

Freedom Through Law,  
Not as an Exemption From Law

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This report presents a non-libertarian description of liberty. Freedom emerges from what Kant calls a civil condition. Freedom arises out of civil society and does not precede it. This non-libertarian description of liberty is presented initially through an evaluation of Isaiah Berlin's *Two Concepts of Liberty*.

Like many moral and political philosophers before him, Berlin sought -- through his *Two Concepts of Liberty* -- to bring clarity of meaning to the term freedom. Berlin labels his two concepts negative liberty and positive liberty. By subsuming both negative liberty and positive liberty under a general rubric of freedom, we will see that Berlin perpetuates the kind of confusion about freedom which he sought to clarify.

One cannot understand freedom without understanding duty, freedom's opposite. The concepts of "negative" and "positive" provide us with a method through which we can obtain a better understanding of both freedom and duty.

Libertarians see freedom as an exemption from laws. They come to freedom by excluding or getting clear of duty. The position here is that freedom can be understood only within the context of duty. Kant's theory of justice serves as a final example of why libertarian freedom as an exemption from laws is wrong.

## *Beginnings*

Michael Ignatieff notes in his biography of Berlin, that *Two Concepts of Liberty* “was delivered as his inaugural lecture as Chichele Professor to a packed hall in the School’s Building in Oxford on 31 October 1958.” [Ignatieff 225]<sup>1</sup> The two concepts explored in these lectures, Berlin describes as negative and positive liberty. These two conceptions and the distinction between the two has generated significant discussion and controversy. Most of the commentators who criticize these two concepts, or at least the nomenclature Berlin gave to these two concepts, do not spend much time trying to understand the source of Berlin’s use of these terms. If one looks at the history a little, it is easier to see the problem of freedom as Berlin understood it and how, at least in his mind, this lecture pointed towards a solution to the problem.

Berlin had given four lectures at Bryn Mawr in February and March of 1952. The third lecture was entitled “Two Concepts of Freedom: Romantic and Liberal.” This lecture apparently remains unpublished. (Ignatieff 201-02).

Here is how Berlin understood the problem of freedom:

Until Rousseau, liberty had always been understood negatively, as the absence of obstacles to courses of thought and action. With Rousseau, and then with the Romantics, came the

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<sup>1</sup> Ignatieff refers to Michael Ignatieff, *Isaiah Berlin, a Life* (Henry Holt and Company, 1998).

idea of liberty being achieved only when men are able to realize their innermost natures. Liberty became synonymous with self-creation and self-expression. A person who enjoyed negative liberty -- freedom of action or thought -- might nonetheless lack positive liberty, the capacity to develop his or her innermost nature to the full. (Ignatieff 202)

Here we see the germination for that which Berlin came to call negative and positive liberty. These themes were an abiding obsession for Berlin. In the final essay he wrote at the age of 87, *My Intellectual Path*, Berlin gives the reader an historical synopsis of how he came to embrace pluralism as the only viable political theory. Berlin understood the enemy of pluralism as monism “--the ancient belief that there is a single harmony of truths into which everything, if it is genuine, in the end must fit.”(MIP 56)<sup>2</sup> This creed, said Berlin, was not however confined merely to the Enlightenment. Berlin gives us a litany of similar monists: Plato, who believed that mathematics was the route to truth, Aristotle, who believed that perhaps it was biology, Jews and Christians who sought the answers in sacred books, to others who believed that the laboratory and mathematical methods could settle things and still others, like Rousseau, who believed that only the innocent human soul, the uncorrupted child, the simple peasant would know the truth. (MIP 37)

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<sup>2</sup> MIP refers to Isaiah Berlin, “My Intellectual Path,” *The First and the Last* (New York Review of Books 1999)

As Berlin understands the Romantics, the Romantics said something

wholly new and disturbing: that ideals were not objective truths written in heaven and needing to be understood, copied, practiced by men; but that they were created by men. Values were not found, but made; not discovered, but generated. . . (MPI 45-46).

Berlin understood his political pluralism as a product of reading Vico and Herder, and of understanding the roots of romanticism. Berlin believed that “monism is at the root of every extremism.” (MPI 57)

## *Two Concepts of Liberty*

Berlin notes that freedom or liberty have been used to describe very different aspects of human conduct. In *Two Concepts of Liberty*, he proposes to examine two central senses in which freedom or liberty have been used.

The first of these political senses of freedom or liberty (I shall use both words to mean the same), which (following much precedent) I shall call the 'negative' sense, is involved in the answer to the question 'what is the area within which the subject – a person or group of persons – is or should be left to do or be what he is able to do or be, without interference by other persons?' The second, which I shall call the positive sense, is involved in the answer to the question 'what, or who, is the source of control or interference that can determine someone to do, or be, this rather than that?' (TCL 121-22)<sup>3</sup>

What's wrong with the picture Berlin presents us in *Two Concepts of Liberty*?

In Berlin's account, he discusses what he terms negative liberty and positive liberty. In my own account, freedom will be given the same definition which Berlin gives negative liberty. This is also, at least generally speaking, the same definition which Hobbes and Mill assign to freedom and it is the definition which is generally understood to denote freedom in the Anglo-American tradition.

