed harm no one. The smokers are already kept far enough apart that there is no risk to the health of the rest by passive smoking. It is just that the rest dislike the smell. Still, dislike is not harm, the smokers are quick to point out. But Mill's harm test imposes much too stiff a burden of proof on the rest. Why can they not just say that smoking makes them enjoy themselves less? After all, what is at stake for the smokers is usually that smoking allows them to enjoy themselves more. Exceptional circumstances aside, this is a clash between the enjoyment of some and the enjoyment of others. Why not just settle it by finding out where the balance of enjoyment lies? Why introduce liberty? It just erects a powerful protective barrier around the enjoyments of the one group at the expense of the enjoyments of the other (possibly larger) group. Mill's harm test wrongly turns these cases into issues of liberty, while the personhood test does not.

Mill and I are, admittedly, looking for different things in a principle of liberty. I am looking for an account of liberty, the human right, that fits all cases, large social scale and small interpersonal scale. Mill is looking for something narrower: the limits on social institutions in exercising their power to restrict individuals' behaviour.⁸ Still, as what I say about liberty is also meant to apply to social action, the conflict between Mill and me remains.

This conflict brings me back to the choice between broad and narrow interpretations of liberty. My earlier remarks left a problem about the

choice unsolved, which arises like this. Liberty, indeed any human right, not being basic in the whole moral structure, needs grounds; it needs sufficiently determinate existence conditions by reference to which we can tell whether the term is used correctly or incorrectly. But once there are existence conditions (e.g. as specified by the personhood account), there follow material constraints on the content of the right. In order to decide what is and is not an issue of liberty, society must decide, according to the personhood account, what can and cannot conceivably matter to whether we function as normative agents. But, as I noted earlier, that seems altogether too dangerous a decision to leave in society's hands. And Mill's account of liberty seems to have the great virtue of avoiding that danger.

So should we, after all, return to the broad interpretation of liberty centred on human desires? What human beings desire has the advantage of being a matter of fact, often quite a plain matter of fact. Even my personhood account may lead me to abandon my earlier allegiance to the narrow interpretation. There is the second ground for human rights: practicalities. Perhaps when we start thinking about formulating a principle of liberty suitable for actual social circumstances, we shall be drawn to simplify in the way in which the broad interpretation simplifies.

I think not. The broad interpretation of liberty, too, cannot be without constraints. It cannot plausibly treat literally any restriction on one's doing what one wants as an infringement of liberty—for example, the murderous desires of someone gone berserk, or the imprudent desire of an infant to touch a hot kettle, or the desire of a colonist to enslave the native population. The third desire would violate the formal constraint: liberty compatible with equal liberty for all.⁹ The first two desires are not the desires of responsible agents. The broad interpretation would have to be supplemented by some requirement of rationality and some requirement of respect for the interests of others.

Mill meets both requirements: the first by limiting the application of his principle to persons 'open to rational persuasion', and the second by applying it only to actions that do not 'harm' others. This is, of course, merely Mill's particular way of meeting the two requirements, but every broad interpretation of liberty would have to be accompanied by some such restrictions. For instance, James Fitzjames Stephen, a prominent Victorian jurist and utilitarian critic of Mill of a distinctly conservative bent, also employed the broad interpretation of liberty and also imposed his own, rather different restrictions on it.¹⁰ If liberty is broad, and so a kind of

licence, Stephen reasonably asks, what is so good about it? Surely, whether it is good or bad to be free to pursue what one wants all depends upon what one wants.¹¹ In place of Mill's harm principle, and in order to get a domain of liberty more restricted than Mill's, Stephen imposed a three-point utilitarian test for permitted coercion: coercion is permitted if 'the object aimed at is good, if the compulsion employed such as to attain it, and if the good obtained overbalances the inconvenience of the compulsion itself'.¹² At a time when utilitarianism was a radical doctrine, Stephen used it, along with pessimistic assumptions about human nature, to churn out conclusions 'much more akin to the tenets of Hobbes, Burke, or Carlyle than those maintained by Jeremy Bentham and the two Mills'.¹³ A central argument of his went like this: as most of us require 'both the spur of hope and the bridle of fear', and as religion is perhaps the most effective device for spurring and bridling us, it is no infringement of liberty for society forcefully to inculcate religion.¹⁴

