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Freedom and the Pursuit of the Good

Exercising an Opportunity Concept

By

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A thesis submitted for the degree of Doctor of Philosophy to the
Department of Politics, the Faculty of Social Sciences, the
University of Glasgow

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Abstract

If freedom is thought of as an opportunity concept, what value does it have for individuals who are unable to take advantage of their opportunities because of ignorance or poverty? If one concedes that individuals ought to be granted certain basic liberties, then there must also be a corresponding effort to empower individuals in their pursuit of the good; for to be free without all-purpose means such as wealth and income is to have the worth of one's freedom eroded. This simple theme, I argue, inspires egalitarian liberalism, whereby the state plays an active role in empowering individuals to pursue their self-chosen ends. Although this argument is advocated by the likes of Rawls and Berlin, the current literature pays insufficient attention to its force. In this thesis, I make amends for that omission. I infer certain social obligations from a commitment to negative liberty; I consider this rubric in the context of four variants of egalitarian liberalism; and I propose an array of social policies that flow from broader considerations on the worth of liberty.

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Freedom and the Pursuit of the Good

Exercising an Opportunity Concept

"No-one can compel me to be happy in accordance with his conception of the welfare of others, for each may seek happiness in whatever way he thinks fit, so long as he does not infringe upon the freedom of others to pursue a similar end which can be reconciled with the freedom of everyone else." - *Immanuel Kant*¹

¹ Kant, I., 'On the Relationship of Theory to Practice in Political Right', *Kant's Political Writings*, Reiss, H., (ed.), Nisbet, H.B., (trans.), Cambridge University Press, 1970, p.74.

Introduction - The Analysis of 'Liberty'

"Only that which is without history can be defined." – Friedrich Nietzsche²

'Freedom' and 'liberty' have roughly the same meaning in the English language. A brief examination of the etymology of each word explains this synonymy. The porous nature of the English language has resulted in the absorption of vocabulary with Germanic, Nordic, Celtic, and French roots. Whereas 'free' derives from the Anglo Saxon 'frēo' (explaining the existence of 'frei' in German), 'liberty' derives from the Old French 'liberté', and originally from the Latin 'liber'. There may have been subtle differences in the root meaning of these terms. In all likelihood, the term 'liber' originally referred to the status of a group or tribe, as in the citizens of a Republic, who were at liberty to generate and live by a system of laws designed to reflect their primary interests. By contrast, the Anglo Saxon term more explicitly alludes to the absence of bonds or chains on the individual (for example, the Icelandic term 'frjals', which also derives from a Germanic root, literally means 'having a free neck').³ Yet, it would obfuscate matters if we were to insist on any current literal distinction between 'liberty' and 'freedom' – as the English language has evolved, the two expressions have come to be used interchangeably. I shall not attempt to alter this convention.

The analysis of language is perhaps the most appropriate starting point for an investigation into the idea of freedom. This approach became prominent during the middle of the 20th Century, following the lead of J.L. Austin. It was argued that the core meaning of a term could be discerned by considering how it is employed in everyday language. However, as I will ultimately demonstrate, the analysis of language can take our understanding of freedom only so far, for it is incapable of resolving problems of incoherent or divergent usage.

Let us try to build up a basic picture of what liberty means by testing our intuitions against an array of hypothetical situations in which the term 'free' is employed:

² Nietzsche, F., *On The Genealogy of Morals*, Smith, D., (trans.), Oxford University Press, 1996.

³ Kristjánsson, K., *Social Freedom*, Cambridge University Press, 1996, p.9

- The prisoner had been locked in the dungeon and was no longer free.
- In the modern liberal state, atheists are free from legal persecution.
- I was a new person, free from the drugs that had shackled my existence.

Is it possible to discern a common root among these divergent uses of the term 'free'? We might say (by way of an opening remark) that the term 'free' refers to the absence of some repressive or constraining force or obstacle, and hence that it is characterised by 'a genuine negativeness'.⁴ As Alan Ryan points out,

"[Freedom] takes its meaning from the absence of something which might have been present but isn't. The negativeness involved is that we can always ask the question 'what might we have had to free him from?' or 'what might have stopped him being free to do it?'"⁵

Returning to the above examples, the prisoner in the dungeon is constrained by the walls that limit his opportunities; for the prisoner, freedom is the absence of imprisoning walls. Or again, an atheist living in a liberal democracy is not oppressed by heresy laws -- his freedom is defined in terms of the absence of censure. Finally, the freedom of the reformed drug addict is manifest as the absence of insatiable cravings. Thus, the absence of a constraining force or obstacle is arguably the essence of liberty.

In addition to the 'negativeness' of the concept of freedom outlined above, ordinary language analysis seems to reveal a positive component. Thus, a man is free from drug addiction in order to live according to his 'real will'. Or again, being free from a social obligation to worship God allows us to be open about our secular beliefs. Now, if freedom refers not only to the holding off of some oppressive force, but also to the capacity 'to do', does this not mean that freedom is composed of a triadic relationship involving both a negative and positive component? Perhaps at root liberty is a triadic concept: X seeks to be free from Y in order to do Z. This is the contention of Gerald MacCallum.⁶ For MacCallum, a concept of liberty cannot simply be articulated around the XY or XZ axis (i.e. as 'freedom from' or 'freedom to') since such a

⁴ Ryan, A. 'Freedom', *Philosophy*, 1965, p.110

⁵ Ryan, A. 'Freedom', *Philosophy*, 1965, p.110

⁶ MacCallum, G. C., 'Negative and Positive Freedom,' *Philosophical Review*, vol. 76, 1967

characterisation serves only to "emphasise one or the other of two features of every case of the freedom of agents."⁷ Consequently, anyone who argues that 'freedom from' or that 'freedom to' is the only 'true' definition of liberty, is misguided:

"It would be far better to insist that the same concept of freedom is operating throughout, and that the differences, rather than being about what *freedom* is, are for example about what persons are, and about what can count as an obstacle to or interference with the freedom of persons so conceived."⁸

MacCallum believes his triadic formulation will generate considerable conceptual clarity amidst the ideological disputes that plague discussion on liberty. He wants to rid competing concepts of liberty of their flesh, leaving only an uncontested skeletal structure; at least this way, he suggests, ideologues can be sure they are arguing about the same thing.

Yet, MacCallum's efforts are ultimately unsuccessful. Whilst his analysis indicates certain structural features about the way in which 'we use the term 'free' in our language, he does not provide us with an adequate concept or definition of liberty. The triadic structure of 'freedom' as it is used in our language actually says very little about a given concept of freedom; it does not establish (as MacCallum contends) that there is only a single concept of liberty. Indeed, MacCallum's search for conceptual clarity serves only to purge different formulations of liberty of their substantive content and hence of their distinctive meaning. Concepts of liberty are identified by their particular take on human beings and their interests, as we will see when Berlin's historical approach is discussed.

MacCallum's under-developed analysis is exposed when we come to consider the value of freedom. As Berlin argues: "A man struggling against his chains or a people against enslavement need not consciously aim at any definite further state. A man need not know how he will use his freedom; he just wants to remove the yoke."⁹ In other words, freedom is valued inasmuch as it permits choice *in a general sense*. The slave who seeks liberation values liberty as a means to many possible ends, that is, as

⁷ Ibid., p.318

⁸ Ibid., p.320

⁹ Berlin, I., 'Two Concepts of Liberty,' *Four Essays on Liberty*, Oxford University Press, 1969, p.xliii

a general opportunity to act, not as a means to some specific end (as MacCallum implies when he claims that one is free to do Z). Consequently, for the slave, the plea for freedom is adequately expressed in terms of X being free (or unfree) from Y.¹⁰ MacCallum's framework therefore fails to appreciate the value that we place on being free to choose. Whilst we must distinguish between freedom and choice, and whilst choice is not a sufficient condition for the existence of freedom (for I may be forced to choose), the *value* of freedom derives from our desire to choose uncoerced and unthreatened.

