

# What is a Right?

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Natural rights are rights that do not depend for their existence—as opposed, perhaps, to their determinate content—on social convention. Such rights are often explained in terms of moral duties, with the rights-holder identified by a special relation in which they stand to the duty in question. Consider, for instance, standard versions of the will and interest theories of rights, on which rights consist in *pro tanto* duties subject to the will, or grounded in the interests, of a given individual.<sup>1</sup>

In this paper, I present a puzzle about the nature of rights that rules out not only will and interest theories but also demand and joint commitment theories of rights, and the idea that natural rights are irreducible or primitive.<sup>2</sup> In the second half of the paper, I illustrate how the puzzle can be solved, sketching a theory of rights that reduces them to facts about the validity of consent, and the reasons that consent provides.

## 1. Hart's Thesis and the Reciprocity of Rights

We can extract the puzzle that interests me from H. L. A. Hart's classic treatment of natural rights. According to Hart's Thesis, "if there are any moral rights at all ... there is at least one natural right, the equal right of every man to be free" (Hart 1955: 175). The equal right to be free is a right against coercion and restraint "save to hinder coercion or restraint" (Hart 1955: 175) and a liberty to act in ways that do not coerce or restrain other people and are not designed to injure them. The details do

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<sup>1</sup> For a development of the Will Theory, see Steiner 1994; and for the Interest Theory, Raz 1986.

<sup>2</sup> For rights as demands, and an appeal to joint decision, see Gilbert 2018; and for rights as primitive, Thomson 1990.

not matter—though it is worth pausing over the distinction between what are sometimes called “claim-rights,” which place claims on others, and “liberties,” which involve the absence of claims or duties. To say that I have a liberty to  $\phi$ , in this sense, is to say that no-one has a claim against me not to  $\phi$  or that I have no duty not to  $\phi$ . (To forestall confusion: what I call a “liberty” here is sometimes called a “privilege.”) The rights I’m concerned with are claims, not liberties, and I’ll continue to call them, simply, “rights,” except where it is important to distinguish the two.

According to Hart, “the concept of a right belongs to that branch of morality which is specifically concerned to determine when one person’s freedom may be limited by another’s” (Hart 1955: 177). In other words, claim-rights determine when coercion is permissible or, perhaps, when it is permissible to demand that someone act in a certain way.<sup>3</sup> Though it needs to be clarified, I think there is an important insight here. This insight sets up Hart’s main argument, which occupies a single sentence: “It is, I hope, clear that unless it is recognized that interference with another’s freedom requires a moral justification the notion of a right could have no place in morals; for to assert a right is to assert that there is such a justification” (Hart 1955: 188-9). That is to say: there can be no rights at all unless there are natural rights against interference.

Hart illustrates his point by considering a promise that creates a claim-right, arguing that the creation of the right must presuppose a network of claim-rights that do not depend on voluntary action. We can unpack this argument as follows:

(1) If A makes a valid promise to B that he will  $\phi$ , this gives B a right against A that A will  $\phi$  and thus a right to make A  $\phi$ .

So: (2) In the absence of the promise, B would not have these rights.

So: (3) In the absence of the promise, A would have a right against B not to be made to  $\phi$ .

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<sup>3</sup> See Hart 1955: 177-8, note 6.

(4) Anyone can make a valid promise to anyone, even in the state of nature.

So: (5) In the state of nature, everyone has rights against coercion and restraint of the sort described in (3).

Two refinements are crucial. First, we should focus on a case in which B's right against A is not overdetermined, so that premise (2) applies. Second, if the conclusion is about claim-rights, B's right to make A  $\phi$  in premise (1) must be a liberty on which A has no claim against B not to be made to  $\phi$ .<sup>4</sup> The idea is that, in the absence of the promise, B would not have this liberty, meaning that A would have a claim: the right described in (3).

Even with these refinements, however, I don't think the argument goes through. The problem is that premise (2) is unsupported. It may follow from the fact that B has a right against A that A  $\phi$  that A has no right against B not to be made to  $\phi$ , but not that A *would* have that right in the absence of the promise. This is what the critic of natural rights denies. In the state of nature, A has no right against coercion and restraint of the sort described in (3) and continues to lack this right when he makes the promise to B.

One could object to the argument in other ways, too, but I am less interested in arguing for the existence of natural rights than in what the objection I have just made grants to Hart. In effect, it concedes the following principle, which specifies the sense in which rights "determine when one person's freedom may be limited by another's" (Hart 1955: 177):

RECIPROCITY: If B has a right against A that A  $\phi$ , A has no right against B not to be simply made to  $\phi$ .