Consider again Mill's principle of liberty. Would one want to allow society to decide what counts as 'harm'? And who is really 'open to rational persuasion'? Society's record on just these decisions is alarming. Just by being permissive (but by no means ridiculously so) about what counts as a 'harm' and strict (but not ridiculously so) about who is 'open to rational persuasion', one can make most of the illiberal regimes of the twentieth century—the dictatorship of the proletariat, to take a chilling example—compatible with Mill's principle of liberty. Now consider Stephen's principle of liberty. Who is going to decide whether contraception, abortion, suicide, euthanasia, homosexual acts, and women's seeking a role outside the home are gross evils, the prevention of which would be 'good obtained'? Stephen's principle is yet more vulnerable to distortion than Mill's; he has no way of meeting perfectly realistic worries about government by moral authoritarians. The Taliban government of Afghanistan could sincerely have cited Stephen's test to show the world that they too were British liberals.¹⁵

What I am offering here is a *tu quoque* argument. It suggests that every proposed principle of liberty will have to leave some potentially dangerous decisions in the hands of society. Of course, the degree of danger matters, but the broad and narrow interpretations of liberty do not seem to be appreciably different in this respect. Liberal societies will establish liberal standards of 'harm' and 'openness to rational persuasion'; illiberal societies will adopt illiberal ones. Similarly, liberal societies will establish liberal standards for

what can be seen as mattering to a worthwhile life; illiberal societies will adopt illiberal ones. One cannot make a formula fool-proof or villain-proof just by adding more words. In the end one is bound to some extent to rely on an interpreter's good sense and good will.

The broad conception of liberty is such a familiar instrument in our modern intellectual tool-box that, despite anything I can say, it will go on being used. And that seems to me perfectly justified. I would not want to deny that the broad interpretation may be the one we need elsewhere in our political thought, only not, I should still wish to say, in explaining the human right to liberty. Indeed, it might seem that I am overlooking an obvious value attaching to Mill's private sphere as such. The private is defined as the non-harmful (to others), and as harm is a plain disvalue, privacy, or non-harm, is a plain value. But I do not think that this identifies a role for the broad conception of liberty. The private sphere, as defined, contains a large value-neutral area: namely, the area between, on the one hand, the class of my actions essential to my personhood and, on the other hand, the class of my actions harmful to others. An example would be whether or not I wear a gown at dinner. It is more promising to consider whether the best policy for a society to adopt, on practical grounds, is to start with the broadest liberty possible and to impose the burden of argument on anyone who wants to restrict it. Still, however good a policy this may be will not alter the fact that much that is thereby protected is likely to be without positive value or of such slight value that it doubtfully merits the powerful restrictive role that principles of liberty would give it.

There is a difference between broad liberty and narrow liberty worth noting. Broad liberty, just because of its great breadth, has to be limited. Both Mill and Stephen limit it by imposing external constraints upon it. Narrow liberty is narrower because it already has internal constraints—the formal and material constraints I mentioned earlier—which define what this particular intrinsically valuable form of liberty is. At any point in political theory at which we wish to introduce an idea of liberty, we should ask which of these two conceptions yields the more plausible consequences.

Take an influential example. A prominent theme of Isaiah Berlin's writing is the incompatibility of certain 'ultimate values'.

Liberty ... is an eternal human ideal, whether individual or social. So is equality. But perfect liberty ... is not compatible with perfect equality. If a man is free to do

anything he chooses, then the strong will crush the weak, the wolves will eat the sheep, and this puts an end to equality.¹⁶