Yet, it is not only MacCallum who finds error in the analysis of ordinary language. Other commentators such as Alan Ryan maintain that our linguistic practices reveal a distinctly evaluative dimension to a given understanding of liberty. For instance, it is claimed that the term 'free' always renders a positive appraisal; in using it, I will be endorsing something, not merely conveying a factual point. As Ryan points out, whilst I might claim that my savings are 'tax-free' I would not seriously claim that they are 'profit-free'; whereas tax is viewed as a burden to be avoided, profit is actively sought.¹¹ Or, as Benn and Weinstein argue, "we congratulate ourselves on being free from care, poverty, and fatigue; but cannot correspondingly complain that we are free from nourishment, riches, or rest."¹² However, the evaluative use of the term 'free' does not always hold. For instance, when I state that 'I'm free to meet you tomorrow' I am primarily making a factual statement pertaining to my availability. The statement conveys neither that I am pleased nor displeased - the evaluative dimension is absent. It may well be that the meeting is necessary but entirely loathsome, meaning I will meet grudgingly. Ordinary language does not demonstrate, then, that a positive evaluation is always implicit in our use of the term 'free'.

The inadequacy of linguistic analysis becomes even more exposed when we come to examine the nature of constraint. For instance, some would argue that if I am prevented from leaving my office by a locked door I am clearly unfree, irrespective of how that door came to be locked. This position largely accords to the argument advocated by Hobbes, for whom any physical obstacle is potentially freedom denying

¹⁰ We should note, by contrast, that it is insufficient only to express the XZ axis: whenever X is free to do Z, he is also free from Y. Freedom must always involve the absence of some constraining factor.

¹¹ Ryan, A. 'Freedom', *Philosophy*, 1965, p.103

¹² Benn, S.L., and Weinstein, W.L., 'Being Free to act, and Being a Free Man', *Mind*, 1980, p.195

(at least insofar as it can cause some kind of blockage). A man is unfree when an avalanche blocks his exit from a cave, just as he is unfree when imprisoned by the state. Notwithstanding Hobbes's peculiar idea that inanimate objects can be the possessors of liberty,¹³ this understanding of freedom is supported (or at least not disqualified) by ordinary language. If I am trapped in a cave by an avalanche then it seems I am not free to leave. Yet, others would prefer to say that in this instance I am merely unable to leave. There seems to be no means of settling this argument by reference to ordinary language alone, since there are examples of both uses of the term 'free' in our language. To this extent, linguistic analysis is uninformative. Even Austin, the great advocate of ordinary language analysis accepts that 'sometimes we do ultimately disagree' over the meaning of words and that other factors must be considered 'if our interests are more intellectual than the ordinary'.¹⁴ The impotence of ordinary language analysis to settle such disputes is its greatest weakness. In short, it has no way of resolving problems of incoherent or divergent usage.

The comprehensive conceptual properties of freedom are difficult to derive from ordinary language analysis because of the term's diverse application and its metaphorical extension. When we consider that the prefix 'free' can be applied to speech, action, merchandise, provisions, states, citizens, and choices, we might agree with S.I. Benn that: "No neat set of necessary and sufficient conditions could be either discovered or even plausibly stipulated for the proper use of 'freedom', which would embrace such diversity."¹⁵ As such, freedom as a political concept must admit of certain boundaries, which are not commonly respected by the varied and diverse ways in which the term 'freedom' is used in our language. Heidegger was surely right when he observed that 'freedom is not merely what common sense is content to let pass under this name.'¹⁶

¹³ For Hobbes, a flow of water blocked by an impediment could accurately be described as having its liberty taken away.

¹⁴ Austin, J.L. 'A Plea for Excuses' quoted in Kristjánsson, K., "Social Freedom," Cambridge University Press, 1996, p.175

¹⁵ Benn, S.I., *A Theory of Freedom*, Cambridge University Press, 1988, p.123

¹⁶ Heidegger, M., *The Essence of Truth*, Continuum International Publishing, 2002.

Divergent Concepts of Freedom

It would seem from the indeterminacies of linguistic analysis that 'liberty' cannot be pinned down as a single concept. We have already noticed that our use of this term in everyday language is diverse and often contrasting. As such, we should think about different concepts of liberty, which are located in different historical epochs, linguistic contexts and ideological traditions. These criteria serve to distinguish distinct understandings of freedom.

To give an example of an historical criterion, Benjamin Constant distinguished between the 'liberty of the ancients' and the 'liberty of the moderns'. Roughly speaking, the former involved the 'active and constant participation in collective power': deliberating in the public square over war and peace; legislating for the common good; calling fellow citizens to account for their actions. Yet, for Constant, this notion of liberty was potentially a danger to individual sovereignty, since it involved 'the complete subjection of the individual to the authority of the community.' By contrast, the liberty of the moderns consists of 'private enjoyment and private independence'; it exists in the pursuit of our particular interests. Yet, this liberty is not without its loss either, since the moderns are 'lost in the multitude' -- their political influence is imperceptible.¹⁷

Theorists such as Quentin Skinner and Philip Pettit have developed the idea of the 'liberty of the ancients' into a concept that is now commonly referred to as 'republican freedom'.¹⁸ Briefly, republican freedom is held to be a property of both states and individuals. Historically, a state was said to be free in the sense that it was able to resist aggressive monarchical states and the tyrannous powers of the Church. As Machiavelli writes, free states "are far from all external servitude, and are able to govern themselves according to their own will."¹⁹ Within the republic, individuals are free inasmuch as they are entitled to run for public office and contribute to the

¹⁷ Constant quoted in 'The Liberty of the Ancients and the Liberty of the Moderns', *Political Thought*, Rosen M., Wolff, J., (eds.) Oxford University Press, 1999, p.122

¹⁸ Pettit, P., *Republicanism: A Theory of Freedom and Government*, Clarendon Press, 1997; Skinner, Q., 'The Republican Ideal of Political Liberty' *Political Thought*, Rosen, M. and Wolff, J., (eds.), Oxford University Press, 1999, p.169

¹⁹ Machiavelli quoted in Skinner, Q., 'The Republican Ideal of Political Liberty', *Political Thought*, Rosen M., Wolff, J., (eds.) Oxford University Press, 1999, p.167

legislative process. Note that the freedom of the citizen is not *dependent* on active participation in democratic government (à la Constant), only the opportunity to participate in government, which is conferred by the legal status of citizenship.²⁰ At root, then, the republican idea of freedom is tied to a conception of citizenship in which all have an equal moral standing under law, to be contrasted with the morally subordinate subjects of an absolute ruler. This builds on the historical distinction made between 'liber' and 'servus', or citizen and slave. This is the idea of liberty as it was understood in the city-states of the ancient world; it is contextualised by a specific linguistic heritage (Latin), ideological tradition (republicanism) and historical timeline (Ancient Rome).

There is also evidence to suggest that Constant's conception of 'liberty of the moderns' is too broad to accurately represent the idea of freedom in the post-Enlightenment world. By the 19th Century, the period during which Constant wrote, two very different modern concepts of liberty had emerged, both of which were distinct from republican freedom. The first, which had its roots in the Anglo-Saxon tradition, conceived of liberty in terms of the opportunity to act; freedom was synonymous with license. The second, which had a continental origin, cast liberty as obedience to the moral law; individuals were said to be free when acting in accordance with their most fundamental purposes. This dichotomy has been conceptualised by Isaiah Berlin as negative freedom and positive freedom.