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<sup>4</sup> For the problematic reading, on which B's right is a claim she wouldn't have in the absence of the promise, see Mack 1976 and Gilbert 2018: 248-50.

Being “simply made” to  $\phi$  is being made to  $\phi$  by minimal, direct intervention, without negative side-effects. If you like, imagine a form of mind control or magic spell that makes someone  $\phi$  without further effects on them or anyone else. The device is fanciful but it helps us focus on the relevant question: do the autonomy rights of the agent protect her from having to perform the action we are considering?

I think Reciprocity, or something like it, must be true. We can bring out the appeal of Reciprocity by supposing I have a right against you that you *not*  $\phi$ . Am I not then within my rights to prevent you from  $\phi$ -ing, if I can do so without negative side-effects? Simple prevention would not infringe your rights, and Reciprocity holds.

There are tricky cases, but I don’t think they refute the principle. Suppose, for instance, that B makes a promise to A that she will not enforce her right that A  $\phi$ . B still has a right against A that A  $\phi$ : other things equal, A would wrong B by not  $\phi$ -ing. But in light of the promise, A has a right against B not to be made to  $\phi$ . Doesn’t that conflict with Reciprocity? Not quite. The right B would infringe by making A  $\phi$  is not a right against being *simply* made to  $\phi$ , since it turns on a negative consequence of making A  $\phi$ , namely breaking a promise not to make A  $\phi$ . The counterexample fails.<sup>5</sup>

If Reciprocity is true, as I believe, we face a serious puzzle in understanding rights. We can bring the puzzle into view by considering schematic formulations of the will and interest theories.

WILL THEORY: For B to have a right against A that A  $\phi$  is for A to have a duty to  $\phi$  that is subject to B’s discretion.

Can the Will Theory account for Reciprocity? It’s hard to see how. Why should it follow from the fact that A has a duty to  $\phi$  that is subject to B’s discretion that B has no duty not to simply make A  $\phi$  that is subject to A’s discretion? A’s duties are one thing; B’s duties are another.

There’s a similar challenge for the Interest Theory:

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<sup>5</sup> Thanks to Jack Spencer for helping me see this.

INTEREST THEORY: For B to have a right against A that A  $\phi$  is for A to have a duty to  $\phi$  that derives from B's interests.

How does it follow from the fact that A has a duty to  $\phi$  that derives from B's interests that B has no duty not to simply make A  $\phi$  that derives from A's interests? Again, A's interests are one thing; B's interests are another. Why must they dovetail in the way required for Reciprocity?

The problem generalizes to other theories of rights, such as one proposed by Margaret Gilbert in a recent book:

DEMAND THEORY: For B to have a right against A that A  $\phi$  is for B to have the standing to demand that A  $\phi$ .<sup>6</sup>

How does it follow from the fact that B has standing to demand that A  $\phi$  that A lacks standing to demand that B not simply make him  $\phi$ ?

There is a further problem for the Demand Theory, about the very idea of "standing": how can we make sense of this—as in the standing to make demands—without appeal to rights?<sup>7</sup> If we think of "demanding" as the verbal correlate of simply making someone  $\phi$  and interpret standing to demand as a liberty—that is, the absence of a claim-right—it follows from Reciprocity that, when B has a right against A that A  $\phi$ , B has the standing to demand that A  $\phi$ . In my view, Reciprocity thus subsumes the insight behind the Demand Theory, but it does so in a way that prevents that theory from explaining the nature of rights. What we get instead is the puzzle of Reciprocity: a problem for theories of rights.

We can press this problem further by considering another view, again derived from Gilbert's work.

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<sup>6</sup> See Gilbert 2018: 61.

<sup>7</sup> For related questions, see Cruft 2019: 34-5.

JOINT COMMITMENT THEORY: For B to have a right against A that A  $\phi$  is for A and B to have a joint commitment that A will  $\phi$ .

Gilbert claims that joint commitment is sufficient for having a “demand-right” and conjectures that it’s necessary, too. But this conflicts with Reciprocity. There’s nothing to prevent A and B from making a joint commitment that A will  $\phi$  *and* a joint commitment that B will not simply make A  $\phi$ .<sup>8</sup>

Finally, what about the view that rights are irreducible or primitive? On this view, we cannot explain what it is to have a right in terms of anything else. If that is true, there is no hope of explaining Reciprocity. There is nothing to prevent B from having a right against A that A  $\phi$  while A has a right against B not to be simply made to  $\phi$ . These are independent facts.

