THE NATURE AND IMPORTANCE OF LIBERTY

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What is liberty, and why is it important? Why do we care about it? The first premise that I offer here is that liberty is an expression of what is valuable about us as human beings. It is a natural law idea; that is to say, it is a moral imperative based on what is fundamental (another moral idea) about our human nature.1

I would say that what is important about us, what makes us moral human beings, is our individual capacities to think, reason, choose, and value. It is what Kant called our freedom and rationality.2 Individuals, therefore, are the elementary particles of moral discourse. Our value is our taking individual responsibility for our lives, and our choices. And if a person is to count as a person—and here we have the difficult questions about the beginning and the end of life—then we are all equally valuable in this same way. It is from that base of our equal responsibility for ourselves that we choose our goods: that we choose what to make of the only life we will ever have.

My liberty, then, is my ability to choose that life. No one has the right to interfere with that choice, except as it is to further his own good. But that good of the other is worth no more than mine because he is not worth any more than I am. There is, therefore, a right of mutual noninterference: an equal right. By the same token, nobody can interfere with or draft another person to help him achieve his own good if the other person has not chosen voluntarily to enlist in that campaign.

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2. See IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 116 (H.J. Paton ed. & trans., Harper Torchbooks 3d ed., 1956) (1948) (declaring that “to every rational being possessed of a will we must also lend the Idea of freedom as the only one under which he can act”).
There are conclusions to be drawn from these postulates; for example, that liberty is a relation among persons. Liberty is violated when someone else interferes with it. Gravity, tigers, and disease do not interfere with my liberty; other people do. In addition, I can make your good, that which you choose, part of my good. But then I must work through you, through your liberty, and not upon you, not in spite of your liberty.

And what is interference? It can be hindering you for your sake, for your good. Or hindering you for my sake, for my good. When do I hinder you in that second sense; when do I hinder you for my sake? There are two ways. First, when I disregard you. Second, when I use you, as when I trick you or threaten you or force you in some way or another.

The issue of hindering others by disregard is, in fact, conceptually the most difficult. It is pretty easy to tell when I hinder you in the second sense: when I use you, when I trick you, when I force you. These are clear-cut violations of liberty. But, how can we tell when I am hindering you by, for instance, just failing to help you, by just disregarding you? The picture I have is of my driving down the middle of the highway at eighty miles per hour, disregarding that you are coming the other way. Am I hindering your liberty, or does your demand that I regard you hinder mine? It is out of this dilemma—this dilemma of when do we hinder each other by disregarding each other, just going our way, running over each other—that we derive, in a very general sense, the concept of property. Which is why property is so closely related to liberty.3

Property describes the whole—I will call it the $n$-dimensional space, as it is much more than three-dimensional—$n$-dimensional space in which I may operate as a free person without being hindered by you as you go about in pursuit of your goods. You may not violate my property, you may not enter my $n$-dimensional space. But that $n$-dimensional space must be defined somehow. Is it defined by liberty itself, or is it conventional, or is it a little bit of each?

If it is conventional, if our property in ourselves and our property in the outside world which we have assimilated to ourselves is wholly conventional, then of course its boundaries are established by convention. If it is the creature of conven-

3. See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 32 (C.B. Macpherson ed., Hackett Publ’g Co. 1980) (1690) (describing liberty as the ability to dispose and order one’s whole property).
tion, it is the creature of others. And that is a serious problem for liberty and one which the friends of liberty have sought many ways to solve—the social contract tradition is such an attempt—and the enemies of liberty have sought to exploit from the very beginning.4

Now, there are, however, certain natural, not conventional features of my property in myself and my property in the world. Most importantly, because it derives from my liberty to reason, to choose, to decide, is my liberty of the mind.5 That is why it is not surprising and it is not perverse that the realm of liberty of contract which, in the Nineteenth Century was celebrated, has gradually shrunk, and why the First Amendment rights have become as robust as they have.6 It is also why, when thinkers—and there are many of them, for instance Cass Sunstein—promise us a New Deal for the First Amendment,7 I shiver because I know what the New Deal did to our other property liberties. And I shiver to know what that New Deal holds in store for liberty of mind.