These two concepts are said to express fundamentally different, and often incompatible, views of human freedom. Positive liberty is a thesis on the importance of self-determination and responds to the question 'By whom am I governed?' I am free insofar as I am my own master, in charge of my own destiny, able to follow my most important plans and initiatives. Constraints on positive liberty might include fears, irrational desires, and immoral cravings. Negative freedom, by contrast, considers the question 'To what extent am I governed?' Here, a man is said to be free to the degree that he has the opportunity to act without the external interference of another person or group. Constraints on negative liberty take various forms: physical violence, restraint, compulsion, threat and legal prohibition.

²⁰ For an expansion of this idea, see Pettit, P., *Republicanism: A Theory of Freedom and Government*, Clarendon Press, 1997, p.52; Knowles, D., *Political Philosophy*, Routledge, 2001, p.85-86

Whilst Berlin is convinced that the distinction between positive and negative liberty 'is neither trivial nor confused,' he also accepts that the two concepts 'cannot be kept wholly distinct'.²¹ There are certain conceptual commonalities: "the essence of the notion of liberty, both in the 'positive' and 'negative' senses, is the holding off of something or someone – of others who trespass on my field or assert their authority over me, or of obsessions, fears, neuroses, irrational forces – intruders and despots of one kind or another."²² This concession is crucial, for it implies there is a relationship between positive and negative freedom. Indeed, if positive freedom is concerned with the question 'By whom am I governed?' and if, by implication, a man is not free who cannot govern himself, then we must establish what constraining factors limit this freedom. It may well be that I do not have the will power, or that I do not have the required intelligence, or that I am dominated by my passions. Yet, it may be that my inability to become my own master stems from the interference of others, in which case the denial of my positive freedom occurs as a result of the denial of my negative freedom. This point is implicitly recognised by Berlin:

"I wish to determine myself, and not be directed by others...my conduct derives an irreplaceable value from the sole fact that it is my own, and not imposed upon me. But I am not, and cannot expect to be, wholly self-sufficient...I cannot remove all the obstacles from my path that stem from the conduct of my fellows...if I am not to be dependent on others in every respect, I shall need some area within which I am not, and can count on not being, freely interfered with by them."²³

In this passage, Berlin suggests that self-mastery is contingent upon a degree of negative freedom, meaning the two concepts of liberty are linked. If I am to act in accordance with my self-determined goals (positive freedom), then I will require a minimum of (negative) freedom to realise this. To this extent, both positive and negative freedom are noble ideals. Yet, Berlin also saw a darker side to the liberation of human beings: the ethic of self-government, which underlies the concept of positive freedom, has often been transmuted into a doctrine of authority. Berlin argues

²¹ Berlin, I., *Four Essays on Liberty*, Oxford University Press, 1969, p.xliii

²² *Ibid.*, p.xliii; p.158

²³ Berlin, I., 'Introduction,' *Four Essays on Liberty*, Oxford University Press, 1969, p.xliii

this has occurred historically because of the association between 'self-mastery', the 'bifurcated self' and 'monistic rationalism'. These terms will be explained shortly. Before proceeding, however, I should outline how my thesis will develop.

In **Section I**, I more or less uphold Berlin's critique of self-mastery. I suggest that the notion of the bifurcated self is inimical to a liberal concept of freedom, which ought to deal solely with the revealed preferences of individuals; these preferences are sovereign in terms of the ends at which freedom is directed. To this extent, I make a case for negative freedom, which is roughly defined as the opportunity to act without being coerced or compelled by other people. Though this concept of liberty is generally thought amenable to classical liberalism or libertarianism, I aim to show that it can be used to justify progressive social policy. Indeed, I argue that a concept of negative liberty promotes the type of egalitarian liberalism that has become increasingly influential over the last fifty years.

In **Section II**, I consider the broader relationship between egalitarian liberalism and the concept of negative liberty itself. Specifically, I assess the contribution of four liberal theorists – Joseph Raz, Alan Gewirth, Isaiah Berlin, and John Rawls – who each acknowledge the importance of supplementing liberty with all-purpose means such as wealth and income. Each author argues that personal freedom is worthless unless one has the capacity to advance one's ends within a given social structure. However, though allied by this common belief, the four theorists I consider are importantly different in other ways: they disagree on the justification and value of liberty. These differences shall be filled out later.

Section III deals with the type of institutions that flow from the broader argument. It is suggested that certain social goods must support freedom if it is to be meaningfully exercised by individuals. Each of the authors discussed in Section II hints at how these social goods might be institutionalised in a modern liberal democracy, but none explore the substantive implications of their argument at any length; they deal largely with abstract justifications. The purpose of the last section, then, is to work out concrete social policies that are consistent with the view that liberty ought to be supported by a network of social goods. I variously consider the role of health care, employment, and education in relation to a system of basic liberties. I touch upon the

type of support that is necessary to empower individual choice, and I examine the reach of that choice.

*

Section I – Concepts of Liberty

The analysis of language is a useful tool that can deepen our understanding of the idea of freedom. However, considered in isolation, it is unlikely to provide us with a fully developed concept of liberty; we must also locate an idea within a philosophical or political tradition. Hence, the history of ideas is an important source for our conceptual investigation; different ideological currents have placed diverse slants on the definition of liberty, not all of which have been coherent or indeed liberal. This point is made most eloquently by Isaiah Berlin, arguably the foremost historian of ideas in the 20th Century. His essay on negative and positive freedom is perhaps the most influential work on the subject since Mill wrote 'On Liberty'. Nonetheless, critics argue that Berlin's essay is bound by its historical context and that many of its central themes are no longer current or valid. My aim is to persuade the reader otherwise: while Berlin's work is undoubtedly weakened by ambiguities and unwarranted generalisations, it makes four essential claims about liberty:

- Freedom ought not to be confused with other concepts such as power or equality.
- Freedom as self-mastery is potentially illiberal because it second-guesses the actual desires of human beings.
- The law always places restrictions on liberty.
- If personal freedom is to be worth anything at all, it must be accompanied by appropriate social conditions that enable individuals to advance their ends.

Each of these points requires significant explanation and development, which I will undertake in the first three chapters of this thesis. Let it be said, however, that the development of a concept of liberty along these lines is a necessary first step in my general argument, which holds that a system of basic liberties ought to be complemented by an array of social goods if individuals are to be empowered in their pursuit of a conception of the good. In other words, liberty by itself is not enough; individuals need additional capacities to take advantage of their freedom.

Chapter 1 – The Corruption of the Liberal Ideal

“All we can know for certain is what men actually want.”

- Berlin, ‘Tolstoy and Enlightenment’²⁴

Introduction – Berlin’s Two Concepts of Liberty

The broader aim of this chapter is to assess the validity of Berlin’s critique of positive liberty. Though I suggest that the relationship between self-mastery and ‘monistic rationalism’ is more complicated than Berlin would care to admit, I broadly support his suspicion of positive freedom and the doctrine of the divided self. I aim to demonstrate that a liberal should not find meaning in a hierarchy of inner selves (higher or lower; true or false) or believe that there can ever be a political solution to the experience of inner conflict. Human beings are what they are, and liberalism deals only with what human beings say they want. Their preferences can be contested, doubted, even denied, but to use coercion in order to liberate them is always illegitimate. The revealed preferences of ordinary men and women must be the limit and the arbiter of all practical politics. In short, liberalism must accept what people say they want. Positive freedom cannot inform a liberal agenda because it is either coercive or perfectionist.