Here Berlin just assumes broad liberty. On narrow liberty, however, the strong are not free to crush the weak. Admittedly, on narrow liberty, the strong may still come out in the end rather better off than the weak, but it is a good deal less clear that one person's turning out better off than another is as morally objectionable as one person's crushing the other, if indeed objectionable at all. It is true that some writers believe that the mere fact of two persons' turning out unequal is *prima facie* a bad thing. But what is the content of the principle of equality that they would be appealing to here? There are very many different principles of equality, as many as there are different forms of morally weighty forms of equality: for instance, equal regard (i.e., the moral point of view itself), equal rights, equal opportunity, equal well-being, and so on. To give the name 'equality' its necessary content, we must be able to answer the question, Equality of what? It is clear that Berlin means something like equality of well-being, or of various components of well-being, such as wealth, social status, and accomplishment. But this is a form of equality the moral weightiness of which is also much in question. Is the mere fact of difference of level of well-being, if all are well above the minimum acceptable level, morally objectionable? Once we raise the question of content, Berlin's case becomes doubtful.¹⁷

9.7 GENERALIZING THE RESULTS

The form of my remarks about liberty can be repeated for all other human rights. One starts with a demand for a fuller account of the existence conditions of a human right than we have so far established. Because it is *human* rights that we are interested in, not rights generally, it is likely that the account we need will be, at least in part, evaluatively substantive; we must explain what being 'human' in this context means. This demand for a fuller account is, I think, impossible to resist. But once we have such an account—the personhood account is only one form it might take—it will imply a material constraint on the content of each human right. In understanding human rights, a name is not enough; it is not enough to know merely that we have a right to *liberty*, to *life*, to *health*, and so on. We also need to know the contents of these rights. It is the formal and material constraints

that determine their contents. Once determined, their contents will usually turn out to surprise us. It is not just the twentieth-century inflation in the number of rights that has to be challenged: the inflation of the content of individual rights does too. The implications of this are wider than just the case of liberty.

10

Welfare

10.1 THE HISTORICAL GROWTH OF RIGHTS

Contrary to widespread belief, welfare rights are not a twentieth-century innovation, but are among the first human rights ever to be claimed. When in the twelfth and thirteenth centuries our modern conception of a right first appeared, one of the earliest examples offered was the right of those in dire need to receive aid from those in surplus.¹ This right was used to articulate the attractive view of property prevalent in the medieval Church. God has given all things to us in common, but as goods will not be cared for and usefully developed unless assigned to particular individuals, we creatures have instituted systems of property. In these systems, however, an owner is no more than a custodian. We all thus have a right, if we should fall into great need, to receive necessary goods or, failing that, to take them from those in surplus.

One finds, very occasionally, what seem to be human rights to welfare asserted in the Enlightenment, for example, by John Locke, Tom Paine, and William Cobbett.² Following the Enlightenment, rights to welfare have often appeared in national constitutions: for example, the French constitutions of the 1790s, the Prussian Civil Code (1794), the constitutions of Sweden (1809), Norway (1814), The Netherlands (1814), Denmark (1849), and, skipping to the twentieth century, the Soviet Union (1936)—though it is not always clear that the drafters of these various documents thought of these fundamental civil rights as also human rights. By the end of the nineteenth century, political theorists were beginning to make a case that welfare rights are basic in much the sense that civil and political rights are.³ But it was Franklin Roosevelt who did most to bring welfare rights into public life. The Atlantic Charter (1941), signed by Roosevelt and Churchill but in this respect primarily Roosevelt's initiative, declared that in addition to the classical civil and political freedoms there were also freedoms

from want and fear. In his State of the Union message of 1944, Roosevelt averred:

We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. 'Necessitous men are not free men' ...

In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a second Bill of Rights ...

Among these are: The right to a useful and remunerative job. ... The right to earn enough to provide adequate food and clothing and recreation ...

The United Nations committee charged with drafting the Universal Declaration of Human Rights (1948), chaired by Eleanor Roosevelt, included most of the now standard welfare rights: rights to social security, to work, to rest and leisure, to medical care, to education, and 'to enjoy the arts and to share in scientific advancements and its benefits'. The Universal Declaration is a good example of how extensive—some would say lavish—proposed welfare rights have become.

Virtually all of the classical rights of the seventeenth and eighteenth centuries (what are sometimes called 'first-generation' rights) are, on the face of it, negative—with the possible exception of the rights to life and property (more about them later). The welfare rights of the mid-twentieth century ('second generation' rights), being positive, seem to increase not only the number of rights but also their kinds.⁴ And if, as many philosophers think, duties not to harm are generally more stringent than duties to aid, welfare rights may constitute a less demanding kind of right—second rank as well as second generation. Many writers doubt that welfare rights can even aspire to the status of *human* rights.

