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## The state, the individual and rights

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# The state, the individual and rights

by Kay Lauchland and Bernard McCabe, Associate Professors of Law, Bond University.

This paper examines the tension between individuals and the state. We begin by considering the different situations in which the state might seek to legislate to limit the individual's freedom of action. We then consider the different conceptions of the role of the state, and the role of individual rights.

## The individual and the state in conflict

It is a fundamental principle of our legal system that one is at liberty to do anything which is not prohibited by law. The point was made by Lord Goff in the decision of the House of Lords in *Attorney General v Guardian Newspapers Ltd* [1990] AC 109 who said at 283 that "...everybody is free to do anything, subject only to the provisions of the law...".

To say that one may do that which is not prohibited does not tell us a great deal about what should be prohibited. Determining when the state should exercise its power to limit the freedom of an individual is a political question. It follows that each exercise of state power through the medium of the legal system must be evaluated according to political criteria.

John Stuart Mill proposed an attractively simple criterion for state intervention. He argued that:

*"The only purpose for which power can be rightly exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant."*

Do you think that Mill's "Harm principle" provides adequate guidance for determining when state intervention is justified? Consider the question with reference to these practical examples:

In your opinion, should the state be able to stop an adult person from:

1. Getting a tattoo – even a tattoo on his or her face?
2. Body-piercing – from ears to navel to nipples to genitalia?
3. Having a homosexual relationship?
4. Mutilating one's self ?
5. Accessing "hard core" pornography on the internet?
6. Having an abortion?
7. Taking one's own life if one is suffering from a terminal illness?

8. Engaging in prostitution?
9. Agreeing with a business competitor to fix the price of goods sold by both businesses?
10. Taking non-prescription drugs, such as heroin or marijuana?

Does the “harm principle” permit the government to require:

1. Children to be immunised against childhood diseases?
2. Persons with an infectious disease to be quarantined?
3. Business persons to register their business name (if their business does not trade in the individual’s name) with the state Department of Fair Trading?

Can you think of three examples where the state has exercised its power in ways that would not satisfy the “harm principle” but which you nonetheless believe are appropriate?

One contentious aspect of the “harm principle” is the definition of what constitutes harm justifying state action. If an individual’s actions injure the feelings of another, or lower his or her self-esteem, does the first person cause harm that justifies intervention? What if the individual causes grave offence – by intentionally insulting the religious beliefs of another, for example? Should there be a law against flag burning?

The process of “harm evaluation” is illustrated by the judgment of the US 7th Circuit Court of Appeals in *American Booksellers Association v Hudnut* 771 F2d 323 (1985). In that case, the court was required to decide the validity of a city ordinance that prohibited the distribution of pornography which depicted women in a position of subservience to men. The court ultimately struck down the ordinance because it breached the first amendment to the United States constitution which provides that Congress shall not make laws “abridging the freedom of speech, or of the press”. In the course of his judgment, Easterbrook J accepted that:

*“Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets.”*

Easterbrook J added, however, that:

*“Much speech is dangerous. Chemists whose work might help someone build a bomb, political theorists whose papers might start political movements that lead to riots, speakers whose ideas attract violent protesters, all these and more leave loss in their wake. Unless the remedy is very closely confined, it could be more dangerous to speech than all the libel judgments in history.”*

In other words, the court in *Hudnut* warned that governments should (and in the United States, for constitutional reasons, governments *must*) only exercise their powers to limit behaviour in cases where there is a risk of clear and immediate harm. To adopt a lower standard would provide the state with more power and influence over our lives than is appropriate.

## The nature and role of rights

How do rights work? Ronald Dworkin, a legal philosopher, suggests that rights are trumps. If a person has a right, that right must be respected by the state even if doing so frustrates the state in the achievement of its legitimate polit-

ical objectives. In any dispute between the state’s interests and the rights of the individual, the individual’s rights must prevail – or at least be weighed in the balance.

Any discussion of rights soon runs into definitional disputes. What are rights? Wesley Hohfeld suggested it was possible to define rights in a strict and a broad sense.

In the strict sense, a right gives rise to a corresponding legal duty or obligation on someone else to do something, presumably for the benefit of the first person. Thus the right to be informed of the reasons for my arrest manifests itself in an obligation on the arresting officer to tell me why he or she is exercising the power of arrest. A failure to comply with the obligation might result in a claim for wrongful arrest.

Sometimes we speak of a right to do something that does not give rise to a duty or obligation on anyone else. For example, I might assert a right to walk in the park. But I am really talking about a liberty or privilege – I am at liberty to walk in the park in the sense that I am free to do so, but no-one is under an obligation to assist me to that end. Alternatively, I might exercise the right to give away or sell my goods. In that case, I am probably referring to a power – the ability to dispose of the ownership claim. Lastly, I might use the word right to describe an immunity – I have the right to occupy a property in the sense that no-one has the power to remove me.