Self-Mastery as a Doctrine of Authority

According to Berlin, self-mastery is attained only when we act autonomously, in accordance with a rational plan for life:

“I wish to be a subject, not an object; to be moved by reasons, conscious purposes, which are my own, not by causes which affect me, as it were, from outside. I wish to be somebody, not nobody; a doer...[capable] of conceiving goals and policies of my own and realising them...I wish, above all, to be conscious of myself as a thinking, willing, active being, bearing responsibility for

²⁴ Berlin, I., *Russian Thinkers*, (London: Hogarth Press, 1978)

my choices and able to explain them by reference to my own ideas and purposes.”²⁵

Yet, for Berlin, this altogether honourable notion of self-mastery is easily debased, and has historically been transmuted into a doctrine of authority. This transformation has not only been of academic importance; down the ages, seemingly benign ideas have been manifest as sinister political realities. Indeed, it was because of such a political reality that Berlin decided to write his famous polemic on freedom - it was the effrontery of the Soviet dictatorship's claim to liberate its citizens that fuelled his opposition to the idea of positive freedom.²⁶ Berlin's critique of self-mastery was thus delivered as a riposte to Marxist claims that only communism could deliver 'true freedom'.

For the Marxist, freedom only comes with the classless society, a vision that exists just beyond the horizon; until then, apologists claim, we must accept that a socialist dictatorship will rule in the real interests of man. Berlin's suspicion of this promise echoes that of the Russian critic Alexander Herzen. We cannot write off the current generation in the name of a glorious future. Life is characterised by the here and now, which is how we must live. Human life is fragile and should not be sacrificed to some far-off goal. What use is 'the ironic promise that after your death life on earth will be splendid'? Will you toil in the fields, knee-deep in mud, all in the name of 'Future Progress'? Such an unlikely pledge should make people cautious: the aim, endlessly far, is but a snare. The goal must be nearer – at the very least 'the labourer's wage', or 'pleasure in work performed'.²⁷

Yet, Berlin's most profound objection to the Marxist programme is not simply that coercion has often been justified in the name of some hazy, distant dream. Rather, he offers a critique of enlightened rationalism, a doctrine in which the 'true' purpose of humanity is deemed to be ascertainable by the insights of gifted men. Such indeed is the burden of Marxism, or perhaps its saboteurs, who attribute a scientific validity to

²⁵ Berlin, I., 'Two Concepts of Liberty,' *Four Essays on Liberty*, Oxford University Press, 1969, p.131 Berlin uses various expressions to convey the generic idea of self-mastery, namely: self-direction, self-control, rational self-direction, self-government and self-realisation. He appears to use these terms interchangeably.

²⁶ Berlin first heard of this doctrine upon visiting the Soviet Union in 1945.

²⁷ Herzen, A., 'From the Other Shore', *Selected Philosophical Works*, Foreign Languages Publishing House, 1956, p.363

their argument and label those who refute its truth as ignorant or misguided or subject to false consciousness. From this dangerous premise, a paternalistic vision follows, where fools and the uninformed are 'educated' in order to 'liberate' them from their ideological prison; and if they do not submit to this liberation willingly, then they must be forced to be free. However, as Berlin points out, once I take this view "I am in a position to ignore the actual wishes of men or societies, to bully, oppress, torture...in the secure knowledge that whatever is the true goal of man...must be identical with his freedom."²⁸ The logic of the Marxist argument, then, is to espouse an Orwellian oxymoron - coercion liberates.

This type of argument is not only dangerous in the hands of materialists. Idealists have also justified coercion in the name of liberty, and hence similarly debased the idea of positive freedom. Great names like Plato, Rousseau, and Hegel have all affirmed some sort of coercive vision. For the Idealist, freedom is attained when the higher 'rational' self controls the lower 'sensual' self. This doctrine becomes truly menacing when a conception of rationality is employed that is loaded with 'monistic' assumptions about truth. Berlin describes these assumptions as follows:

"First, that all men have one true purpose, and one only, that of rational self-direction; second, that the ends of all rational beings must of necessity fit into a single universal, harmonious pattern, which some men may be able to discern more clearly than others; third, that all conflict, and consequently all tragedy, is due solely to the clash of reason with the irrational or the insufficiently rational - the immature and underdeveloped elements in life - whether individual or communal, and that such clashes are, in principle, avoidable, and for wholly rational beings impossible; finally, that when all men have been made rational, they will obey the rational laws of their own natures, which are one and the same in them all, and so be at once wholly law-abiding and wholly free."²⁹

For Berlin, when idealists combine the doctrine of the bifurcated self with a commitment to monistic rationalism, coercive prescriptions almost always follow. If the higher rational self can discern the one true goal of humanity, and yet if some men choose to ignore this goal (being subject to the oppression of false desires), then they

²⁸ Ibid., p.133

²⁹ Berlin, I., 'Two Concepts of Liberty,' *Four Essays on Liberty*, Oxford University Press, 1969, p.154

should be set free, liberated from their errant purposes. Coercion, therefore, increases the liberty of such men, since they do not know what is good for them. It is in this sense that Berlin claims the ideal of positive freedom has been corrupted: freedom as self-mastery has been twisted to the extent that it has become a "specious disguise for brutal tyranny."³⁰ Thus, positive liberty, which began as a doctrine of freedom, ultimately becomes a doctrine of oppression; it stipulates that the 'true' interests of men must take priority over their actual interests.

Berlin is concerned that any remnants of negative freedom may ultimately be consumed by the attempt to establish monistic truths of reason or morality, science or history. This danger does not merely lurk in the damp recesses of a philosopher's study - all too often this doctrine has been manifest at a practical political level. The Soviet dictatorship is an obvious example, but European history is littered with the corruption of liberty. For instance, when Rousseau, writing in 18th Century France, fused the idea of republicanism with his own naive idealism, he concluded that liberty and authority would coalesce, so long as the former is articulated in terms of the General Will. By this idea, the individual is assimilated into the social whole and subjected to the authority of the community. Soon enough, the works of Rousseau became, with Robespierre, the 'blood stained weapon' that destroyed the ancient regime, replacing it with a system of government that perpetrated persecution and cruelty - and all in the name of liberty.

For Berlin, Rousseau's mistake was to confuse two distinct questions: whereas 'By whom am I governed?' considers the *type* of authority I am subject to, 'How much am I governed?' asks about the *extent* of that government's authority. And whilst Rousseau's heavily democratic answer to the first question might be admired, his argument does not, for all that, protect against the persecution of individuals. As a counterweight to this threat, Berlin argues for specific liberties to be upheld by law - there must be a bare minimum of personal freedom, an inviolable area of private life into which the state and other persons cannot be allowed to encroach. At the very least freedom of religion, opinion, expression, and property must be protected against arbitrary invasion. In this fashion, the individual is protected against oppressors,

³⁰ Berlin, I., *Four Essays on Liberty*, Oxford University Press, 1969, p.xlvii, p.131

irrespective of whether the oppressor is an absolute monarch or the enforcer of the General Will. It is indeed this concern, raised by liberals down the ages, that has given rise to the pursuit of certain safeguards, guarantees of private frontiers that no government can cross. It is exactly this freedom, written-off by Marxists as bourgeois morality, which, for Berlin, ensures the virtue of liberalism.