So that is one natural property right that we have that is not conventional. But I think there is another one, and it has a lot to do with why we are holding this Symposium, why we are lawyers, why this is a subject for law. When students graduate from this law school, we proclaim that they “are ready to aid in the shaping and application of those wise restraints that make


6. See Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000) (holding that a state’s application of its public accommodations law to require the Boy Scouts to admit a homosexual member violated the organization’s First Amendment right of expressive association); Cohen v. California, 403 U.S. 15, 26 (1971) (concluding that the state does not have the power to criminalize the public display of a four-letter expletive because government does not have the capacity to forbid certain words without also running a substantial risk of suppressing ideas in the process).

us free.” Of course, law is that engine, that system, which defines this $n$-dimensional liberty. But if it is to do that, if it is to define our liberty, it must have certain characteristics. And its characteristics are that it must be stable and it must be formal. That is to say, it must seek to attain a certain neutrality between the contending parties who would seek to realize their various goods.

That is why a libertarian, or liberty-driven, view of law asks at least two things of a system of law. It asks that it be reasonably stable so that we can rely on it. We realize it is difficult to derive from some general principles what all of the law’s details are, although the liberty of the mind can so be derived. But we insist that, whatever society gives us, it will at least stay still long enough that we can order our choices, make our plans, and live: The law must not be a moving target, so to speak.

And the second thing is why it is that the friends of liberty are also decried in the world of law as formalists. I always tell my students, “To call an argument a formalist argument is not a term of abuse.” And the reason for this is that, when the law is formal, when those who adjudicate do not purposefully but formally, indeed formalistically, there is an attempt to honor the law as the definition of our property, our liberty space, and not to change that definition, not to change those boundaries for the competing goods of the persons who are contending within those spaces.

Finally, what then of love, of friendship, of generosity, of music, of art, and of science? Are these not the things that are valuable about us? Yes, they are, if they are freely chosen. If they are ours, they arise out of our deliberate personal, individual choices. And if they are not, their value disappears.

My dear friend and frequent interlocutor, Michael Sandel, is the only one on this Symposium panel who really stated the

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8. See Thomas C. Grey, Holmes and Legal Pragmatism, 41 Stan. L. Rev. 787, 799 (1989) (describing legal pragmatists’ attack on formalism based on first principles); see also Duncan Kennedy, The Stages of the Decline of the Public/Private Distinction, 130 U. Pa. L. Rev. 1349, 1351–52 (1982) (describing the collapse of the formalists’ distinction between the public and the private spheres); Cass R. Sunstein, Naked Preferences and the Constitution, 84 Colum. L. Rev. 1689, 1697, 1718 (1984) (positing that the Lochner decision’s theoretical basis is undermined by acknowledging that the “market status quo” is truly just the result of previous government choices).
competing point of view, as best articulated by Aristotle. This alternative perspective asserts that freedom sometimes requires that government and law not be neutral with respect to questions of the good life, with respect to moral and religious questions. Freedom is not a matter of autonomy or choosing whatever we happen to want. Rather, to be free is to live a certain mode of life: the good life. Professor Sandel admitted that this conception of freedom and rights could be termed judgmental or moralistic, particularly because, under this rubric, deciding what rights people possess requires one to consider the purpose and moral worth of the social practices that give rise to such questions about rights.

As an example of this understanding rightly put into practice in his estimation, Professor Sandel recounted the majority opinion in *PGA Tour, Inc. v. Martin.* Writing for the majority, Justice Stevens concluded that the purpose and essence of golf has nothing to do with whether or not a golf cart is used, and therefore the Americans with Disabilities Act (ADA) requires the PGA Tour to allow carts to be used by disabled contestants.

It is quite interesting, because there is another case in which Justice Stevens tried to use similar arguments, but did not succeed. In *Boy Scouts of America v. Dale,* he knew what the essence of being a Boy Scout is, and it did not include some distaste for homosexual relations. That was no part of being a Boy Scout, and he knew that.

What was at stake in *Dale* was the ability of the Boy Scouts to define for themselves what it is that their particular association meant: not for Aristotle, and not for Professor Sandel, and not for Justice Stevens. The reason that *Martin* came out the way it did is that, to fall under the sway of the ADA, golf or a golf tournament has to be either commercial or a public accommodation, similar to a hotel or a movie theater. If golf, however,

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11. Id. at 683–86.


13. See *Martin,* 532 U.S. at 675–77 (noting the ADA’s public accommodation requirement and finding that the PGA’s golf tours on golf courses meet that requirement).
had been a religious ritual then I suppose that Justice Stevens would try to the do the same number, but I devoutly hope he would, once again, have been in the dissent.