10.2 WELFARE: A CIVIL, NOT A HUMAN, RIGHT?

A human right is a claim of all human agents against all other human agents. It is, as I said earlier, doubly universal.⁵ At least, that is the way liberty rights have been thought to work: all of us have a right not to be dominated or blocked, and the correlative duty falls on every other individual and group and government—in short, upon all agents. But this is not the way most of us think of welfare rights. We think that only members of a particular community may claim welfare, and may claim it from only their

own community. This implies that welfare rights are, at most, ethical rights that one has as a citizen—civil rights, not human rights.⁶

The strongest argument for this view comes from what I have called the Kantian schema: the division of obligations into perfect universal, perfect non-universal, and imperfect.⁷ On this schema, obligations to help the needy are imperfect, to which there are no correlative natural rights. This is taken to explain various features of supposed rights to welfare: for example, the unspecifiability of the duty-bearers. I discussed these matters earlier.⁸

The next strongest argument runs along these lines. The ground for the right to welfare is membership of a community, in particular the cooperation and reciprocity that such membership typically involves. Think of a small frontier community. Everyone benefits from being in the community—mutual protection, some division of labour, social life, and so on. Everyone typically contributes to these benefits. If one year a certain family's crops are hit by a blight, the others help out, partly owing to the sympathy that naturally grows up in a small community, but also out of a sense of being part of a co-operative group, each benefiting the others and being benefited in return. This special relationship justifies claims to a certain mutual concern and help.

This special relationship carries over into large modern societies. It may seem that financial support for, say, a single mother in a modern urban slum is pure charity and has nothing to do with reciprocity, but that is not so. It matters to a society whether children in it grow up alienated and hostile or co-operative and productive, and mothers matter greatly to the outcome. So single mothers should be seen as contributing to society in return for the assistance they receive.⁹ Most of us think that it is vital to preserve the model of reciprocity. That is why we invent new names for various kinds of welfare, such as 'job-seeker's allowance' and 'workfare'. This insistence on reciprocity leaves the undeserving poor out in the cold, but we shall consider their fate later.

One of the few other potentially weighty objections to regarding welfare as a human right, I should say, is the charge that a right to welfare would undermine liberty. It would, the objection goes, reward the unsuccessful and penalize the successful; it would penalize them by compelling a redistribution of their resources to the needy, and such compulsion would violate their liberty. That is a general point, to which Robert Nozick has given a well-known particular twist.¹⁰ I have two kidneys and can survive on one: in that

sense one of my kidneys is surplus to my minimum requirement. Yet most of us would regard it as a gross violation of my human rights if the government were to demand one of my kidneys for transplant. I may offer it, but it cannot be demanded. Much the same is true, Nozick thinks, of my property. Part of me is in it: my thought, my effort, are all bound up with it. I may choose to give some of it to the needy, but if the government confiscates it, even for the same purpose, it violates my human right to liberty. To force redistribution of one's income, even for a worthy cause, is, in effect, to force me to work for a certain time for the state. It is forced labour; the government arrogates to itself partial ownership in my person. It thereby violates my human right to liberty, in the way that slavery does. It is, therefore, ruled out on moral grounds. But then the supposed human right to welfare is ruled out on the same grounds.

Nozick's particular version of the liberty objection has been replied to often and, to my mind, successfully.¹¹ I should myself wish to enter an objection to it at a very early stage. Nozick misunderstands what the political value of liberty is. Not every interference with what one wants to do is a violation of liberty.¹² One violates someone's liberty only by stopping that person from pursuing what that person sees as a valuable life. For a government to tax someone's income, especially someone comfortably above the minimum level, does not stop that person from pursuing, or even living, a valuable life. My income's being taxed for redistributive purposes does not destroy my liberty, properly conceived, any more than my recognizing a moral obligation to give to charity does. Both are demanded of me—though in different ways—yet neither destroys my liberty. Neither is a form of, or tantamount to, slavery. If a slave manages to live a good life, on the slave's own conception of a good life, it is merely by lucky chance. But to have, say, one-third of an ample income taken in tax does not stop one from pursuing, and having reasonable hopes of achieving, a worthwhile life. This reply to Nozick is also a reply to other versions of the liberty objection.