A Rejoinder to Berlin

Despite the undeniable popular success of Berlin's polemic, many critics remain unconvinced by its argument. For C.B. Macpherson, Berlin is inconsistent regarding the legitimacy of self-mastery. This inconsistency derives from the association made between monistic rationalism and positive liberty. As Berlin argues:

"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, recognise the fact that human goals are many, not all of them commensurable, and in perpetual rivalry with one another."³¹

This is Berlin's classic view of value conflict, in which monism is denounced and pluralism celebrated. Yet, within this statement there are several contestable assertions, one of which is the problematic insinuation that positive freedom is inherently monistic. In his essay 'Berlin's Division of Liberty', C.B. Macpherson maintains that Berlin's take on enforceable rational freedom is a 'brilliant analysis' and accepts that there "is no doubt that the concept of positive liberty *has*...been used to deny the very freedom for human self-development that it began by invoking."³² Nonetheless, he opposes Berlin's deep suspicion of self-mastery, and, in particular, the attempt to categorise positive liberty as inherently monistic. The basic case assembled by Macpherson is that whilst enforceable rational freedom should be rightly rejected as both incoherent and immoral, the fundamental idea of freedom as

³¹ Berlin, I., *Four Essays on Liberty*, Oxford University Press, 1969, p.171

³² Macpherson, C.B. 'Berlin's Division of Liberty,' *Democratic Theory: Essays in Retrieval*, Clarendon Press, 1973, p.107 Many of the points made by Macpherson in his paper can be found in the arguments of other authors e.g. West, D., 'Spinoza on Positive Freedom' *Political Studies*, 1993, 284-96.

rational self-direction is entirely legitimate.³³ The essence of rational self-direction "is the ability to live in accordance with one's own conscious purposes, to act and decide for oneself rather than to be acted upon and decided for by others."³⁴ Portrayed in this light, self-mastery is as 'humane' as negative freedom. For Macpherson, there is no quality inherent in self-mastery that requires it to be articulated in a monistic fashion; there is no reason why rational self-direction must imply "conformity to a preordained cosmic order."³⁵ Macpherson argues the idea of rational self-direction is open to the idiosyncrasies of individuals, and to the disparate, multifarious ends they pursue; rationality is here conceived instrumentally, called upon only as a capacity to examine the means to our valued ends. For Macpherson, then, rational self-direction, or self-mastery, is not inconsistent with pluralism. Just because I am guided by rational thought does not mean my ends will be identical to yours.

In fairness, Berlin does not recommend a blanket dismissal of positive freedom; rather he points to the inherent flaws of monism, which propagates the false belief that the central truths of life cannot conflict.³⁶ Yet, this plea is undermined by his consistent efforts to link monism with the concept of self-mastery; indeed these efforts reveal a genuine inconsistency in his work. If positive freedom is, in Berlin's own words, "a valid universal goal,"³⁷ then he must retract his insinuation that self-mastery is inherently monistic. Berlin insists the monistic doctrine is incoherent (insofar as it denies that conflict exists between values), which renders it a false, and presumably invalid, pursuit. Thus, a given species of positive freedom cannot be both monistic and 'a valid universal goal' at the same time. In the end one of these characteristics must give, and if, as Macpherson demonstrates, positive freedom can be constituted pluralistically, then we have to abandon Berlin's ultimate thesis: positive liberty might often have been cast as a monistic doctrine, but this is not necessarily so.

³³ Macpherson was not the first to articulate this view. Indeed, Maurice Cranston, writing before Berlin, differentiates between two types of self-mastery. The first, which is not necessarily harmful, might be described as rational self-discipline. Here, freedom is attained by overcoming one's weaknesses or mastering one's base desires; it is to this extent a private ethic. The second, which Cranston terms *enforceable rational freedom*, is more malevolent. This doctrine is manifestly political; it suggests that force and coercion are valid tactics in the promotion of rational freedom. It is this vision that we find in - among others - Spinoza, Rousseau, and Hegel. See Cranston, M., *Freedom*, Longmans, 1967 (orig. 1955)

³⁴ Macpherson, C.B. 'Berlin's Division of Liberty,' *Democratic Theory: Essays in Retrieval*, Clarendon Press, 1973, p.109

³⁵ Ibid. p.111

³⁶ Berlin, I., *Four Essays on Liberty*, Oxford University Press, 1969, p.lviii, note 1

³⁷ Ibid. p.xlvii

Yet, even if freedom as self-mastery is not *inherently monistic*, the concept is malleable and has the potential to become authoritarian. This is the less rigid and less dogmatic argument that Berlin pursues in 'Two Concepts of Liberty'. Whilst the metamorphosis from liberty to authority could equally have occurred with negative freedom, the notion of self-mastery has been more amenable to this transformation, in both doctrine and practice.³⁸ The notion of rational self-mastery, which is based upon the idea of a man divided against himself, is conducive to the faulty reasoning that leads to enforceable rational freedom. This doctrine allows us to travel (more easily than with negative liberty) from the freely chosen ideals and policies of the individual to the coercive ideals and policies of a higher entity - the State, or the Party, or the Church, say. The image here is that of a higher rational authority ruling over a lower deviant will.

To make this point more strongly, the very notion of self-mastery would seem to imply a divided self: it expresses the idea of a self as both master and mastered. If one maintains that freedom is a matter of mastering some oppressive tendency within, perhaps a lower non-rational self or our reckless passions, one is already committed to a dualistic conception of the human being. If self-mastery is attained by obedience to the correct type of authority, we are already committed to a dichotomous view of the legislating self and the self that obeys. Thus, whilst there is no intrinsic connection between self-mastery and monism, there is certainly an authoritarian dimension to the doctrine of the bifurcated self.

On the Dangers of the Divided Self

In a famous paper, Charles Taylor attempts to establish the validity of freedom as self-mastery.³⁹ A man is free only insofar as he is the autonomous shaper of his own life, and is not motivated by alien desires of any kind. He is free to the extent that he can explain his action with reference to his own ideals, to the extent that he can control his own life. Freedom refers not only to the absence of external constraints that prevent me from pursuing my preferred way of life, but also to the absence of internal barriers — compulsions, phobias, obsessions, illusions, ignorance, and irrational fears. For

³⁸ Berlin, I., 'Two Concepts of Liberty,' *Four Essays on Liberty*, Oxford University Press, 1969, p.134, p.xliv

³⁹ Taylor, C., 'What's wrong with Negative Liberty', *Liberty*, Miller, D., (ed.) Oxford University Press, 1991

instance, suppose I have an irrational fear, which is preventing me from doing something that I consider valuable, say, taking a flight to visit an old friend. Now, it seems likely that I would experience this fear as a constraint, and hence I would be freer if I were not affected by it. This occurs because I do not associate the fear with my true self, and consider that I would not lose any important part of my personality if I were without it. That is to say, we experience our purposes and desires as qualitatively discriminated, as higher or lower, significant or trivial; and since some of our purposes will be more important than others, our freedom is at stake when we find ourselves carried away by a less significant goal (such as the avoidance of air travel) at the expense of a more important one (such as visiting a friend). In short, our freedom presupposes the ranking of our desires in terms of their overall importance in our lives.

Now, this is all well and good, but Taylor goes further and asks whether in ranking our desires we necessarily choose correctly; that is, whether we always favour our most important desire. According to Taylor, we cannot be content with a theory that allows for discrimination between purposes without introducing the notion of second-guessing, for we cannot accept that "there may be inner obstacles to freedom, and yet...not admit that the subject may be wrong or mistaken about these."⁴⁰ Taylor claims that we can experience certain feelings and psychological processes mistakenly, perhaps as a result of misunderstanding the circumstances that gave rise to them.

