

Liberty and justice

Ralf M. Bader

1 Introduction

Liberty and justice are two of the most central ideals in legal and political philosophy: justice should be brought about whilst liberty should be respected and safeguarded. Yet, are these ideals compatible? Or does the pursuit of justice require restrictions of liberty? This article will argue that the relationship between these ideals, in particular whether liberty is compatible or in conflict with justice, depends on whether one is operating with a moralised or a non-moralised conception of liberty, which in turn depends on whether one construes the significance of liberty in deontological or axiological terms.

2 Liberty vs. justice?

Nozick famously argued that liberty and justice are in conflict when one adopts a patterned conception of justice, which considers a distribution to be just if it conforms to a pattern, such as equality, need or merit. Using the Wilt Chamberlain example, Nozick illustrated how liberty upsets patterns (cf. Nozick: 1974, pp. 1601-64). When one starts out with a just distribution D_1 that conforms to a certain pattern and lets individuals freely dispose of the holdings that have been assigned to them, then the actions and interactions of these individuals will lead to a distribution D_2 that most likely will not conform to the pattern (for instance, if a large number of individuals decide to pay money to watch Wilt Chamberlain play basketball, then he will end up with far more resources than others at the end of the season).

Since maintaining a pattern requires continual interference, liberty and justice are in conflict when justice is understood in terms of a distributive pattern. Proponents of such patterned theories have two options. They can either respect individual liberty, but then end up with distributions that do not conform to their desired pattern. Or they can restrict individual liberty by prohibiting “capitalist acts between consenting adults” (Nozick: 1974, p. 163), where this includes not only market exchanges but also donations and gift-giving, in order to enforce the pattern.

An entitlement theorist, by contrast, is not faced with this unpalatable choice. According to the entitlement theory, a distribution is just if the holdings of the various individuals were acquired and then transferred in a just way. The justice of a distribution is, in this way, reducible to the justice of the various actions and transactions that gave rise to this distribution. Since the entitlement theory considers voluntary transfers to be justice-preserving, the voluntary actions and interactions that transform D_1 into D_2 preserve the justice of the distribution from which one started. Liberty and justice, accordingly, do not conflict on the entitlement theory.

Although justice is not in conflict with liberty on the entitlement theory, this approach is often criticised on the basis that the freedom¹ that it grants may well be empty. Even though everyone is at liberty to dispose of their holdings, this freedom is merely formal for those who do not have significant holdings. The poor, for example, cannot really enjoy this freedom. Although they have the same freedom as everyone else, namely the freedom to dispose of their property in the way that they see fit, this freedom lacks significance for them due to the fact that they do not have much property.²

This critique points out that equal freedom does not imply equal worth of freedom, since the worth of freedom can be compromised by a lack of resources.³ Proponents of patterned conceptions of justice can then say that, even though their theory of justice requires restricting freedom to some extent, it distributes resources in a way that makes the freedom that people have significant and worth having. Some go even further and argue that a lack of ability implies a lack of freedom, rejecting the idea that one can be free to ϕ without being able to ϕ .⁴ In that case, a lack of resources compromises not merely the worth of freedom but is inimical to freedom itself. This allows them to say that, although the pursuit of justice requires restricting the freedom of some, it grants freedom to others and thus amounts to a redistribution of liberty.

3 Moralising liberty

A more fundamental critique of Nozick's argument is that enforcing property rights is inimical to freedom and involves coercion. Whilst individuals are free to

¹'Liberty' and 'freedom' will be used interchangeably.

²This can be understood in terms of the fact that the action-type that everyone is free to perform encompasses fewer action-tokens in the case of those having fewer resources.

³Cf. "The inability to take advantage of one's rights and opportunities as a result of poverty and ignorance, and a lack of means generally, is sometimes counted among the constraints definitive of liberty. I shall not, however, say this, but rather I shall think of these things as affecting the worth of liberty" (Rawls: 1971, p. 204).