10.3 A CASE FOR A HUMAN RIGHT TO WELFARE

The intuitive case for a *human* right to welfare goes something like this. Human rights are protections of human standing. We attach a high value to our living as normative agents—our autonomously choosing and freely pursuing our conception of a worthwhile life. Then it is not surprising that

we should include among human rights, as indeed the tradition did from the start, not only a right to liberty but also a right to life. If human rights are protections of a form of life that is autonomous and free, they should protect life as well as that form of it. But if they protect life, must they not also ensure the wherewithal to keep body and soul together—that is, some minimum material provision? And as mere subsistence—that is, keeping body and soul together—is too meagre to ensure normative agency, must not human rights guarantee also whatever leisure and education and access to the thought of others that are also necessary to being a normative agent?

That is the heart of the case. It appeals to our picture of human agency and argues that both life and certain supporting goods are integral to it. Life and certain supporting goods are necessary conditions of being autonomous and free.¹³ Many philosophers employ this necessary-condition argument to establish a human right to welfare—or, at least, to establish the right's being as basic as any other right.¹⁴

Of course, not every necessary condition for one's having autonomy and liberty—for example, that one was conceived—comes into the class of human rights. We can stop the chain of necessary conditions that are rights from getting ridiculously out of control by restricting them to 'proximate' necessary conditions, though that leaves us in need of a criterion for 'proximate'. No doubt, the early advocates of natural rights were trying to get some ethical purchase on characteristic human agents; it is a hard enough job to do that without adding the difficult cases, such as potential human agents, non-human agents, foetuses, new-born babies, and so on. So as a start on a criterion, we can take necessary conditions of agency as 'proximate' only if they are necessary for the agency of human agents as already going concerns.

I too want to invoke the necessary-conditions argument; I should only want to strengthen it. It is now common to say that liberty rights and welfare rights are 'indivisible'.¹⁵ But that, also, is too weak. It asserts that one cannot enjoy the benefits of liberty rights without enjoying the benefits of welfare rights, and vice versa. But something stronger still may be said. There are forms of welfare that are empirically necessary conditions of a person's being autonomous and free, but there are also forms that are logically necessary—part of what we mean in saying that a person has these rights. The value in which human rights are grounded is the value attaching to normative agency. The norm arising from this value, of course, prohibits persons from attacking another's autonomy and liberty. But it prohibits

more. The value concerned is *being* a normative agent, a self-creator, made in God's image. The value resides not simply in one's having the undeveloped, unused capacities for autonomy and liberty but also in exercising them—not just in being able to be autonomous but also in actually being so. The norm associated with this more complex value would address other ways of failing to be an agent. It would require protecting another person from losing agency, at least if one can do this without great cost to oneself; it would require helping to restore another's agency if it has already been lost, say through giving mobility to the crippled or guidance to the blind, again with the same proviso. All of this is involved simply in *having* a right to autonomy or to liberty. Welfare claims are already part of the content of these rights. What, then, should we think of the common division of basic rights into 'classical' liberty rights and welfare rights? Into which of these two classes does the right to autonomy or to liberty go? Into which of the two classes do the difficult, apparently borderline cases go, such as rights to life, to property, to the pursuit of happiness, to security of person, and to privacy? The sensible response would be to drop the distinction.

What is more, a right to welfare *is* a human right. Recall my earlier discussion about identifying the duty-bearers correlative to human rights.¹⁶ I said then that ability to help played an important, but not the exclusive, role in determining the duty-bearer, and that ability to help shifted from one agency to another as circumstances changed—in England, for example, from the Church (in the Middle Ages) to local government (after the dissolution of the monasteries), then fitfully to central government (especially during the nineteenth and the first half of the twentieth centuries), and now, in the AIDS crisis in the Third World, to rich countries. Ability to help is not the only determinant of the duty-bearer; the domain of permitted partiality, for example, also limits both duties and duty-bearers.