Hobbes tells us that "liberty, or freedom, signifies properly the absence of opposition -- by opposition I mean external impediments of motion -- and

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<sup>3</sup> TCL refers to Isaiah Berlin, "Two Concepts of Liberty," *Four Essays on Liberty* (1969).

may be applied no less to irrational and inanimate creatures than to rational.” In the context of political freedom or political liberty, Hobbes tells us what it means to be free. Hobbes describes a free man as “he that in those things by which his strength and wit he is able to do is not hindered to what he has a will to.”<sup>4</sup> Here we find an early expression of political liberty understood as a negative. That is, political liberty is understood as the absence of opposition, the absence of an impediment to action

Political liberty, for Hobbes, consists in liberty from covenants and rules.

For seeing that there is no commonwealth in the world wherein there be rules enough set down for the regulating of all the actions and words of men, as being a thing impossible, it follows necessarily that in all kinds of actions by the laws pretermitted men have the liberty of doing what their own reasons shall suggest for the most profitable to themselves. For if we take liberty in the proper sense for corporal liberty -- that is to say, freedom from chains and prison -- it were very absurd for men to clamor as they do for the liberty they so manifestly enjoy. Again, if we take liberty for an exemption from laws, it is no less absurd for men to demand as they do that liberty by which all other men may be masters of their lives.<sup>5</sup>

The object of Mill’s essay *On Liberty*, was to assert one very simple principle,

that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of

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<sup>4</sup> Hobbes, *Leviathan*, Part II, Chapter 21.

<sup>5</sup> Hobbes, *Leviathan*, Part II, Chapter 21.

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.<sup>6</sup>

In this fashion, Mill describes his famous “no harm principle” as the only basis for individual or social interference with the liberty of another. In *On Liberty*, the greatest good does *not* appear to be happiness (utility) but human freedom.<sup>7</sup> Indeed, Mill seems critical of the practical possibility of actually being able to calculate utility. “But the strongest of all the arguments against the interference of the public with purely personal conduct is that, when it does interfere, the odds are that it interferes wrongly and in the wrong place.”<sup>8</sup> Mill says the “principle of freedom cannot require that he should be allowed not to be free. It is not freedom to be allowed to alienate his freedom.”<sup>9</sup>

In my own account, what Berlin calls positive liberty will not be identified with any form of freedom. Indeed, the position here is that positive liberty rather than being a description of freedom, is a description of its opposite: duty.

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<sup>6</sup> Mill, *On Liberty*, 13.

<sup>7</sup> Mill, *On Liberty*, 100.

<sup>8</sup> Mill, *On Liberty*, 102.

<sup>9</sup> Mill, *On Liberty*, 125.

Subsuming both negative liberty and positive liberty under the general rubric of freedom frankly perpetuates the kind of confusion about freedom which Berlin sought to clarify. I will discuss what Berlin means by these two different notions of freedom (negative and positive), but that discussion has been had in many places by many commentators and will not be dealt with in great detail. The point here will be to deny that positive liberty has anything to do with freedom. There are not two concepts of liberty, there is one concept of liberty. The only concept of freedom to be understood as such is negative freedom. Positive liberty is not freedom; it is duty.

Berlin connects positive freedom to the notion of social justice. Yet he recognizes the significant difference between freedom and social justice. He understands that freedom's value is dependent upon one's social or economic condition and that "individual freedom is not everyone's primary need." Berlin, more so than Mill or Hobbes, recognizes that "[m]en are largely interdependent, and no man's activity is so completely private as never to obstruct the lives of others in any way. . . the liberty of some must depend on the restraint of others." (TCL 124)

Berlin is critical of those who are tempted to say that an increase in justice by the curtailment of freedom somehow makes all of us, as a whole, more free. Berlin accurately describes a curtailment of freedom as a loss of

freedom however great the other values which are promoted by such curtailment.

When I am restrained in my freedom in order that others may gain in their social or economic condition so that they can more fully enjoy their freedom, the sacrifice on my part, Berlin says,

is not an increase in what is being sacrificed, namely, freedom, however great the moral need or the compensation for it. Everything is what it is: liberty is liberty, not equality or fairness or justice or culture, or human happiness or a quiet conscience but if I curtail or lose my freedom, in order to lessen the shame of such inequality, and do not thereby materially increase the individual liberty of others, an absolute loss of liberty occurs. This may be compensated for by a gain in justice or in happiness or in peace, but the loss remains, and it is a confusion of values to say that although my 'liberal,' individual freedom may go by the board, some other kind of freedom – 'social' or 'economic' – is increased. (TCL 125-26)

Berlin, of course, is a pluralist. Freedom has significant value, but freedom is not a sacred or untouchable value. There are principles which justify the curtailment of freedom.

A great virtue of Berlin's essay is in its implications about the ontological status of the individual. Berlin does not directly confront the ontological status of the individual. Rather he quite cogently makes the case that there is a real question as to whether there is a self independent of society.

Even Mill's strenuous effort to mark the distinction between the spheres of private and social life breaks down under examination. . . . for am I not what I am, to some degree, in virtue of what others think and feel me to be? . . . I am not disembodied reason. Nor am I Robinson Crusoe, alone upon his island. It is not only that my material life depends upon interaction with other men, or that I am what I am as a result of social forces, but that some, perhaps all, of my ideas about myself, in particular my sense of my own moral and social identity, are intelligible only in terms of the social network in which I am (the metaphor must not be pressed too far) an element. (TCL 155)

What is this self which asserts its freedom? What is this self which claims an exemption from laws? I will return to a discussion of the ontological status of both self and society. Needless to say, the more dubious the ontological status of the self, the less compelling is the case for liberty as understood by Hobbes, Mill and their progeny.