The puzzle of Reciprocity thus calls for a reductive theory of rights. While I have not canvassed every theory of this sort, we’ve seen that standard theories fail to meet the puzzle. We can generalize further. Take any theory of rights that is otherwise tempting and ask: do its conditions for having a right preclude B’s having a right against A that A  $\phi$  while A has a right against B not to be simply made to  $\phi$ ? If not, the theory conflicts with Reciprocity—and is false.

## **2. Rights, Reasons, and Consent**

Although it rules out many theories of natural rights, the puzzle of Reciprocity can in principle be solved. The solution I propose turns on the power of consent.

In general, when B has a right against A that A  $\phi$ , A’s  $\phi$ -ing is in B’s jurisdiction: A needs B’s consent not to  $\phi$  and B does not need A’s consent to make A  $\phi$ . Rights can of course be waived: for the most part, when B consents to A’s not  $\phi$ -ing, A can refrain from  $\phi$ -ing without infringing B’s rights. These observations point to a simple theory of natural rights that has the shape required to account for Reciprocity:

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<sup>8</sup> The Joint Commitment Theory is also extensionally inadequate. What about natural rights against bodily harm? It doesn’t help to appeal to “moral rights” of some other kind (see Gilbert 2018: 282-9), since the right against bodily harm is a claim-right that grounds directed duties.

SIMPLE CONSENT THEORY: For B to have a right against A that A  $\phi$  is for three conditions to hold: (1) B does not consent to A's not  $\phi$ -ing; (2) if B does not consent to A's not  $\phi$ -ing, that fact is a reason for A to  $\phi$ ; (3) if A does not consent to B's simply making him  $\phi$ , that fact is not a reason for B not to simply make A  $\phi$ .

If B has a right against A that A  $\phi$ , it follows from the Simple Consent Theory that A's not consenting to B's simply making him  $\phi$  is not a reason for B not to simply make A  $\phi$ , from which it follows in turn that A has no right against B not to be simply made to  $\phi$ . Reciprocity holds.

The idea behind the Simple Consent Theory can be illustrated as follows. Suppose B has a right against A that A not give her an injection. Assuming B does not consent to the injection, A ought to be moved not to give it to B by the fact that it will harm her and by the fact that B has not consented to this harm. Both facts are reasons for A not to give the injection to B, so conditions (1) and (2) are met. What's more, A's consent—or lack of it—is not a reason for B not to simply prevent him from giving her the injection. There may be reasons for B not to intervene in this way, but the absence of consent on A's behalf is not among them.<sup>9</sup>

This contrasts with a case in which A could benefit B by  $\phi$ -ing but B has no right to this benefit. Suppose A could share some food with B, which B would like. A ought to be moved to share with B by the fact it will benefit her and by the fact that B has not consented to A's not sharing. Both facts are reasons for A to share, so conditions (1) and (2) are met. But condition (3) is not. If A does not consent to B's simply making him share, that fact is a reason for B not to do so. To this extent, at least, she should respect A's decisions.

My view is that the nature of rights has the shape it is given by the Simple Consent Theory: it has to do with interweaving patterns of reasons that turn on the will of the parties joined together by

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<sup>9</sup> It might be objected that reasons are cheap: suppose the philosophers' evil demon tells B that he will destroy the world if she prevents A from giving her the injection without A's consent. But this is not a reason for B not to *simply* prevent A from giving the injection, since it turns on a negative side-effect of prevention.

the right. (This is the insight in the Will Theory, detached from its appeal to duty.) The point is not that rights are constituted by consent, but by facts about the reasons that consent provides. Nor does the theory tell us what these reasons are, or whether there are any: it doesn't settle the existence or extent of natural rights. It merely tells us what such rights would be. Even in that limited role, the theory faces serious complications; and I am more confident of the outline than the details.<sup>10</sup>

For instance, whether A has reason to do something may depend on what they are able to do. If it's a condition of having a reason to  $\phi$  that one be able to refrain from  $\phi$ -ing, clause (2) will wrongly preclude B's having a right against A that A  $\phi$  when A cannot help but  $\phi$ . (Suppose A cannot kick B and thus cannot refrain from *not* kicking her; B still has a right not to be kicked by A.) For similar reasons, considerations of ability may interfere with the intended reading of (3). In each case, we should ignore or set aside conditions on having a reason (not) to  $\phi$  that turn on one's ability (not) to  $\phi$ .<sup>11</sup>

Because it appeals to the absence of consent, not the capacity for it, the Simple Consent Theory accommodates the rights of those who lack that capacity: non-human animals, newborn infants, and the incapacitated. That they do not consent to certain actions can be a reason not to perform them. There is a potential difficulty, though. If these individuals have no reasons of their own, condition (3) is always met. We risk losing the distinction between claim-rights and benefits to which one has no right, as in the sharing case above. This problem might be solved by the preceding stipulation, about reasons and abilities. If we ignore or set aside the fact that a newborn infant cannot simply make me act, it may be true that the fact that I don't consent to being simply made to share my food with them is a reason for the infant not to simply make me, while the fact that I don't

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<sup>10</sup> A complication I will not discuss: arguably, the facts about consent that provide or fail to provide reasons are ones whose rational significance turns on whether we apprehend them by way of "personal acquaintance" with A and B; I address this issue in Setiya 2020 and Setiya forthcoming.