Dworkin’s description of rights as trumps is probably a reference to rights in the narrow sense describe by Hohfeld. But the word has come to be used even more loosely. In modern political discourse, the word right is often used to convey the impression of an entitlement that ought to be satisfied, even if it does not give rise to a legally enforceable duty or obligation. Thus it is common to hear of:

1. The right to a job;
2. The right to a clean environment;
3. The right to become a parent; or
4. The right of a child to live in a stable home environment.

Rights in this wide sense are really political statements of claim. The advocates of these rights are seeking to create a political obligation to exercise power in a particular way.

## Where do rights come from?

There is a range of theories about the source of rights. It would be impossible to address them all here, or even provide a comprehensive treatment of some of them. Nonetheless, we will attempt to summarise some of the common arguments.

1. *Rights are the product of natural law.* Natural lawyers like John Finnis argue that certain rights exist in nature in the sense that they are self-evident. (Recall the words of the American Declaration of Independence, which begins “We hold these Truths to be self evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness...”).
2. *Rights are the product of a social contract.* Some theorists argue that society is based on an implied understanding between all of its members. The implied agreement between us provides that we accept the authority of laws made in the understood way in return for certain guarantees – rights. Locke and Rousseau refer to a social contract, although they have very different ideas about

the content of the rights that are retained by the individual. Another advocate of the social contract was Thomas Hobbes, who famously said that Life in the “state of nature”, without an organised state, was “nasty, brutish and short”.

3. *Rights are the product of an agreement we didn't make, but which we all would make if we thought about it.* John Rawls argues that we can identify rights because members of society who were placed behind a veil of ignorance which prevented them from knowing about their own position in society – whether they would be rich or poor, black or white, educated or uneducated, etc – would all agree on certain basic rights as guarantees just in case they found themselves in a weak position in life. If everyone would agree to the existence of rights in these circumstances, then the rights should be implemented.

It will be apparent from even this brief treatment of some of the major schools of thought that there is no consensus as to what rights an individual should be able to assert, and what effects those rights should have against the state. Should the rights be absolute trumps, to use Dworkin's language? Are the rights narrow or broad? Do they amount to an entitlement to have the state act positively, or are they entirely defensive in nature? These questions are inextricably linked to one's conception of the proper role of the state.

## What is the proper role of the state?

Friedrich Hayek, an economist and political philosopher, suggested that one might use a triangle to represent the differing schools of thought about the role of government. On one corner of the triangle lie the classic liberals, or libertarians. The liberals (be careful of the term – Americans mean something quite different when they describe someone as a liberal) believe that government has a very limited role to play. They are prepared to let change – in social and economic relationships, and in civil arrangements – evolve. Liberals are skeptical of the state's wisdom and its power to do good, and they fear its power to bad things. They can only accept government intervention where it is really necessary – most obviously, to prevent harm.

In the second corner lie the activists. They possess a more positive view of the role of the state. Hayek said that socialists belonged in this corner, but other political creeds might be found here as well. The activists believe that the state should use its power to pursue an agenda. The state should seek to initiate and direct change, and promote social development.

In the third corner lie the conservatives. Conservatives are more skeptical than the activists about the use of state power to manage change, because they are more skeptical of change. They are prepared to use state power to preserve institutions and existing states of social development. They might be prepared to use state power to reinforce community values and institutions.

In practice, most individuals find themselves at some point between the corners on the triangle. They might, for example, be categorised as liberals in relation to economic matters and conservatives on social questions. Or they might be activists on some social questions and liberals or conservatives on others. But individuals often exhibit a broadly consistent approach to their view of the role of the state.

The content of rights and the role they play is determined to some extent by one's conception of the role of the state. Liberals aim to preserve freedom for the individual and do this in part by limiting government intervention. Rights tend to be expressed negatively as defences against the exercise of state power, given that liberals assume that little good will come of government action. The rights take effect as absolutes: they may not be overridden by the state (unless it is necessary in order to prevent an even greater harm).

Activists might have a much broader concept of rights that reflects their more generous view of the role of the state. A right is not so much a defence as an assertion of an entitlement – the individual is entitled to expect that the state will exercise its powers to achieve particular objectives that are in accord with its agenda. The creation of rights that fit a state's agenda and their assertion by the individual can actually drive the exercise of state power. The rights might also include a defensive element designed to protect the individual against the misuse of state power in particular cases. But many of the rights are broadly defined and, in part, aspirational so that they are open to negotiation and compromise.

Rights play a different role for the conservatives, and have different content. Because conservatives tend to be more skeptical about the positive role of the state they often have a narrower view of rights as protections. But they might be less inclined to treat rights as trumps where some community values or institutions are at stake.