⁴This can either take the form of a bivalent view that treats a lack of ability as a source of unfreedom or a trivalent view where a lack of freedom renders both freedom and unfreedom inapplicable, such that one is neither free nor unfree to ϕ when one is unable to ϕ .

dispose of their own holdings, others are prevented from using what is not theirs. Property rights thus restrict the freedom of non-owners. More precisely, the enforcement of property rights is detrimental to the freedom of non-owners since they are prevented from performing actions that involve the holdings of other people.⁵ The freedom of owners thus comes at the expense of the unfreedom of non-owners. Liberty then conflicts with justice even when the entitlement theory is accepted. In fact, conflicts between justice and liberty turn out to be inevitable on any theory of justice. This is because the enforcement of any distribution of holdings will restrict the freedom of those not in possession of the relevant holdings.

The reason why Nozick considers the entitlement theory to render justice compatible with liberty is that he is operating with a moralised conception of liberty. Moralised accounts draw a distinction between liberty and license (cf. Locke: 1689, §6; Bader: 2016). Actions are distinguished into those that the agent has a right to perform, i.e. those that it is permissible for the agent to perform, and those that the agent does not have a right to perform, i.e. those that it is impermissible to perform. Actions that the agent can be free (or unfree) to perform are restricted to the former, whilst the latter are excluded and belong to mere license. Being prevented from performing an action that belongs to the latter category is not an infringement of liberty. The underlying idea is that if an agent lacks the right to perform a particular action, then preventing the agent from acting accordingly is not a restriction of liberty since the agent is not free to perform that action in the first place.

The contrast between liberty and license is drawn in normative terms on the basis of the rights of an agent. The domain of liberty is constituted by the actions that an agent has the right to perform. Rights are here understood as Hohfeldian liberties/privileges, i.e. an action belongs to the domain if the agent is at liberty to perform this action, which means that he is not under a duty not to do this action. This is a normative fact about the duties the agent is under. Some of these liberties are protected liberties, insofar as the agent has various claim rights against others to the effect that they not interfere. If the agent is at liberty to do something, yet is prevented from doing it, where the relevant interferences are rights-violating interferences, then he is unfree to do that action. This means that an agent is rendered unfree to ϕ if he is at liberty to ϕ yet is prevented from ϕ -ing in a way that violates his claim-rights. Put differently, if a protected liberty is interfered with in a way that violates a claim of non-interference, then liberty is infringed and the agent is rendered unfree to act in this way.

The moralised account thus leads to a threefold classification of actions:

⁵From this perspective even voluntary market exchanges are deemed to be coercive because they involve threats to withhold benefits, where these threats are backed up by the state's enforcement of property rights (cf. Hale: 1943; Fried: 1998, ch. 2). A person who offers to exchange something for something else can then be understood as someone who threatens to withhold the thing in question unless he is provided with the relevant object of exchange.

- x is free to ϕ iff x is normatively at liberty to ϕ and there is no rights-violating constraint preventing the agent from ϕ -ing
- x is unfree to ϕ iff x is normatively at liberty to ϕ yet there is a rights-violating constraint preventing the agent from ϕ -ing
- x is not-free to ϕ iff x is not normatively at liberty to ϕ

This means that there are two ways in which obstacles that make it impossible for an agent to ϕ nevertheless do not render the agent unfree to ϕ . Either the agent is normatively at liberty to ϕ but the constraint preventing the agent from ϕ -ing does not violate any of the agent's rights, where an interference can fail to be rights-violating either because the liberty is not protected at all, or because the interference does not contravene against any of the claims that the agent has. If the interference is not a rights-violating interference, then there is no loss of liberty and no infringement of freedom. This means that the interference results in inability rather than in unfreedom – the agent, whilst being free to ϕ , is then simply unable to ϕ .⁶ Or the agent is not normatively at liberty to ϕ , in which case ϕ -ing is part of license. An interference with ϕ -ing in that case does not classify as a restriction of liberty since the agent is not free to perform that action in the first place.