Let us apply Taylor's argument to a real example. A woman suffering from anorexia nervosa believes that by limiting her food intake she is acting in accordance with her most significant purpose; she is exercising control over her life, and hence acting freely. Yet, psychologists tell us that the woman's desires are a symptom of mental illness; by refusing to eat, she has mistaken her real interests. In other words, the anorexic woman would seem to be wrong in identifying her true desires and as such we must accept that she cannot be the final arbiter on whether or not she is free; in truth, she will be liberated only through forcible intervention. By this view, a definition of freedom must allow for phenomena such as false consciousness or

⁴⁰ Taylor, C., 'What's wrong with Negative Liberty', *Liberty*, Miller, D., (ed.) Oxford University Press, 1991, p.159

repression or self-deception: "The fact that I'm doing what I want, in the sense of following my strongest desire, isn't sufficient to establish that I'm free."⁴¹ This, however, is the argument Berlin warns against, for as soon as we argue that we cannot accept a person's desires at face-value, or that a person does not know what their *real* freedom is, then there is no limit to the ways in which paternalism or coercion can take the guise of freedom. By doubting an individual's knowledge of her true desires, it is but a short step to the sanctioning of an external authority to determine what she *should* want.

*q

In order to expand on this criticism, let us consider the notion of false consciousness and its various manifestations – repression, self-deception, and ideological delusion. Whilst these generic ideas are neither synonymous nor easily defined, each implies that a person or group's true interest may be different from their perceived interest, and thus each paves the way for paternalism or coercion. Now, my argument is not that none of these phenomena may be truly experienced. An abundance of psychological research affirms the way in which human beings can bury unappetising thoughts in the depths of their mind or deceive themselves as to their real interests or act out of mistaken beliefs – the anorexic woman is a case in point. My only point is that all of these notions are open to abuse and hence should not inform on the concept of liberty, since they all too easily dismiss the claims and desires of individuals. Irrespective of whether I am ignorant or self-deceiving, my conscious intentions must be respected for what they are; whilst these intentions do not always have to be permitted, there should be no mistake that they are *my* intentions. Freedom is not the opportunity to act in my *true* interests but to act in my *perceived* interests.

Of course, it may be objected that I am denying a clear and necessary role for paternalism in society. Again, though, this is not my argument. To make a child attend school even though she might object to this idea every morning is an example of how we can force someone to do what we believe is in their best interests; indeed, it may even expand the value of their future liberty. Yet, as Berlin was keen to point out, paternalism is not freedom: the liberty of the child who resists school is greatly undermined by our actions, even if we can justify our acts by recourse to their broader

⁴¹ Ibid., p.154

well-being. It is one thing to coerce a person and justify this in terms of what we think is in their interests; it is altogether different to say that if it is in their interests, then they are not being coerced.⁴²

In order to validate his thesis, Taylor deliberately recoils from authoritarian conclusions. He claims that even though the agent cannot always be the final arbiter regarding her own freedom, this does not mean we open the door to 'totalitarian manipulation':

"Others, who know us intimately, and who surpass us in wisdom, are undoubtedly in a position to advise us, but no official body can possess a doctrine or technique whereby they could know how to put us on the rails, because such a doctrine or technique cannot in principle exist if human beings really differ in their self-realisation."⁴³

In other words, Taylor repudiates the view that his theory leads to authoritarian conclusions; instead, he rests his hope on the liberal view that whilst self-realisation might fail for internal reasons, "no valid guidance can be provided in principle by social authority."⁴⁴ This conclusion seems unwarranted however. If we return once more to the woman who suffers from anorexia, would Taylor argue that it is improper for medical authorities to forcibly intervene? These experts, having identified the patient's false beliefs (and having knowledge of her true interests) are presumably justified in invoking compulsory powers to liberate the woman. There is no reason to think that a doctrine of enforced rational freedom could not be institutionalised in this manner, whereby psychiatric experts determine the patient's true interests and hence free her from an overbearing burden on her true self.

The same argument for liberty can take the form of any number of coercive practices. When I split the human personality in two, I affirm the existence of the "transcendent, dominant controller, and the empirical bundle of desires and passions to be disciplined

⁴² See Berlin, I., 'Two Concepts of Liberty,' *Four Essays on Liberty*, Oxford University Press, 1969, p.134

⁴³ Taylor, C., 'What's wrong with Negative Liberty', *Liberty*, Miller, D., (ed.) Oxford University Press, 1991, p.147

⁴⁴ Taylor, C., 'What's wrong with Negative Liberty', *Liberty*, Miller, D., (ed.) Oxford University Press, 1991, p.148

and brought to heel.”⁴⁵ And if I add to this notion the concept of false consciousness, then I pave the way for a paternalistic definition of freedom. If a human subject cannot be the final arbiter on whether she is free (since she cannot be the final authority on whether her desires are authentic) then by implication the final authority must lie elsewhere, perhaps in the more enlightened, or in the wisdom of experts, or in the Party vanguard or in the small number of religious clerics who alone have access to the truth. Given this, I might be told that I can only be free when acting in a certain way, or when certain conditions have been met. I might not realise this, but I would (I’m told) if I did not suffer from the ignorance, or psychological defect, or false consciousness, or pathological condition that is so obviously affecting me. Furthermore, it must be the moral responsibility of the expert, or the Party, or the Church to create the conditions of my true freedom. Of course, this will involve serious coercion, indeed, a few people are going to have to be shot, but there is no higher moral case than providing the conditions of freedom. Freedom, of course (as if you didn’t know) is the highest good.

Now, Taylor’s theory does not admit of these glaring assaults on freedom, but the authoritarian seed is certainly evident; his liberal intentions are engulfed by a dubious paternalism. This tacit menace becomes explicit when Taylor examines the authenticity of a serial killer’s desires. He reckons that we can say of such a man that he has “a highly distorted view of his fundamental purpose,” which is “shot through with confusion and error.”⁴⁶ Yet, this argument is less than persuasive - it turns on equating a person’s actual desires with that which a person would desire if he were something he is not; even more unlikely, it equates one’s true purposes with the moral good. This process is engendered by the doctrine of the two selves. Linking the higher human self to freedom, Taylor insists that only by encouraging the killer to act morally will we be liberating him.⁴⁷ The crucial philosophical difficulty of moving from subjectively determined constraints on freedom to an objectively defined good is accommodated by the familiar appeal to false consciousness. If we can establish that a person is subject to false desires, then we must decide what that person’s ‘true’ desires

⁴⁵ Berlin, I., ‘Two Concepts of Liberty,’ *Four Essays on Liberty*, Oxford University Press, 1969, p.134

⁴⁶ Taylor, C., ‘What’s wrong with Negative Liberty’, *Liberty*, Miller, D., (ed.) Oxford University Press, 1991, p.161 and p.160

⁴⁷ Taylor, C., ‘What’s wrong with Negative Liberty’, *Liberty*, Miller, D., (ed.) Oxford University Press, 1991, p.161 It should be pointed out (as I mentioned earlier) that there are no grounds on which Taylor could object to the idea that one can be forced to be free.

might be. Taylor fills this vacuum with conventional morality. Freedom is ultimately defined in terms of moral goodness; I am now unfree where I do not act in line with probity and decency.