When Berlin discusses issues of social justice, however, he still thinks he's talking about freedom (albeit his so-called positive liberty). But he is not. In Berlin's discussion of positive liberty, I believe Berlin is simply discussing something other than freedom. What Berlin calls positive liberty, I will call duty with its reciprocal element of right.

### *Not Positive Liberty, But Duty*

In this essay I have been using the terms freedom and liberty interchangeably. I wholly separate, however, the term “right” from the terms “freedom” and “liberty.” The terms “freedom” and “liberty” are to be distinguished completely from the term “right.” The term “right” is used as the reciprocal to the term “duty,” as in  $x$  has a duty to do  $y$  for  $z$ . If  $x$  fails to do  $y$ , then  $z$  has a right to compel the performance of  $y$ . If  $x$ 's failure to perform  $y$  causes  $z$  injury, then  $z$  has a right to redress against  $x$ . Mill says that

Duties of perfect obligation are those duties in virtue of which a correlative *right* resides in some person or persons . . . [T]he term appeared generally to involve the idea of a personal right – a claim on the part of one or more individuals, like that which the law gives when it confers a proprietary or other legal right. Whether the injustice consists in depriving a person of a possession, or in breaking faith with him, or in treating him worse than he deserves, or worse than other people who have no greater claims – in each case the supposition implies two things: a wrong done, and some assignable person who is wronged. . . . it seems to me that this feature in the case – a right in some person, correlative to the moral obligation – constitutes the specific difference between justice and generosity or beneficence. Justice implies something which is not only right to do, and wrong not to do, but which some individual person can claim from us as his moral right.<sup>10</sup>

The term “justice” will be understood as that which occurs when a duty is performed or when there has been a failure to perform a duty and the failure

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<sup>10</sup> Mill, *Utilitarianism*, 61-62.

has been appropriately redressed. An injustice is when this formula breaks down and does not hold.

Freedom and liberty are defined as Berlin defines negative liberty: not being interfered with by others. Liberty is not a right. It is thus incorrect to say that one has a right to be left alone. It is incorrect to say that one has a right not to be interfered with. It is incorrect to say that one has a duty not to interfere with others. It is confusing and unhelpful to think of liberty in the same way as we think of rights. Again, rights and duties represent reciprocities. Duty and liberty are mutually exclusive. But before Hayek and other economic libertarians acknowledge (metaphorically) my joining their pack, they need to await the *coup de grâce*: negative liberty is unintelligible, incoherent and, frankly, doesn't exist -- if, by exist, we mean something which can be a part of the fabric of a society. Speaking ontologically, the social is real; the individual is not. Or, not to put too fine a point on it, the reality of the individual emerges from, is created by, the social.

Again for Hobbes, the greatest liberty depends on the silence of the law.

In cases where the sovereign has prescribed no rule, there the subject has the liberty to do or forbear according to his own discretion. And therefore such liberty is in some places more and

in some less, and in some times more, in other times less, according as they that have the sovereignty shall think most convenient.<sup>11</sup>

For the term “rule,” I will substitute “duty.” Where there is no duty, one has the liberty to do or forebear according to one’s own discretion. I thus accept Hobbes’ statement that liberty is an exemption from laws. Liberty is outside the law. To put it in the terms used in this essay, liberty is an exemption from the commands of duty. Liberty is outside of duty.

The frequent and honorable mention of the word “liberty” in the histories and philosophy of the ancient Greeks and Romans is understood by Hobbes to refer to praise of the liberty of sovereigns, not of private men. By way of example, Hobbes tells us that there

is written on the turrets of the city of Lucca in great characters at this day the word Libertas, yet no man can thence infer that a particular man has more liberty or immunity from the service of the commonwealth there than in Constantinople. Whether a commonwealth be monarchical or popular, the freedom is still the same.<sup>12</sup>

The liberty of a sovereign state is not to be confused as the liberty of private persons. Individual liberty is understood solely as an absence of constraint by the state over the individual. The liberty of a person is understood primarily through the absence of a law directed toward the

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<sup>11</sup> Hobbes, *Leviathan*, Part II, Chapter 21.

<sup>12</sup> Hobbes, *Leviathan*, Part II, Chapter 21

potential acts of a person. To the extent that a state may call upon its citizens to act for some social purpose, however noble that purpose, it is a constraint on freedom.

I don't take these definitions of liberty, duty, right and justice to be particularly controversial. The formulation is well known. Mill describes duty as "a thing which may be *exacted* from a person, as one exacts a debt. Unless we think that it may be exacted from him, we do not call it his duty."<sup>13</sup>

To use the analogy of law, I would say that the reciprocal relationship between duty and right is similar to what in the law is known as a cause of action in tort. The elements of a tort cause of action are duty, breach of duty, causation and injury. There is no cause of action (there is no "right") for someone who has suffered an injury as a result of another's conduct unless there is a duty. The mere fact that certain conduct causes injury does not give rise to a cause of action, does not give rise to a claim or right against another, unless that other person had a duty with respect to the injured party.