<sup>11</sup> Another possible complication: suppose B does not consent to A's not  $\phi$ -ing but *would* consent if A were not to  $\phi$ . Arguably, this does not prevent B from having a right against A that A  $\phi$  but does prevent B's non-consent from being a reason for A to  $\phi$ , i.e. a consideration to which A should give weight in deciding whether or not to  $\phi$  (see Muñoz 2020: §5). If this is right, we should amend clause (2) of the Consent Theory: if A refrains from  $\phi$ -ing without B's consent, B's non-consent is a reason for A to  $\phi$ . A parallel amendment would apply to (3).



consent to being simply prevented from kicking them is not a reason for the infant not to simply prevent me for doing so.

I am not sure this is right, but I propose to table the issue for now, in order to address more foundational questions. It is key to the Simple Consent Theory that we specify the nature of consent without appeal to rights. There are various ways in which this might be done. What they have in common is that they characterize consent in psychological terms, not by appeal to the waiving of a right. Consent may be a speech act, or a mental state, or a matter of joint decision, by which we purport to waive a right—but sometimes fail.

Once we clarify this, however, it is clear that the Simple Consent Theory is too simple: it gives at most a sufficient, not necessary condition for B's having a right against A that A  $\phi$ . For consent can be invalid. This may happen through irrationality on B's part. If B consents to A's inflicting minor harm on her while B is incapacitated by drugs and so unable to think properly, her consent will not be valid. Assuming A knows that B is incapacitated—to avoid complications about ignorance—he would still infringe B's rights by inflicting this harm, despite the Simple Consent Theory. In a different sort of case, B is not incapacitated but the harm is so great, and any benefit so minor, that it should be obvious to B that she should not consent to A's inflicting the harm. Her practical reasoning is too deeply flawed for her consent to count as valid. Again, ignoring ignorance on A's part, he would infringe B's rights by inflicting the harm.

In either case, B consents without effecting a change in the rights that protect her. The Simple Consent Theory cannot account for this. Hence the need for a modified view:

**RATIONAL CONSENT THEORY:** For B to have a right against A that A  $\phi$  is for three conditions to hold: (1) B does not rationally consent to A's not  $\phi$ -ing; (2) if B does not rationally consent to A's not  $\phi$ -ing, that fact is a reason for A to  $\phi$ ; (3) if A does not consent to B's simply making him  $\phi$ , that fact is not a reason for B not to simply make A  $\phi$ .

It's not obvious how to frame the standard of rationality invoked by the Rational Consent Theory. In the case of incapacitation, B's capacity for practical reasoning is seriously impaired, and in the case of grave harm, it should be obvious to her that she is making a mistake. But we don't want to say that every case of defective practical reasoning yields invalid consent. We can successfully waive our rights for dubious reasons. It is a difficult task for the theory of rights to make the distinctions needed here sufficiently sharp and thus to explain why we cannot always waive our rights. Again, I set that task aside, turning instead to a final foundational problem.

One way in which consent can be invalid is through irrationality. But it is also invalid when it rests on wrongful coercion or deception. Typically, when A threatens or deceives B in order to extract consent to his not  $\phi$ -ing, B's consent is invalid and she still has a right against A that A  $\phi$ . What we need is something more like this:

VALID CONSENT THEORY: For B to have a right against A that A  $\phi$  is for three conditions to hold: (1) B does not validly consent to A's not  $\phi$ -ing; (2) if B does not validly consent to A's not  $\phi$ -ing, that fact is a reason for A to  $\phi$ ; (3) if A does not consent to B's simply making him  $\phi$ , that fact is not a reason for B not to simply make A  $\phi$ .

But now the threat of circularity returns. What is valid consent but consent that successfully waives a right? In which case, it's explained in terms of rights and cannot be used to explain what rights could be. We seem to have hit a wall.