The history of help for the needy suggests two conclusions. First, ability to help undoubtedly plays a major role in determining who bears the duty. And, second, the right does not restrict the duty-bearer to the government, nor the right-bearer to a citizen. The most plausible interpretation of the right to welfare universalizes both right-holder and duty-bearer; it is a right that each of us has against all the rest. There are indeed severe restrictions on the right-holders and duty-bearers in this case, but they are best seen as arising, above all, from ability to help and the domain of permitted partiality.

This universalization helps to explain why governments in practice do not treat welfare rights merely as civil rights. For instance, the State of

California has, in recent years, tried to deny various welfare services to illegal immigrants—that is, to people who are, in this particularly egregious way, non-citizens. In August 1996 the Governor, Peter Wilson, signed an executive order ending their access to a wide range of welfare benefits, including prenatal care, long-term health care, and public housing.¹⁷ But his order stopped short of denying them emergency health care. The Governor acted under a provision of a federal law that makes illegal immigrants ineligible for all state and federal benefits, though with similar exceptions; the federal law also excludes services such as emergency medical care and disaster relief. And there is an obvious justification for those exceptions: there are some forms of aid that anyone well able to give them owes to anyone in great need of them—whether or not the two agents are related as government and citizen.¹⁸

Many writers have insisted (this is Isaiah Berlin's version) that 'Liberty is one thing and the conditions for it are another'.¹⁹ Interpreted literally, this is too obvious to need saying; of course, there is a difference between a thing and a necessary condition for the thing. But I take it that the point is that, in the case of liberty, this distinction is often ignored. Too much, these writers suggest, is being smuggled into the notion of liberty in order to trade on liberty's undeniable rhetorical appeal. But I am not smuggling a right to welfare into the right to liberty. They are two distinct rights. But the earlier discussion of the distinction between negative and positive rights²⁰ shows that to restrict human rights to purely negative concerns would not provide an adequate explanation even of the values in which human rights are grounded. Liberty already has positive elements.

10.4 IS THE PROPOSED RIGHT TOO DEMANDING?

Does this account of a human right to welfare fail by making it too demanding? I have several times employed the common proviso 'so long as the cost to oneself is small', but surely the cost to oneself can be somewhat greater than small and one still have to pay it. And surely the benefit to the other person can be somewhat less great than life itself and one still have to provide it. Where are the two cut-off points?

I said a moment ago that mere ability is only one reason-generating consideration in cases of aid, that a limit on the demands on us comes from the domain of permitted partiality. This limit still leaves open the

possibility of hefty claims on governments and, through taxation, on citizens to help the needy, as well as claims directly on individuals to be charitable.

There is a second limit, this one deriving from the content of the right. How much may the needy claim by human right? The United Nations,²¹ along with several philosophers,²² says that the claim is to a 'satisfactory' standard of living, but the obvious trouble with relying on the word 'satisfactory' is its tendency to change with time and place. What seems 'satisfactory' is too likely to be relative to the wealth of a society. What we need is some stable, non-arbitrary, normatively based criterion. On the personhood account, of course, there is one: the cut-off point is when the proximate necessary conditions for normative agency are met. That point will be higher than mere subsistence but lower than levels of well-being characteristic of rich contemporary societies. That, admittedly, leaves a large middle ground, and there will be hard interpretative work to be done on the idea of 'proximate necessary conditions for normative agency' to make it sharper-edged. Still, this idea gives us less meagre starting conceptual materials than society often has to work with.

Major indeterminacies remain, the most important, to my mind, being this: we have good empirical evidence to believe that in a famine there is usually enough food in the stricken country to keep all the population alive; it is just that the starving have no effective way of getting at it.²³ We also have reason to believe that liberal democracies are less likely than countries with other forms of government to suffer serious famine.²⁴ And we have reason to believe that rushing food to an area of famine is often only a short-term palliative. What is needed in these countries for long-term improvement is often deep political change. Is bringing about that change one of the duties correlative to the right to welfare? Must better-off countries therefore intervene in the internal affairs of other countries? There will be a long list of good reasons why one should not, or need not, intervene: the effects of intervention can be highly uncertain; the means can be very costly; and so on. But our interest now is only in the content of the right to welfare: does it include a *prima facie* claim on others to their help in bringing about, where necessary, radical political change?