The question most simply put is this: What is the relationship between freedom and duty? How does one go about deciding whether a particular facet of human conduct falls within the sphere of freedom or is encumbered, if you will, within the realm of duty? Anglo-American political theory has been

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<sup>13</sup> Mill, *Utilitarianism*, 60.

dominated by a presumption that freedom wins by default and that the case for duty must be made. The burden of proof is on duty and if duty fails to carry its burden, then freedom wins. The privileging of freedom over duty cannot, I contend, be justified. The purpose of a portion of this report is to mount an attack on the long dominant privileging of freedom over duty and, concomitantly, to argue that there is no basis to privilege freedom over duty.

### *Berlin*

Berlin moves from negative to positive freedom by moving the focus from an individual self to a self conceived as something wider than the individual – a tribe, a race, a church, or the state. The move to positive freedom, says Berlin, is a move based upon the concerns and freedom of a true self which is defined in this fashion. The true self must be taken into account, Berlin says.

One's inner spirit, one's true rational nature, is the only self that deserves to have its wishes taken into account. When others coerce me for my own good they are bringing to heel my empirical bundles of desires and passions. It is a good which I would recognize if I weren't blind, ignorant or corrupt; if I wasn't caught up in the empirical world of desires and passions.

This recognition of the good is what might be referred to as responding to a higher calling. This higher calling, a calling to put aside empirical hedonism, if you will, is the calling duty makes on us. It is not the call of freedom. It is the acceptance of a social obligation in a particular context at a particular moment which the individual chooses over her freedom. The positive freedom advocate is saying that this obligation (the obligation to act in a way which curtails my freedom) has a greater value for her than acting as she would otherwise wish to act. Her tribe, her race, her church, her state require

of her certain actions or require that she restrain from certain actions for the good of her tribe, her race, her church, or her state. Positive freedom is the exercise of duty, not freedom.

For Hegel and Marx, Berlin says, one is free only when one understands the world. When I understand the world I understand the physical laws of the world. If I want laws to be other than what they necessarily are, I must be crazy. What you know through critical reason is the necessary truth. To want something other than reality is either ignorance or irrationality. Through these types of premises, one can reach a conclusion that one can be “forced to be free.” This counter-intuitive notion is not counter-intuitive at all if we substitute being “forced to do one’s duty” for “forced to be free.”

Again, Berlin is a pluralist. Berlin’s positive freedom expresses values. Berlin is sympathetic to many of these values. At times in his essay, his hope seems to be that if he could just get the advocates of positive freedom to become pluralists like himself, then we would have the best of both worlds. We would have (1) liberty with values and (2) values not prone to totalitarianism.

Berlin believes that positive freedom is indeed a credible expression of freedom if it gives up its fallacious premise “that there must exist one and only one true solution to any problem.” Such rationalism, with its assumption of a

single true solution, Berlin argues, is what leads from an ethical doctrine of individual responsibility and individual self-perfection to an authoritarian state, obedient to the directives of an elite of Platonic guardians. Berlin seems to believe that an ethical doctrine of individual responsibility and individual self-perfection is somehow an ethical doctrine of freedom which then somehow historically led to an ethical doctrine of unfreedom. But an ethical doctrine of individual responsibility and individual self-perfection is a different ethical doctrine than an ethical doctrine of an authoritarian state obedient to the directives of an elite of Platonic guardians. One doctrine may, in an historical sense, lead to the other doctrine but that is as true as simply saying one ethical system may evolve into another ethical system. Ethical doctrines *aren't* free. Freedom is not a component of *any* ethical system. But if one sees Berlin's exponents of positive freedom (e.g. Hegel, Marx, Kant) as espousing particular systems of responsibility, not freedom, then much of the difficulties with which Berlin struggles go away.

In the section "*Self-realization*," Berlin says that the "only true method of attaining freedom, we are told, is by the use of critical reason, the understanding of what is necessary and what is contingent." (TCL 141) In this section, Berlin analyzes the metaphysical foundation upon which positive freedom rests.

An obligation system, a system of duties and rights, necessarily attempts to be rational, self-sufficient, and, of course, obligatory. When one stands inside the particular system of duty in question (e.g. Hegelian, Marx or Kantian systems) then it makes sense to say that if you want the world to be other than as it is, you must be crazy. A paradigmatic act of freedom is the act whereby one attempts to stand outside the system of duty. From *that* point of view, there is nothing necessary about the singular, rational structure of the duty (or positive freedom) system.

Berlin says the positive sense of the word liberty derives from the wish on the part of the individual to be his own master (TCL 131). The wish on the part of the individual, says Berlin, is to be a subject, not an object. It is a wish to be somebody, not nobody. It is a wish to be a doer; to be self-directed:

I wish, above all, to be conscious of myself as a thinking, willing active being, bearing responsibility for my choices and able to explain them by references to my own ideas and purposes. I feel free to the degree that I believe this to be true, and enslaved to the degree that I am made to realize that it is not. (TCL 131)

This description may seem like a description of acts of freedom, but it is not. The wish to be somebody is a wish to be recognized by others. The wish to be self-directed, the wish to bear responsibility for one's own choices, the wish to be able to explain those choices by reference to one's own ideas and purposes are wishes made within a context. This kind of context is a system of

obligation involving reciprocal duties and rights. I have obligations to others and others have obligations to me. I have importance. I am a doer. Yes its true I can be called upon to perform my duties, but I can also call upon others to act on my behalf. I have rights.