The obvious response would be a theory of validity that spells out, in substantive terms, what is involved in wrongful coercion, deception, and the like. But again, it's hard to see how this can be done without appeal to rights.<sup>12</sup> Isn't a wrongful threat precisely one that deprives you of options to which you have a right.<sup>13</sup> The same might apply to wrongful deception: what makes it wrongful is a

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<sup>12</sup> For a contrasting view, see de Kenessey 2020: 216-7 on "good faith" and joint deliberation.

<sup>13</sup> For relevant discussion, see Pallikkathayil 2011, Kolodny 2017, and Gibert ms.

rights-infringement. In general, the suggestion runs, consent is invalid when it is irrational or when it is influenced in a way that infringes someone's rights.

Despite appearances, however, the Valid Consent Theory need not be circular. What breaks the circle is the fact that, when consent is invalid, its invalidity is captured by the Rational Consent Theory. In other words:

VALIDITY: For B's consent to be invalid is for it to be irrational or to be influenced in a way that infringes B's rights by the lights of the Rational Consent Theory.<sup>14</sup>

Why does this view work? Because consent always gives out, leaving a rights-infringement to which B does not consent—so that the question of validity does not arise—or actions that are not even potential rights-infringements.

Suppose B rationally consents to A's not  $\phi$ -ing. We ask: was B's consent influenced in a way that potentially infringes her rights, i.e. in a way that meets conditions (2) and (3) of the Rational Consent Theory? If not, it was not influenced in way that infringes B's rights according to the Rational Consent Theory or the Valid Consent Theory. It is therefore valid.

If B's consent was influenced in a way that potentially infringes her rights, we ask: did B rationally consent to this influence? If not, B's consent was influenced in a way that infringes her rights according to the Rational Consent Theory, i.e. in a way to which B does not rationally consent, such that the absence of rational consent is a reason not to exert that influence on B, and the absence of consent to B's simply preventing the influence from being exerted is not a reason for B not to

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<sup>14</sup> The influence that infringes B's rights need not be due to A. If C threatens to harm B unless she consents to being harmed by A, and A is aware of the threat—to avoid complications about ignorance—B's consent does not typically prevent A from infringing her rights by harming her; see Millum 2014, Liberto 2021, §3, and Dougherty 2021b. Liberto and Dougherty both claim that third-party duress only sometimes invalidates consent. Suppose C threatens to harm B severely unless A harms B in some minor way with B's consent, i.e. the threat demands not only B's consent but A's subsequent action. Can't B's consent to A be valid, so that A does not infringe B's rights by harming her? I am sceptical. While it may be true that A should harm B, given B's consent, this is a justified infringement of B's rights. What obscures this fact is that A need not apologize for his action, as in an ordinary rights-infringement, because B has forgiven him in advance.

simply prevent it. In this circumstance, I submit, B's consent is not valid: it rests on an action that oversteps B's jurisdiction.

The final possibility is that B's consent was influenced in a way that potentially infringes her rights, but to which B rationally consents. In that case, we ask our questions again. B's consent to A's not  $\phi$ -ing was influenced in a way that potentially infringes her rights, but to which she rationally consents. Was the latter consent influenced in a way that potentially infringes her rights, but to which she rationally consents? The question iterates, but chains of rational consent must eventually end: B cannot consent to A's not  $\phi$ -ing, and to a potential rights-infringement that induced her consent, and to a potential rights-infringement that induced her consent to the potential rights-infringement that induced her initial consent, and to a potential rights-infringement that induced her consent to the potential rights-infringement that induced her consent to the potential rights-infringement that induced her initial consent, ad infinitum. Eventually, we must reach rational consent that is invalidated by a potential rights-infringement to which B does not rationally consent, or that was not influenced in a way that potentially infringes B's rights and is therefore valid. If the final consent was influenced in a way that infringes B's rights by the lights of the Rational Consent Theory, that invalidates the whole chain of consent; if not, that validates the chain.

The upshot is that the Valid Consent Theory, together with Consent and Validity, forms the core of a promising theory of natural rights. The theory is regrettably intricate—regrettable both because I take no special joy in complexity and because it is the kind of theory that is likely open to counterexamples; it will need further refinement. What's more, it leaves some open questions: about the rights of those with limited capacities, and about the standard of irrational consent, and about the nature of conventional, not natural, rights. But I have argued that, in this case, there is no alternative to elaborate philosophical theory: nothing else could account for Reciprocity. If B has a right against A that A  $\phi$ , it follows from the Valid Consent Theory that A's not consenting to B's

simply making him  $\varphi$  is not a reason for B not to simply make A  $\varphi$ , from which it follows in turn that A has no right against B not to be simply made to  $\varphi$ . Reciprocity holds.<sup>15</sup>

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