⁶Freedom and unfreedom are independent of abilities on moralised accounts. One can be free to ϕ , even if one is unable to ϕ and, correspondingly, one can be rendered unfree to ϕ , even if, independently of the relevant interference, one would be unable to ϕ . This is because unfreedom-generating interferences involve violations of the duty not to render certain actions impossible, where this duty holds independently of the ability of the person being interfered with. For instance, although x is unable to walk, he is nevertheless normatively at liberty to walk on his land, so that if y interferes with x's property rights and impermissibly builds an obstacle on x's land that makes it impossible to walk on the land, then x is rendered unfree to walk on his land, despite the fact that he is unable to do so independently of the interference. In this case, y's interference violates x's rights and renders actions that x is at liberty (though unable) to do impossible, i.e. an action that x was previously unable to perform is now an action that it is impossible to perform.

This argument presupposes that one can understand what it is for an interference to render an action impossible independently of abilities. This, however, has been called into question by Cohen, who argues that whether someone is prevented from ϕ -ing by a certain interference would seem to depend on the abilities of the agent, insofar as the abilities of a given agent determines whether or not that agent is able to overcome the interference, which would enable the agent to ϕ despite the interference (cf. Cohen: 2011, p. 195). This argument, however, is problematic since what an interference does is to render particular ways of ϕ -ing impossible, such that there may be alternative ways of ϕ -ing that can be performed by those having the relevant abilities, such that overcoming an interference does not amount to being able to ϕ in precisely the way that the interference is taken to rule out but to being able to ϕ in a different way. For instance, if a wall is built between points A and B, then x might still be able to get from A to B since x but not y has the ability to climb over the wall. In that case, taking a leisurely stroll from A to B is rendered impossible for both x and y and both are equally rendered unfree in that respect, whilst getting from A to B by climbing over the wall is not rendered impossible for either but simply happens to be something that only one of them has the ability to perform, such that whilst both are free to act in this way only x but not y is able to do so.

The latter possibility is the one that is crucial for Nozick's claim that the entitlement theory does not require restrictions of liberty. This is because the interferences, as well as threats of interference, that protect and enforce the property rights recognised by the entitlement theory will be legitimate and will not infringe liberty. The interferences that non-owners are liable to will not infringe their freedom, on the basis that they do not have the right to use those things. In the same way that people are not free to go on a killing-spree, they are not free to take or use things that are not theirs and they are liable to be interfered with if they nonetheless try to do so.

If liberty is moralised, then one can claim that non-owners are not free to do these actions to begin with and hence are not rendered unfree when they are prevented from doing them. Since one is not free to do those things in the first place, preventing someone from using or taking something that is not theirs (i.e. preventing someone from stealing) will not count as an infringement of liberty. Even though a regime of private property rights ensures that people are liable to interference, the interference in question does not constitute an infringement of liberty.

Once justice is built into liberty, liberty and justice are guaranteed not to conflict, no matter which theory of justice one adopts. If the transfers that one is free to perform are restricted to those that do not upset justice, then any theory will render justice compatible with liberty. This means that a pattern theorist can reject the claim that liberty upsets patterns by moralising liberty in terms of the property rights that are granted by the patterned theory of justice. Only those transfers that preserve the pattern are ones that people have a right to perform and that they are hence free to perform. Since they are not free to upset the pattern in the first place, preventing them from doing so will not classify as an infringement of their liberty.

Considerations pertaining to moralised freedom are, accordingly, dialectically ineffective when it comes to arguing in favour of a particular conception of justice. Since justice will be prior to liberty, one cannot argue from liberty to justice. This means that the Wilt Chamberlain argument is dialectically ineffective, since it presupposes rather than establishes the entitlement theory. In effect, it is a circular argument from entitlements to moralised freedom and back to entitlements. More generally, freedom is no longer capable of doing fundamental justificatory work since the moralisation presupposes more fundamental normative notions (cf. Ryan: 1977, Cohen: 1995, Waldron: 1991).⁷

In short, if one moralises liberty in terms of justice, then liberty and justice are by their very nature compatible, where this holds independently of the conception of justice that one endorses. By contrast, if one does not moralise liberty,

⁷Whilst unable to do fundamental justificatory work, it can nevertheless be useful for classificatory purposes and is the only notion of liberty to which one can assign intrinsic normative significance (cf. Bader: 2018).

then conflicts between liberty and justice are inevitable insofar as establishing and maintaining justice requires restricting liberty.