Yet, this raises an important question: should our understanding of liberty be defined in terms of what is right, or just, or good? Consider Raskolnikov, the hero of Dostoevsky's classic novel, 'Crime and Punishment'.⁴⁸ Raskolnikov is an impoverished student who murders an old woman and her sister, and makes off with their savings. Yet, the reason for murder is not simply financial; rather, it is an attempt to exert his supremacy over his victims and his dire social environment, an expression of Nietzsche's 'will to power'. In this light, 'Crime and Punishment' is a tragic parable, in which the terrible sufferings and pathological state of Raskolnikov engenders a diabolical expression of his base desires. Now, by Taylor's account, Raskolnikov is not acting freely; irrespective of what Raskolnikov considers his true self, it is plain for Taylor that one's true desires can only be informed by what is morally correct. Yet, I would like to offer a different interpretation, of a Nietzschean slant. The act of murder committed by Raskolnikov is an example of self-mastery, or of positive liberation: oppressed by the dire social conditions in which he lives, he looks for a means to express himself, in spite of his powerlessness; he overcomes the moral constraints that would otherwise have prevented him from committing the murder, and hammers the old lady and her sister until they are dead. Thus, he exercises his power over others; he commits an act of self-creation and is liberated from his prison, from a pitiful herd morality. This is the self-mastery of the Nietzschean *Übermensch*, where one rises above the conditions in which one lives in order to exercise innate power; here, Raskolnikov's truest or highest desire is the desire to kill. Of course, I use this example not because I want to defend the ethics of Raskolnikov's action, but in order to demonstrate that the normative vacuum created by the bifurcated self can be filled with a morality far less honourable than that prescribed by Taylor. Would a Nietzschean not describe Taylor's morality as weak and delusional? Would a Nietzschean not consider himself a liberator? The existence of a normative vacuum means liberty need not be tied to conventional moral goodness. If I associate my true self with the Nietzschean will to power, and find

⁴⁸ Dostoevsky, F. *Crime and Punishment*, Penguin Books, 1991

myself constrained by moral feelings, then I will view such feelings as a limitation on my freedom; if liberty is infringed when one is prevented from doing something one truly desires, then the moral conscience of the murderer must be interpreted as a constraint.

To sum up my argument so far: Berlin is wrong to associate rational self-direction with the monistic belief that all of the great goods in life coalesce. The idea of self-mastery is not necessarily inconsistent with pluralism; it can be articulated in a manner that accommodates the various and divergent ends of individuals. However, Berlin's concern about the doctrine of the two selves *is* justified. Indeed, this doctrine allows one to travel from the honourable sense of self-mastery to a debased sense in which paternalistic interference and coercive practice are integral. In order to locate this danger in a modern context, let us examine the current debate between liberals and radical feminists in the US, as regards the freedom-denying effects of pornography.

Positive Freedom, Pornography and Censorship

"Nature has endowed women with a power of stimulating man's passions in excess of man's power of satisfying those passions, and thus made him dependent on her goodwill, and compelled him in his turn to endeavour to please her, so that she may be willing to yield to his superior strength."

- J.J. Rousseau, 'Emile'

Ever since Mary Wollstonecraft objected to Rousseau's characterisation of women, there has been a strengthening tide against the oppression of women. Most of the arguments formulated in defence of women's rights have been entirely just, a consequence of which has been greater economic, political and professional equality. Nonetheless, certain feminist literature relies on argument that is akin to the idea of positive self-mastery, and in particular, to a variant of self-mastery which sanctions coercion. This is in spite of rather honourable and benign beginnings, in which male expectations of female form and behaviour were criticised as imperialistic and oppressive. Wollstonecraft, for instance, complained that women are taught, from an early age, that beauty is their 'sceptre'. Consequently, "the mind shapes itself to the

body, and roaming round its gilt cage only seeks to adore its prison.”⁴⁹ Yet, ever since this argument was made, the feminist movement has been encumbered with a seemingly intractable problem – the complicity of women in their alleged subjection. If a woman identifies herself as an object of beauty, and pursues a life in which that self-conception is paramount, in what sense can we argue that that woman has not identified with her true self?

This problem has been exacerbated in modern times through the widespread publication of pornography. Radical feminists have attempted to portray pornography as a means of imprisonment, in the sense that pornography defines and limits what women can be. This argument is accompanied by claims that pornography should be banned, in light of the servitude it engenders. Indeed, this issue recently generated a heated public debate between two eminent American academics, Ronald Dworkin and Catherine MacKinnon. The former, an uncompromising liberal, offers a line of argument similar to that of Mill, in which individual freedom (to buy or produce pornography) should be protected, even though some would deem it immoral or distasteful. The latter, a radical feminist, suggests that pornography causes great harm to women: it can lead to sexual violence, it undermines the standing of women and erodes equality of opportunity, and it encourages women to define themselves according to a sexual ideal constructed by men. MacKinnon therefore suggests that pornography should be prohibited.

During the mid-1980s, MacKinnon, along with other feminists such as Andrea Dworkin, acted upon this principle and sponsored an anti-pornography ordinance in Indiana, USA. The group hoped that pornographic material would be censored (and hence the sexually explicit subordination of women prevented). The aim of the ordinance was not simply to regulate the display of pornography, or to guard against its exposure to children, but to recommend wholesale censorship. Yet, the ordinance was unsuccessful; the American courts ultimately ruled that censorship could not be based simply on the offensiveness of material, citing the First Amendment of the US Constitution, which protects ‘freedom of speech’.⁵⁰ This reading of the constitution is supported by Ronald Dworkin, who accepts that “pornography is often grotesquely

⁴⁹ Wollstonecraft, M., *A Vindication of the Rights of Women*, 1792

⁵⁰ Although pornography is not ‘speech’ as such, its publication was judged to be protected by this amendment.

offensive," but nonetheless maintains that this cannot be considered "a sufficient reason for banning it without destroying the principle that the speech we hate is as much entitled to protection as any other."⁵¹

Nonetheless, there is a subtler philosophical argument that might be brought against those who would allow the production, publication and use of pornography. This refers to the idea that pornography undermines women by portraying them as submissive victims and hence subverts their capacity for self-mastery. In other words, pornography imprisons, since it defines what women can be. Women cannot identify with their true desires, so long as pornography is freely available:

"[Pornography] institutionalises the sexuality of male supremacy, fusing the eroticization of dominance and submission with the social construction of male and female... Men treat women as who they see women as being. Pornography constructs who that is. Men's power over women means that the way men see women defines who women can be."⁵²

For MacKinnon, the subjection of women is currently propagated by the dissemination of pornography, in which "'woman' is defined by what male desire requires for arousal and satisfaction."⁵³ In other words, in order for women to attain self-mastery, there must be a sweeping system of censorship and prohibition with respect to pornography; only then can the concept of 'woman' be reconstructed. As it is, pornography is indelibly linked with violence and domination. MacKinnon insists: "pornography is not harmless fantasy or a corrupt and confused misrepresentation of otherwise natural healthy sex."⁵⁴ Rather, she concurs with Andrea Dworkin's diagnosis that pornography "reveals that male pleasure is inextricably tied to

⁵¹ Dworkin, R., *Freedom's Law*, Oxford University Press, 1996, p.218 Admittedly, MacKinnon's complaint is not simply that pornography is offensive; she also claims it is harmful. Here, MacKinnon formulates an empirical argument, namely, that pornography causes violence towards women. If this link were established, there would be good reason to ban pornography. Yet, evidence to date does not seem to verify this conclusion. See Dworkin, R., *Freedom's Law*, Oxford University Press, 1996, p.230 and p.402, Note 4

⁵² MacKinnon quoted by Dworkin, R., *Freedom's Law*, Oxford University Press, 1996, p.220

⁵³ MacKinnon, C., 'Sexuality, Pornography, and Method: 'Pleasure under Patriarchy' *Ethics*, 1988-89, p.318

⁵⁴ MacKinnon, C., 'Sexuality, Pornography, and Method: 'Pleasure under Patriarchy' *Ethics*, 1988-89, p.328 It should be pointed out that there is a difference between pornography *revealing* the victimising nature of male pleasure and actually *causing* such victimisation.

victimising, hurting, exploiting.”⁵⁵ This context disallows women from defining themselves in a way that is consistent with their true interests.