Admittedly not every system of obligation works in this manner and, thus, not every system of obligation fits Berlin's notion of positive freedom. The fit will be complete, however, if one adds the element of choice. I choose the particular system of obligation in which to join as a member. I get to choose the club to which I will belong. When I choose that club, I agree to be bound by its rules and I can also avail myself to all rights to which I am entitled as a member of that club. The 'freedom' part of Berlin's positive freedom is the choice I exercise when I choose the club, rather than letting others choose the club for me. There are at least these two components of Berlin's notion of positive freedom:

- (1) A system of obligation involving reciprocal duties and rights; and
- (2) To which I voluntarily join and to which I voluntarily pledge allegiance.

The real self, Berlin says, may be conceived as something wider than the individual. The real self may be part of a tribe, a race, a church or a state. This tribe, race, church or state becomes the true self. The true self must be

taken into account. The empirical bundle of desires and passions must be brought to heel (TCL 132-33). It is precisely the empirical bundles of desires and passions which are given free play in the notion of negative liberty. There is no element of constraint in negative liberty which controls or channels this empirical bundle of desires and passions. I myself may bring my empirical bundle of desires and passions to heel, or direct them in a particular manner. In exercising my negative liberty, however, that is a choice I make not governed by reference to any standard or ideal to which I am obliged to align my desires, wishes and actions.

What Berlin subsequently describes are the various historical ways in which his notion of positive freedom is played out. Berlin describes in great detail the individual searching for status. If a person is not recognized, that person may fail to recognize. Berlin recognizes that the desire for status is not itself freedom.

Paternalism is despotic because it is an insult to my conception of myself as a human being:

So much can I desire this, that I may, in my bitter longing for status, prefer to be bullied and misgoverned by some member of my own race or social class, by whom I am, nevertheless, recognized as a man and a rival – that is as an equal – to being well and tolerantly treated by someone from some higher and remoter group, who does not recognize me for what I wish to feel myself to be. . . . although I may not get ‘negative’ liberty at the

hands of the members of my own society, if they are members of my own group; they understand me as I understand them; and this understanding creates within me the sense of being somebody in the world. (TCL 157)

The individual pledges his allegiance to his tribe, race or church rather than to his liberty. Many individuals have preferred to be bullied by one of their own, rather than to enjoy even a wide breadth of negative liberty under a colonial ruler, for instance. Many a dictator has been able to gain power by rallying his tribe to throw off the yoke of a foreign oppressor. In the western liberal democracies, the citizens ask themselves how could this third world country repudiate 'enlightened' western governors for this brutal and nasty dictator?

These citizens, however, are listening with ears solely attuned to the pitch of negative liberty. But it is a mislabeling of the venture to say that the tribe is pursuing positive freedom. The description Berlin gives about the search for status accurately explains and demonstrates the rationality of this decision by the tribe. Yet it is not freedom they seek, but status.

It is this desire for reciprocal recognition that leads the most authoritarian democracies to be, at times, consciously preferred by its members to the most enlightened oligarchies, or sometimes causes a member of some newly liberated Asian or African state to complain less today, when he is rudely treated by members of his own race or nation, than when he was governed by some cautious, just, gentle, well-meaning administrator from outside. Unless this phenomenon is grasped, the ideals and behavior of

entire peoples who, in Mill's sense of the word, suffered deprivation of elementary human rights and who, with every appearance of sincerity, speak of enjoying more freedom than when they possessed a wider measure of these rights, becomes an unintelligible paradox (TCL 157-58).

When I subsume my own empirical bundle of desires and passions to the wishes of something greater than me, I become greater than just that mere empirical bundle. When I become a fighter for the cause, I become somebody. I proudly take on this system of obligation even when its reciprocal obligation of duties and rights leave little or no area in which I can enjoy the pleasures of negative freedom. These desires for status, these desires for a commitment to a cause greater than oneself explain as much about human conduct as the clarion call for negative liberty.

Berlin recognizes that it is a profound misunderstanding of the temper of our times to assume that what attracts former colonial nations to nationalism or Marxism is not simply a surrender of liberty for the sake of security (TCL 159).

What they seek is more akin to what Mill called 'pagan self-assertion,' but in a collective, socialized form. Indeed much of what he says about his own reasons for desiring liberty – the value that he puts on boldness and non-conformity, on the assertion of the individual's own values in the face of the prevailing opinion, on strong and self-reliant personalities free from the leading strings of the official law –givers and instructors of society – has little enough to do with his conception of freedom as non-interference, but a great deal for the desire of

men not to have their personalities set at too low a value, assumed to be incapable of autonomous, original, 'authentic' behavior, even if such behavior is to be met with opprobrium or social restrictions, or inhibitive legislation. (TCL 159-60)

Finally, Berlin concludes, the believers in negative liberty want to curb authority and the believers in positive liberty want authority place in their own hands. This, he calls the cardinal issue (TCL 166).