4 The significance of liberty

The distinction between non-moralised and moralised conceptions of liberty is closely related to the distinction between axiological and deontological accounts of the significance of liberty.

An axiological construal takes liberty to be significant on the basis of the goodness of the actions that one is free to perform: x 's being free to ϕ is significant because and to the extent that the opportunity to ϕ is significant. On this approach, real opportunities that are worthwhile are to be promoted. First, the opportunities need to be real rather than merely formal opportunities, since only the former but not the latter can be realised and are hence of significance. Since merely formal freedoms are not axiologically important, the worth of freedom can be compromised by a lack of abilities and resources. Lack of interference thus needs to be combined with the requisite resources and abilities in order for the relevant opportunities to be significant and for freedom to be of value. Second, the significance of the opportunity to ϕ derives from the significance of ϕ -ing.⁸ This means that the opportunity to perform an action is important only if performing that action is important. Opportunities have a form of extrinsic significance. Correspondingly, constraints are bad because they prevent various goods, i.e. they have preventative disvalue (which is a form of instrumental disvalue). Third, at least when concerned with prudential goodness, the significance for the agent is independent of the permissibility of the relevant actions. Both permissible and impermissible opportunities can be considered to be valuable, since an action can have prudential value even when morally impermissible.

This axiological construal is central to the non-moralised approach. All actions, whether permissible or impermissible, are ones that one can be free or unfree to perform. In the case of each action, it is the significance of performing that action that makes the freedom to perform it valuable, as long as the relevant opportunity is a real rather than merely formal opportunity. The value of the various freedoms ensures that liberty is something that is to be promoted, in the

⁸Some have argued that freedom can have non-specific value (cf. Carter: 1999) or content-independent-value (cf. Kramer: 2003). Whilst the freedom to ϕ can be valuable in certain contexts in a way that is independent of and not derivative from the value of ϕ -ing due to context-dependent facts, such as the fact that having the freedom to ϕ can enhance the autonomy of the agent, the value that the freedom has in the respective context is not a value that applies to the freedom to ϕ as such, which can be seen by the fact that this contextual value varies across context, as happens for instance when, instead of enhancing the autonomy of the agent, having too many options is detrimental to control and can undermine careful deliberation. Accordingly, whilst freedom can be significant in a number of different ways, the value that the freedom to ϕ has as such is value that it has due to the significance of ϕ -ing.

sense that individuals are to be provided with valuable opportunities. One can then assess not only which system maximises freedom, given that one has a suitable way of measuring freedom, but also which system best promotes worthwhile opportunities and thus realises the worth of liberty to the greatest extent. Both of these questions are by and large empirical questions that depend on the effects that different systems have on the opportunities available to different individuals.

Since liberty is construed as a good that can be justly distributed, or at least as a good that is closely connected to the resources that can be justly distributed, one can assess both how the extent of freedom and the value of freedom are impacted by the justice of a distribution. Different theories of justice will have different effects in terms of how much a just distribution departs from a situation in which freedom is promoted to the greatest extent as well as a situation in which the worth of freedom is maximally realised, which determines the degree to which these ideals conflict at the aggregate level.

A deontological construal, by contrast, focuses in the first place, not on the value of the opportunities, but on the wrongness of infringements of liberty. Liberty is to be understood as something that needs to be respected, rather than as a good that is to be promoted. Liberty, on this approach, is taken to have intrinsic significance in the sense that being rendered unfree is wrongful as such, independently of the abilities and resources of the agent, as well as independently of the significance of performing the action.

Such a deontological construal of the significance of liberty lies at the core of moralised accounts of liberty.⁹ Since it is not the case that all opportunities need to be respected,¹⁰ it is necessary to distinguish those that ought to be respected from those where interference, far from being morally problematic, is the appropriate response. Moralised accounts draw this contrast on the basis of the distinction between liberty and mere license. On such accounts, liberty does not encompass all actions but only those that the agent has a right to perform, whereby the liberties that need to be respected are the protected liberties of the agent.

