

**Law and Liberty:
Precedence in Practice?**

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Liberty and Law in America

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Liberty is the state of being free within society from oppressive restrictions imposed by authority on one's way of life, behavior, or political views.¹ Law is the system of rules which a particular country or community recognizes as regulating the actions of its members and which it may enforce by the imposition of penalties.²² The question of which may come first can be categorized in many ways. Maybe which is of more importance, which must be enacted first, which was conceived first? Addressing which comes first is a fundamental concept of importance, character, and the relationship they share.

Positive or Negative Liberty

Positive liberty is the capacity upon which one may act upon their wills and desires.³ Positive liberty can be described as unhindered liberty and exists merely in the state of nature. In this state, a person has nothing to hinder their wills aside from a lack of resources. But there is no abiding term for which they can possess resources, so, if one were to collect unlimited resources in the state of nature, they have nothing to define how they must use their resources. This is ultimate freedom, and the foundation of liberty.

Negative liberty is the freedom from interference, or external restraint.³ This type of liberty is that which is practiced within the commonwealth. It is what allows many people to all have liberties within one domain. As its name may suggest, negative liberty is seen in a darker light than that of its positive counterpart. If one were to have unlimited resources in a state of negative liberty, they may only act upon these resources in a way which is permitted under the

¹ Editors of Britannica, "law," Encyclopedia Britannica, December 31, 2020, <https://www.britannica.com/topic/law>.

² Editors of Britannica, "liberty," Encyclopedia Britannica, February 16, 2018, <https://www.britannica.com/topic/liberty-human-rights>.

³ Editors of Stanford Encyclopedia of Philosophy, "Positive and Negative Liberty," Stanford Encyclopedia of Philosophy, November 19, 2021, <https://plato.stanford.edu/entries/liberty-positive-negative/>.

guides of their domain. How can one be truly free and practice their liberties if they are only allowed to practice those which have been given by a ruling party?

Liberty or Law

Liberty is freedom from oppression and an oppressive state: this is the most essential natural right, and one which every human is born with. In the state of nature, liberty is limitless; it stretches as far as the imagination itself. In theory, liberty is that which allows all to be equal and is that which divides man from animal. In practice, while naturally good and only good, issues arise when the space in which those freedoms are practiced is no longer that of one man. If liberty in the natural state is truly limitless, how may there be more than only one? This raises the question, where does one liberty end and another begin? Unchecked, one liberty may easily consume another. Quickly can one liberty arise above all others in a commonwealth and impose on the freedoms of others. Solely that it may have presented itself more keenly to one man than another creating an imbalance in the liberties of all such parties. Imbalance can easily lead to imposition.

Law is important to liberty such that it may protect the freedoms of all and define where one liberty ends, and another begins. In this way, law serves only as a servant to liberty acting in a way that may prevent impedance of liberty and protect fundamental rights. Positive liberty ends where law begins which consequently must create some imposition on liberty. The extent to which liberty is imposed by law is to be decided upon by the people because it rules for the people. Law does not provide liberty: it is merely a way of protecting rights and equalizing them amongst the people. There is no way for law to exist such that it does not in some way impede individual liberties. Liberties as a people is the concept that we all have our own liberties and natural freedoms but that we must use these for the betterment of all people. To use our liberties

to enhance the liberties of others instead of imposing ours on theirs. This sounds quite confusing but is quite simple.

Liberty is only impeded by law when we allow it to be. It should be acted upon in a way which defines where one liberty ends, and another begins so that we may prevent accidental collision of liberties. Jean-Jacques Rousseau coined the idea as signing a social contract.⁴ This social contract is to be decided upon by the people. No, you did not specifically sign a contract giving up these rights to secure those; the social contract is a concept of protection for the rights which law defines and by being born under the protection of a governing body, you give up many rights in exchange for protection of your life. Conceptually, it could be seen that without a governing body, you may never get the chance to exercise your rights because of the imminent dangers of nature and the natural state. While yes, law is imposing on freedom, it creates an ability and place in which freedoms may be expended and becomes the equalizing factor for why one may agree to the 'social contract'.

The Social Contract and Free States

The social contract is an agreement within a commonwealth, not to be decided by any individual member or individual group of members. It is to be decided by all people so it may service the common good. A free state (typically in the form of a democracy) requires the input of the governed to decide the governing. In a direct democracy this would mean all people of the commonwealth act within the political realm therefore they are directly influencing and writing their own social contracts. In modern free states, representatives are elected to generate decisions in the favor of the people. While it is true and possible that the opinions of the

⁴ Jean-Jacques Rousseau, *The Social Contract* (Harlow, England: Penguin Books, 2004).

governing body may sometimes neglect the opinion of those it governs there are systems established to generate debate for such disagreement.

Equal rights and equal protection of rights is what makes the social contract so important. Without equal protection of rights, individual liberties may be wildly insouciant of a common good or other individual liberty. In a commonwealth with no social contract, accumulation of liberty may easily lead to a power struggle or greater freedom for one party than another. Inequality inhibits liberty such that it is the greatest form of negative liberty and can reduce liberty to nothing at all.

A free state is one which all members are guaranteed equal rights and equal protections of those rights. It is only in a free state which liberty is president. Law can be defined differently in every commonwealth. In a state which law rules above all liberty, it is no longer a commonwealth. That is the case of one liberty, or one party's liberties reigning over the liberties of all whom it governs. That is an imposition of party liberty upon individual liberties. Impositions such as these act outside of law and do not qualify themselves as law. Therefore, so often do systems of government which use law to impose the liberties of a majority party or party of rule over individual liberties within their state fail. These boundary cases are proof of why law must act in servitude towards liberty, or it shall fail and result in loss of liberty for all.

Liberty and Law

Without law, liberty would be limitless, or limited. It is law which defends liberties and defines how they must be protected. It is without liberties and the right of man to secure these liberties which we would have no law. Together liberty and law may form a common good and a general will which motivate a body to empower individual liberties and secure them for all.

John Stuart Mill argued for the security protection of liberties, individual and common through law in his 1859 paper, *On Law*,

The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. (Mill, 1859, 13)

A system which defends liberty with law is one which values liberty above law. Understand that liberty must be established before it may be defined or enforced by the powers of law. The concept of positive liberty is that which questions how far liberty may reach uninhibited. Within the body of a system, unchecked, positive liberties may easily inhibit the liberties of others. Thus, negative liberty is established which questions the extent to which liberty may be enacted without crossing the barriers of rules established to limit that liberty. Such regulation or reduction of liberty may exist only for the equality of all whom embody the system.

Therefore, it is liberty which comes first and above law. If it were not liberty which motivates man, law would guarantee no right to any individual or promote a common good. Without liberty, there would be no need for law. Law exists only to protect liberty because it is our individual liberty which drives the common good or goal. A commonwealth may never exist if it had no common. The common which fulfils a commonwealth is the equal idea of liberty and

how it may be protected and enacted. By forming law, we may protect, not define liberties, such that no individual liberty may be of impedance toward another and that no liberty holds too great of value. Law allows all liberties to be equal and allows all people equal rights to those liberties.

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