These are not two different interpretations of a single concept, but two profoundly divergent and irreconcilable attitudes to the ends of life. It is as well to recognize this, even if in practice it is often necessary to strike a compromise between them. For each of them makes absolute claims. These claims cannot both be fully satisfied. But it is a profound lack of social and moral understanding not to recognize that the satisfaction that each of them seeks is an ultimate value which, both historically and morally, has an equal right to be classed among the deepest interest of mankind. (TCL 166)

Berlin is no doubt right in claiming that negative and positive liberty each seek an ultimate value. He is certainly right to say that negative and positive liberty are not two different interpretations of a single concept, but two profoundly divergent and irreconcilable attitudes to the ends of life. Berlin undercuts his argument, as I have said, in thinking that when treating both of these ultimate values we are engaged in freedom talk. Berlin creates an unnecessary tension when he treats these two claims as both involving liberty. It seem obvious that once you treat negative liberty as freedom and positive

liberty as duty, then we are not surprised or befuddled to be told that these are two profoundly divergent and irreconcilable attitudes to the ends of life.

We already know that freedom and duty represent divergent and irreconcilable attitudes to the ends of life. Freedom as an exemption from an obligation to others and duty *as* the obligation to others are clearly irreconcilable, but they are not confusing. It is only confusing when you treat these two irreconcilable attitudes as meaning the same thing: to both be attitudes toward liberty.

For instance, an extreme pursuit of freedom -- sometimes referred to as rugged individualism -- can be characterized as a shirking of responsibility. It is almost a commonplace in western democracies, particularly in the United States, to believe that one cannot have too much freedom; that the only limit on freedom perhaps is some type of no harm principle. But surely the push for such extreme individualism comes at a high price. When freedom is embraced so tightly, the claims of society -- the claims of duty -- must suffer as a consequence. After all, the two are “irreconcilable attitudes to the ends of life.” Again, Berlin understands that the belief that “*extremism in the pursuit of liberty is no vice*,” (to quote a famous libertarian) is a belief which has, in fact, been pursued rather rarely in human history.

But the fathers of liberalism – Mill and Constant – want more than this minimum: they demand a maximum degree of non-interference compatible with the minimum demands of social life. It seems unlikely that this extreme demand for liberty has ever been made by any but a small minority of highly civilized and self-conscious human beings. The bulk of humanity has certainly at most times been prepared to sacrifice this to other goals: security, status, prosperity, power, virtue, rewards in the next world; or justice, equality, fraternity, and many other values which appear wholly or in part, incompatible with the attainment of the greatest degree of individual liberty, and certainly do not need it as a pre-condition for their own realization. (TCL 161)

Berlin concludes his essay proposing that

Pluralism, with the measure of ‘negative’ liberty that it entails, seems to me a truer and more humane ideal than the goals of those who seek in the great, disciplined, authoritarian structures, the ideal of ‘positive’ self-mastery by classes, or peoples, or the whole of mankind. It is truer, because it does, at least, recognize the fact that human goals are many, not all of them commensurable, and in perpetual rivalry with one another. (TCL 171)

My criticism of Berlin is not that pluralism, after all is said and done, remains too ambiguous to be helpful. Berlin’s pluralism is a system where respect for the facts, as Berlin puts it, should be given precedence over the absolutes, be they absolutes from the left or right. I just don’t think that Berlin’s model is the best explanation for what is going on with freedom if indeed we are to give such deference to the facts. Berlin’s pluralism is certainly meant to foster tolerance and understanding. The facts, I think, point to a universe of human culture within which there exists freedom and duty

where duty is presented usually through systems of obligation with reciprocal rights predicated upon particular religious or moral beliefs. The religious or moral beliefs upon which this system of duty rests are themselves further predicated upon the underlying metaphysics of particular religious or moral beliefs. In other words, we start with metaphysics and from there we derive the appropriate religious or moral beliefs for human conduct which, through the use of our critical reason, we believe to be the most coherent, “rational” promoter of the underlying metaphysics.

It is demonstrably rare in human history for individuals or societies to hold their metaphysics contingently, to be uncertain about what that individual or that society believes to be reality. Thus it comes as no surprise that the religious or moral system derived from our metaphysics is seen as necessary. Even when it is acknowledged that religious or moral beliefs may be constructed, they are usually thought to be constructed from undisputed premises – such premises constituting the underlying metaphysics.

The foregoing points to the difficulty in understanding, justifying or evaluating any specific system of obligation. It is very difficult to analyze from within the system of belief that forms the particular obligation system (e.g. christianity, marxism, libertarianism). The other problem, the problem that arises when standing outside any particular system of belief, is the

problem Berlin and I face. It is the problem of being adequately descriptive. Berlin's essay is not adequately descriptive in that it adds a different layer of confusion in its attempt at clarification.

### *Reactions to Berlin*

Maccallum believes that the distinction between positive and negative freedom has stood in the way of “getting clear” on *when* persons are free. Hayek agrees with Maccullum that conceptualizing freedom using Berlin’s negative/positive model has led to greater, not lesser, confusion about what freedom is. Hayek more or less adopts the classical definition of freedom which he describes as “independence of the arbitrary will of another.”<sup>14</sup> (FC 81) This meaning of freedom he describes as the oldest and that all attempts by philosophers to refine or improve it have just caused confusion. Berlin’s attempt to refine and improve is an example of the truth of Hayek’s statement. Although extremely critical of positive freedom, Berlin still wants to think of it as a legitimate conception of freedom. Freedom for Hayek has

a distinct meaning in that it describes one thing and one thing only, a state which is desirable for reasons different from those which make us desire other things also called ‘freedom’. . . . In this sense, ‘freedom’ refers solely to a relation of men to other men, and the only infringement on it is coercion by men. This means, in particular, that the range of physical possibilities from which a person can choose at a given moment has no direct relevance to freedom. (FC 81).