To answer, we must go back to the role of human rights, which is to protect normative agency, both our capacity for it and our exercise of it. Take an extreme (but by no means exceptional) case: think of someone very poor in an area of recurrent famine whose whole family suffers from

chronic malnutrition. Food aid during one famine may do little to change that person's life. It may merely keep the person alive until the next famine, probably suffering from chronic malnutrition all the while. It is most unlikely that a person could rise to normative agency in such circumstances: no education, no leisure, no hope, no ambition, no long view. What such a person would need for normative agency is a remedy for these lacks. And in many cases a necessary condition for their remedy will be radical political change. If human rights protect not just our capacity for agency but also our exercise of it, then the *prima facie* duties correlative to the right to welfare will sometimes include political intervention in the affairs of another country. By parity of reasoning, it may also include bringing about radical political change in our own country. Of course, weighing against this *prima facie* duty will be all the good reasons for restraint on the long list I started compiling.

Is the right to welfare implausibly demanding? To my mind, no. The long list of counter-reasons is the appropriate counterweight to it.

10.5 THE UNDESERVING POOR

Many politicians and many theorists insist that welfare aid be restricted to the deserving needy. ('Deserving needy' is a better term than 'deserving poor'; a multi-millionaire might need a liver transplant from the National Health Service, the only source.) Indeed, some philosophers write the restriction to the deserving needy into the definition of the right.²⁵ If they are correct, welfare cannot, after all, be a human right. The restriction is incompatible with the necessary universality of the class of right-bearers. If welfare is a human right, we are not, it seems, allowed to introduce desert into the statement of the right.

But there is a way in which we can introduce it, without abandoning the requirement of universality. Although a restriction to the deserving cannot be written into the human right itself, desert is still an action-guiding consideration that may be weighed, in case of conflict, against the right. The potentially undeserving are a mixed lot: a teenage girl who deliberately gets pregnant in order to claim welfare support, a gambler who loses all his money, a heavy smoker or drinker who needs a transplant, an AIDS victim who ignored the warnings about unsafe sex, a work-shy welfare exploiter when jobs are available. A concessive modern view is that smoking, drinking,

and gambling are addictions; that the work-shy welfare exploiter is alienated from society, and so on. On this view, we are all victims, and the class of undeserving needy is empty. But unsafe sex is not an addiction; nor are all those who practise it alienated from society. And the level of addiction of some regular smokers is probably low enough to be controllable.

If so, then we have conflicts between desert and the right to welfare. How can we weigh them against one another? Both the individual and society are likely to be better off if the work-shy welfare exploiter is forced to be self-supporting; so one may, in certain circumstances—for example, once the welfare exploiter is informed of a suitable job—deem the duties correlative to the right to be discharged. The practice of teenage girls deliberately getting pregnant in order to claim welfare support is something that society might also want to discourage, but in this case it is much harder to see how to do it and *faute de mieux* the government may have to continue the support.

The plainest case of a conflict between welfare and desert would be a clearly undeserving smoker who will die without a lung transplant. But why is the smoker undeserving of help? Because the need is the smoker's own fault. So the deeper question is: what weight are we to attach to its being a person's own fault? Well, fault must have weight at least as a tie-breaker. If I am clearly undeserving and you thoroughly deserving, but we are regarded by the hospital as having equal claim on the next lung available for transplant, you may properly protest that the way the hospital decides priorities is unfair. So fairness also enters, at least to affect priority, and with it, as its inevitable counterweight, will come beneficence. If with the transplant I would have another thirty years of vigorous life and you, despite your desert, only one year of much impaired life, that too should carry weight. What then are the relative moral weights of the right to welfare, a person's desert, and the amount of benefit conferrable?

This question has never yet been satisfactorily answered, but fortunately it is not our question. Ours, rather, is this: is desert an independent consideration to be weighed against the right to welfare, or is it already incorporated as a restriction in the right itself? On the personhood account, the great value of the capacity for and exercise of normative agency sets up claims on us not to destroy them, and within limits, to protect and promote them. The value they have does not rest at all on an agent's desert. And the limits referred to in the qualification 'within limits' are not, at least not usually, incorporated into the statement of the right itself (think, for instance, of the limit to