Since interferences only generate unfreedom as opposed to mere inability when the relevant interference is rights-violating, it follows that interferences with liberty are wrongful as such precisely when and because they are rights-violating. Although freedom encompasses all Hohfeldian liberties, the wrongness of interference is restricted to those cases that result in unfreedom and involve the vio-

⁹Such accounts can also recognise the axiological significance of various opportunities in a subsidiary role, where this axiological significance need not be restricted to liberty but can also encompass mere license since immoral opportunities can be axiologically significant despite the fact that one has no reason to respect them.

¹⁰This follows from the fact that some actions are such that it is right to prevent people from performing them and the claim that if it is right to prevent someone from ϕ -ing, i.e. from exercising the opportunity to ϕ , then it is right to remove the opportunity to ϕ by making it the case that it is not possible for the person to ϕ .

lation of claim-rights and hence only arises in the case of protected liberties. For instance, by impermissibly locking someone into a room one violates some of the person's claim-rights and thereby renders various actions impossible in an illegitimate way – such rights-violating interferences ensure that the agent is now unfree to perform these actions. By contrast, when an obstacle is constructed, where the person has no claim against the construction of the obstacle, then various actions are rendered impossible in a legitimate manner – such rights-respecting interferences ensure that the agent is still free but now unable to perform these actions.¹¹

Interferences that do not violate any rights, most notably interferences with opportunities that the agent does not have a right to perform, do not classify as infringements of liberty and are not deemed to be wrongful as such. The wrongness of interference is thus understood in terms of the interference being rights-violating, which means that it is independent of the significance of the relevant opportunity. Correspondingly, since it is only when someone is rendered unfree to ϕ that the interference is wrongful, a lack of opportunities is not per se problematic from a deontological perspective, even when it can be attributed to the agency of other moral agents, but only when opportunities are lacking as a result of wrongful interference.

5 Conclusion

Either one takes liberty to be something that is to be promoted and that matters because of the axiological significance of the opportunities that an agent is free to perform. In that case, one operates with a non-moralised construal of liberty that will lead to conflicts between liberty and justice, since the pursuit of justice will require one to restrict all those actions that would upset a just distribution. Alternatively one takes liberty to be something that is primarily of deontological significance, insofar as a protected sphere around each individual needs to be respected. Such a moralised construal of liberty renders liberty and justice compatible, since justice is already built into liberty, given that actions that would upset and undermine justice do not belong to the protected sphere that needs to be respected.

6 References

Bader, R. M. 2016. 'Moralized conceptions of liberty'. In *Oxford Handbook of Freedom*, D. Schmidtz and C. Pavel, Eds. Oxford University Press, pp. 59-75.

¹¹Both of these cases need to be distinguished from cases where, rather than the agent's liberty being interfered with, a Hohfeldian liberty is removed such that the agent is no longer at liberty to ϕ rather than unfree to ϕ .

- Bader, R. M. 2018. 'Moralizing liberty'. *Oxford Studies in Political Philosophy* 4, 141-166.
- Carter, I. 1999. *A Measure of Freedom*. Oxford University Press.
- Cohen, G.A. 1995. *Self-Ownership, Freedom and Equality*. Cambridge University Press.
- Cohen, G. A. 2011. *On the Currency of Egalitarian Justice, and Other Essays in Political Philosophy*. Princeton University Press.
- Fried, B. 1998. *The Progressive Assault on Laissez Faire – Robert Hale and the First Law and Economics Movement*. Harvard University Press.
- Hale, R. 1943. 'Bargaining, duress, and economic liberty'. *Columbia Law Review* 43, 5, 603-628.
- Kramer, M. 2003. *The Quality of Freedom*. Oxford University Press.
- Locke, J. 1689. *Second Treatise of Government*. Awnsham Churchill.
- Nozick, R. 1974. *Anarchy, State, and Utopia*. Basic Books.
- Rawls, J. 1971. *A Theory of Justice*. Harvard University Press.
- Ryan, C. C. 1977. 'Yours, mine, and ours: property rights and individual liberty'. *Ethics* 87, 2, 126-141.
- Waldron, J. 1991. 'Homelessness and the issue of freedom'. *UCLA Law Review* 39, 295-324.