Hayek says that a rock climber in a difficult situation who sees only one way out to save his life is free, although he has no choice.

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<sup>14</sup> FC refers to F.A. Hayek, “Freedom and Coercion.”

Whether he is free or not does not depend on the range of choice but on whether he can expect to shape his course of action in accordance with his present intentions, or whether somebody else has the power so to manipulate the conditions as to make him act according to that person's will rather than his own. *Freedom thus presupposes that the individual has some assured private sphere*, that there is some set of circumstances in his environment with which others cannot interfere.<sup>15</sup>(FC 82)

Hayek's attempt to draw a bright line between freedom and everything else is not wholly successful. The distinction between freedom and everything else is found in Hayek's definition of the term as "the only infringement on it is coercion by men." How are we to construe "coercion by men?" Hayek says "we do not clearly distinguish between what other men do to us and the effects on us of physical circumstances." (FC 88) Hayek narrowly construes coercion of men. For example, Hayek says that

[e]ven if the threat of starvation to me and perhaps to my family impels me to accept a distasteful job at a very low wage, even if I am 'at the mercy' of the only man willing to employ me, I am not coerced by him or anybody else so long as the *intent* of the act that harms me is not to make me serve another person's ends, its effect on my freedom is not different from that of any natural calamity. . . (FC 93)

But what if the intent is to garner for my own benefit (or the benefit of my group) as much of the natural resources as possible and it is my intent that by garnering the natural resources I can bend the men necessarily dependent on

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<sup>15</sup> (Emphasis supplied)

those resources to my own will? At what point in the world of cause and effect do we draw the line between coercion by men and a natural calamity?

Intent cannot be the defining distinction. Hayek contradicts himself on this point. For Hayek, “unless a monopolist is in a position to withhold an indispensable supply, he cannot exercise coercion, however unpleasant his demands may be for those who rely on his services.” (FC 92) Here coercion is determined not by intent, but by whether that which the monopolist withholds is “indispensable.” In Hayek’s example the monopolist is the owner of a spring in an oasis. The oasis becomes the sole source of water for the community. Hayek says one can conceive “of a few other instances where a monopolist might control an essential commodity on which people are completely dependent.” (FC 92) In Hayek’s conception there are very few instances where a monopolist exercises an infringement on freedom, as Hayek construes the term “coercion by men.”

Examples Hayek gives of natural calamity are “a fire or a flood that destroys my house or an accident that harms my health.” (FC 93) But what if the fire that destroys my house was caused by faulty wiring? The wiring is faulty because there was no other supplier available in my community. In my community there is no central authority with the power to regulate the wiring sold in the community. Is that a natural calamity? What if the accident which

harms my health occurs on the job as a result of blatantly unsafe working conditions? How natural is that calamity? What if the fire and my accident are foreseeable events arising out of efforts by the wiring contractor and my employer to garner as much profit as possible?

Hayek is to be commended for drawing this bright line between freedom and everything else. By drawing this bright line, Hayek does us a great service by unabashedly describing the price we pay for such an aggressive policy of freedom. But this bright line fails because the line he draws (coercion by men) is artificial and he is inconsistent in requiring intent as an element of coercion.

The types of monopolies that concern Hayek are monopolies such as monopolies of employment “such as would exist in a fully socialist state in which the government was the only employer and the owner of all the instruments of production. . .” (FC 92-93) Here the socialist government’s monopoly would possess unlimited powers of coercion in Hayek’s view. Nor would it make any difference in Hayek’s conception of things if the socialist state was democratic in that one could vote out one monopolist for another.

Hayek is right to say political freedom is not freedom. Political freedom is the embodiment of a particular system of duties with particular reciprocal rights. Hayek distinguishes between his use of the term freedom and political freedom. Hayek accurately notes that

a free people in this sense is not necessarily a people of free men; nor need one share in this collective freedom to be free as an individual. Perhaps the fact that we have seen millions voting themselves into complete dependence on a tyrant has made our generation understand that to choose one's government is not necessarily to secure freedom. Moreover, it would seem that discussing the value of freedom would be pointless if any regime of which people approved was, by definition, a regime of freedom. (FC 82-83)

In Hayek's conception, it is worse to have a socialist state as an employer which one can freely vote in and out than a private employer who exercises a lesser degree of coercion, but over whom one has no control (is not subject to being voted in or out).

Hayek's conception of freedom presupposes an assured private sphere for the individual. How is this sphere assured to be private? Who will assure that there is this private sphere? The assured private sphere and, for Hayek, freedom itself, requires for its existence a parallel universe of duty and rights. Hayek's freedom is dependent upon a cooperative moral system of duty whereby one of the duties is to assure a private sphere for individuals. It is probably necessary to privilege duty over freedom in order to garner for Hayek his assured private sphere.

