

POSITIVE RIGHTS IN A REPUBLIC OF TALK

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POSITIVE RIGHTS IN A REPUBLIC OF TALK

A Survey and a Critique

by

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For my dear Marilyn
(who's earned it)

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Pauline loves to see her name in print, and here it is.

PREFACE

Each and every one of us, in our own way, must assume personal responsibility, not only for ourselves and our families but for our neighbors and our nation.
— President Clinton, Second Inaugural Address (“Transcript”)

This book represents an effort to understand and explain one of the principal controversies inherent in political life: to what extent and under what circumstances are we entitled, via a coercive state, to help from our fellows? It is a question with enormous implications, political, economic, social, legal, and, not least, philosophical. Its prominence and importance have generated widespread interest and discussion, which have dispersed confusion more than dispelled it.

This book aims to liquidate a bit of that confusion. It is a theoretical work, but one intended to cast light on practice, on public policies, on official and private discourse. It belongs not only to what Tocqueville called the kingdom of reason but also to what he named the empire of example. The imagination required to pursue arguments and principles in a variety of circumstances is most useful when grounded in facts, and not mere hypothetical constructs. Disembodied speculation has its place, but so does thought about how we interact in the world.

This book, like most works of analysis, assumes different shapes. In one sense, it is expansive, drawing liberally from a variety of disciplines—philosophy, political science, law, history. In other senses, though, it is deliberately quite limited. First, it concerns rights directed at government, largely omitting consideration of rights in the private sphere. This is not to deny that private rights are important and worthy of study¹—nor that private threats to rights, as Mill rightly observed in *On Liberty*, can be potent, indeed—but simply to acknowledge that books require limits. Otherwise, like water unconfined by walls, they can have no depth.

Second, the book is chiefly about the United States, which is the republic of talk. There are occasional references to other societies and rather numerous excursions into abstract concepts that know no geography, but to the extent that this study is tied to a place that place is usually America. Mostly, the limitation reflects the expertise and interest of the author.

Third, the book’s approach is essentially negative. It frankly avoids the high road of abstract theory building for the low road of destructive criticism, addressing a range of arguments in an attempt to highlight defects of logic and evidence plus bad

¹ The most common right is surely the entitlement created when one person makes a promise to another (see Melden, ch. 2).

consequences, acknowledged and unacknowledged, foreseen and unforeseen. It is, in a phrase, a survey and a critique. Along the way, it picks through a cornucopia of views, from social democracy to libertarianism. None is without merit, but none quite measures up, either. The result is a skeptic's guide to positive rights that would agree with Dewey that "the task of future philosophy is to clarify men's ideas as to the social and moral styles of their own day" (Dewey, *Reconstruction*, 26).

Such a guide is necessary because language has a profoundly important political dimension, which is to say that words are weapons. This is true not only in the sticks-and-stones sense that children recognize, though it is worth acknowledging the obvious fact that we use words to attack and intimidate, to cajole and seduce. More fundamentally (and more insidiously), we use words to construct understandings of reality—and in the West, "rights" is one of the most potent of such words. Like a fish unaware of water, we do not notice that our mind swims in a sea of words. We are wary of being conned by eloquent Iagoes, but we let our guard down in the context of the everyday. It is there where we are most vulnerable. This guide is intended to offer, to those inclined to take it, a *soupçon* of protection.

The organization of the book is straightforward. Chapter I focuses on rights talk, pausing to discuss the views of the Critical Legal Studies and Deliberative Democracy movements. The chapter concludes with a conventional overview of rights in general, and positive and negative rights in particular. Chapter II takes a long look at positive rights broadly construed, setting down arguments pro and con. Chapter III continues in the setting of more narrowly construed positive rights, giving special attention to two contemporary philosophers who have explored the subject in the context of health care, Norman Daniels and Allan Gibbard. Continuing farther down the continuum, Chapter III also seeks to evaluate libertarian alternatives to positive rights by weighing the views of a pair of its most distinguished proponents, H. Tristram Engelhardt, Jr., and Friedrich A. Hayek. Chapter IV emphasizes the American political context, particularly the Constitution, from the perspective of the Framers and the courts. Among the legal writers who are discussed are Frank Michelman, Charles Reich, Peter Edelman, and Charles Black. Finally, Chapter V offers a summary and some conclusions. The point of it all is much less to persuade the reader to adopt a set of opinions than to facilitate (and provoke) independent, critical analysis.