Steiner gets it right when he says that

[t]o ask whether an individual is free to do A, is not to ask a moral question. It is, rather, to ask a factual question the answer to which is logically prior to any moral question about his

doing A. Indeed, it is difficult to comprehend how one could perform an action which one ought not to perform – a wrong action – unless one is free to do it, not prevented from doing it.<sup>16</sup>

This observation comports with the conception of freedom and duty offered here. Duty talk involves asking moral questions, normative questions. The notion of freedom itself is normative in the sense of how large or small will freedom loom in our universe of duty and freedom, but whether one is free to do a particular act is not a moral question. Whether one is free to do a particular act *precedes* the moral question. The moral issue of whether one should or should not do *x* only arises if one is free to do or not do *x*. I am free to do *x*, but I choose not to because it would violate a duty to which I feel an obligation to obey.

A system of duty [in the form of laws] -- *per Hobbes* -- are imposed onto our freedom. Without such a system of duty so understood, Hayek's private sphere cannot be assured.

To summarize then, duty precedes freedom. The default position then is duty, not freedom, as economic libertarians as Hayek require. Freedom is a negative. Freedom has no content. Freedom is valued, more or less, within a particular system of duty. Whether an act is free is a factual question, not a moral one. The scope of the freedom which citizens enjoy in a particular

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<sup>16</sup> Hillel Steiner, "Individual Liberty," 125.

society will be determined within the context of the laws of that particular society. What finally then assures Hayek's private sphere is not freedom, but the rules and laws arising out of a particular system of duty.

In the debate between freedom and duty, it is only by pure fiat that one can claim to privilege freedom over duty. This is certainly true in historical terms. History points to two things: (1) that duties are constructed and (2) that subsequently freedom is constructed. It is only in very recent history that we see the needs or "rights" of the individual distinguished from the needs and "rights" of the tribe. It seems rather silly, therefore, to suppose that there once were individuals, qua individuals, living in a state of nature who came together for their mutual protection to form a society.

So much else has to be in place before freedom becomes important that perhaps one should think of freedom as a luxury item. Rather than as a basic or natural need like bread and water, freedom is a Lexus. Berlin recognized that it is rare in history for many to have sought extreme negative liberty. How could this be so if freedom is conceived as basic, natural, life affirming, a *sine qua non*? If freedom is a Lexus, however, then Berlin's statement does not seem that striking.

Now of course you are free to substitute the luxury item of your choice for the Lexus. The point is that there are material preconditions to the exercise

of freedom. And while there certainly has to be what Hayek calls the “assured private sphere,” that assured private sphere has no value without certain minimal preconditions for the exercise of freedom being met.

But I think we should push this point even further. And the point is that even when the minimal material preconditions for the exercise of freedom are met, it is still true – historically – that few have sought to fully engage that level of freedom into their lives.

A common criticism of freedom in the United States is that the United States is comprised of a nation of consumers, rather than a nation of citizens. The United States is arguably the culture with the largest assured private sphere and has a citizenry which enjoys extensive material wealth. It is nevertheless true that the upshot of such widespread prosperity has been a fascination with and pursuit of further prosperity. Few citizens in the United States have taken advantage of their material wealth to exercise the kind of freedom envisioned by Mill (e.g. his social experiments). This result fits better with the notion of freedom as defined here – mere non-interference – than Mill’s own project.

Berlin, after all, is critical of Mill for being confused on these two notions of negative liberty, the one being non-interference and the other freedom as a precondition to the truth. Mill’s second notion of freedom –

freedom as a necessary precondition for truth – imposes values on freedom. It is this latter notion of freedom which fits into what Berlin calls positive freedom and I describe as a system of obligation – a system of duties with reciprocal rights.

### *The Metaphysics of Morals: Kant's Theory of Justice*

Kant's theory of justice presupposes a community. Kant recognized that the expression of freedom in a civil society arises out of that civil society and does not precede it.

Kant calls a condition in which there is no distributive justice a state of nature. What is opposed to a state of nature is not, for Kant at least, an artificial condition but rather what he terms a *civil* condition, that of a society subject to distributive justice. A civil union does not reflect a society as much as it *makes* a society. (MM 306-307)<sup>17</sup> Kant's original contract is not historical. It is not empirical. It is founded on reason.

From private right in the state of nature there proceeds the postulate of public right: when you cannot avoid living side by side with all others, you *ought* to leave the state of nature and proceed with them into a rightful condition, that is, a condition of distributive justice. (MM 307 -- emphasis supplied)

The only freedom found in a state of nature is a state of externally lawless freedom. The state of nature is a state of violence. (MM307) Hayek is representative of a certain libertarian position, which position radically fails to recognize the incoherence of individual freedom outside of a civil society.

It is only the civil society which can secure equality and justice for all citizens. When the libertarian seeks a Hobbesian exemption from laws, the

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<sup>17</sup> MM refers to Kant, *The Metaphysics of Morals*

libertarian seeks to be outside of the law. What makes a libertarian position radical is the blunt fact that the libertarian seeks an outlaw status.

Kant tells us that human beings “do wrong in the highest degree by willing to be and to remain in a condition that is not rightful, that is, in which no one is assured of what is his against violence.” (MM 308) Kant’s theory of justice points to the way in which we can deliver to Hayek his “*assured private sphere*.” The assurance and privacy of an assured private sphere comes about only after one leaves a state of nature and proceeds into the rightful condition of a civil society, which is a condition of distributive justice.

Our commitment to freedom is necessarily a commitment to the social. Freedom does not stand alone or apart from the social. Freedom arises out of society itself. Our freedom, to the extent it can be assured, will be assured *through* laws, not as an *exemption* from laws.

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