Yet, as Ronald Dworkin points out, this argument seems ‘strikingly implausible’. Whilst sadistic pornography is revolting,⁵⁶ it is not in general circulation, and even milder forms of pornography, which are more readily available, cannot surely have as debasing an effect on women’s self-conception, as advertising, cinema and television, which often portray women in stereotypical and demeaning ways (should we ban these images too?). Quite simply, the reach and influence of pornography is less than MacKinnon supposes.

Nonetheless, whilst the self-conception of women in general is not harmed by pornography (since most women are not exposed to it), it might be said that specific women are harmed insofar as they are involved in the production and/or dissemination of pornography. The argument for censorship could be formulated as follows. Women who are complicit in the production of pornography are not truly following their real desires. Their self-definition is constructed in accordance with the sexual desires of men, and hence they come to want what men want them to want - “Men’s power over women means that the way men see women defines who women can be.”⁵⁷ Consequently, women who are complicit in the production of pornography are not free. In order to liberate them, pornography must be banned.

Yet, this argument fails because it employs a technique for which feminists have quite rightly condemned misogynists, namely, the attribution of false consciousness. As MacKinnon asserts, “the assumption that, in matters sexual, women really want what men want from women makes male force against women in sex invisible.”⁵⁸ In other words, it is precarious to project one’s own sexual desires onto another, for then the principle of consent becomes redundant. MacKinnon, with great rhetorical force,

⁵⁵ Andrea Dworkin quoted by MacKinnon, C., ‘Sexuality, Pornography, and Method: ‘Pleasure under Patriarchy’ *Ethics*, 1988-89, p.328 This is an argument MacKinnon herself promotes: “Each violation of women – rape, battery, prostitution, child sexual abuse, sexual harassment – is made sexuality, made sexy, fun, and liberating of women’s true nature in the pornography.” Ibid., p.327

⁵⁶ Most people would agree on this point. Yet, neither is that to say sadistic pornography should be banned. Sadists and masochists should be allowed to pursue their own good in their own way so long as their sexual relationships are consensual.

⁵⁷ MacKinnon quoted by Dworkin, R., *Freedom’s Law*, Oxford University Press, 1996, p.220

⁵⁸ MacKinnon, C., ‘Sexuality, Pornography, and Method: ‘Pleasure under Patriarchy’ *Ethics*, 1988-89, p.330

identifies the harm that can arise from such projection. Victims of rape, or those forced to participate in pornography, are often powerless to object to their treatment: "When any one of them tries to tell what happened, she is told it did not happen, she imagined it, she wanted it. Her no meant yes."⁵⁹ MacKinnon is clearly correct to argue against the idea that 'no' means 'yes'. If a woman does not want to participate in a sexual act, then it is clearly wrong to doubt this intimation. We must take a woman's choice at face value, rather than second guess it. We cannot doubt her sincerity: 'No' means 'No'.

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Yet, does this not also mean that the principle of consent can legitimise pornographic acts? MacKinnon has her doubts, for such voluntariness can only be explained in terms of an imprisoning social construction, characterised by what "male desire requires for arousal and satisfaction."⁶⁰ In other words, women love and choose their chains because of a male hegemony. Yet, why should we doubt that a woman who expressly consents to such participation is not acting in accordance with her real desires, even where this consent pertains to the production of pornography? Why in this instance does 'yes' mean 'no'? It is dangerous for the feminist to attribute false consciousness to a woman who participates in pornography, for - as MacKinnon admirably shows - this same metaphysical sleight of hand could justify any number of assaults on women. Should we not accept, then, that if a woman voluntarily (without coercion or threat) participates in the production of pornography, even though we might think it is against her interests, she is acting freely? And if so, should we not accept that pornography should not be banned on the grounds that a woman who participates in it is not her own master?

A more convincing justification for the banning of pornography would be that women are often forced to participate in pornography against their will (that is, their actual will). MacKinnon may not be wrong in claiming that pornographic models are often coerced into participation.⁶¹ She has assembled a significant body of evidence that shows how men have sexually exploited their partners, vis-à-vis pornography.⁶²

⁵⁹ MacKinnon, C., *Only Words*, Harvard University Press, 1993, p.5

⁶⁰ MacKinnon, C., 'Sexuality, Pornography, and Method: 'Pleasure under Patriarchy' *Ethics*, 1988-89, p.318

⁶¹ MacKinnon, C., *Only Words*, Harvard University Press, 1993, p.15

⁶² See MacKinnon, C., and Dworkin, A., *In Harm's Way: The Pornography Civil Rights Hearings*, Harvard University Press, 1997

Whether this is enough to justify prohibition is another matter. As Hayek points out, all intimate relationships "undoubtedly offer opportunities for coercion of a peculiarly oppressive kind and are, in consequence, felt as restrictions on personal liberty... But here society can do little to protect the individual beyond making such associations with others truly voluntary. Any attempt to regulate these intimate associations further would clearly involve such far-reaching restrictions on choice and conduct as to produce even greater coercion."⁶³

Conclusion

This chapter has surveyed the notion of self-mastery. I found arguments in favour of the legitimacy of this concept to be wanting in several respects. Although no necessary relationship was discerned between self-mastery and monism, I suggested that the doctrine of the divided self could sanction paternalistic interference. This occurs where the individual is deemed to be too ignorant or deluded to make a judgement as to her most important goals. Consequently, it is rather dangerous to make an association between self-mastery and liberating social conditions, for those conditions could merely serve to support coercive practices. So let us set aside the idea of positive freedom. Instead, the concept of negative liberty shall be examined, which has traditionally been identified as the essence of the liberal society.

⁶³ Hayek, F.A. Von, *The Constitution of Liberty*, Routledge, 1960, p.138

Chapter 2 – Law and Liberty

Part I: Defining Negative Liberty

“The word freedom has no meaning.” – Diderot, ‘Letter to Landois’⁶⁴

Introduction

Let me begin my examination of the concept of negative liberty by offering a brief definition. It refers to the opportunity to act unconstrained by human interference. More specifically, a person’s freedom is restricted if, and only if:

- He or she is 1) compelled or restrained, or is 2) threatened with punishment for non-compliance, by 3) the deliberate intervention of 4) another human agent.

These are the necessary and sufficient conditions that define the restriction of a person’s freedom. To this extent, a person is *not* to be judged unfree merely because:

- He or she has 5) no desire to take advantage of an opportunity, or is 6) unable to take advantage of an opportunity, or is 7) not dissuaded by a threat.

Each criterion will be duly explained in the course of the chapter. My analysis shall draw upon certain linguistic intuitions (and offend against others); it will aspire to internal coherence; and it will consider the nature of our moral relationships. I will begin by discussing the relationship between freedom and ability.

Freedom and Ability

Obstacles to freedom ought not to be confused with simple inability; my liberty is not at stake if I am too weak or too ignorant to take advantage of an opportunity. As Berlin points out, if a person does not have the subtlety of mind to understand the darker pages of Hegel, he is not to this extent unfree; he merely lacks the mental capacity. Let us pin down this linguistic distinction. We would not normally refer to

⁶⁴ Randall, J., (ed.) *Bloomsbury Anthology of Quotations*, (London: Bloomsbury, 2002), p.170

our inability to climb a mountain or swim a sea as a restriction on our freedom; ordinary language requires that we discriminate between 'being free' and 'being able'. As Cranston points out, the former refers to an opportunity, the latter to a capacity. If I were told 'you are free to swim', then I would be subject to a permissive declaration; by contrast, if I were told 'you are able to swim' I would merely be instructed as to my abilities (irrespective of my freedom).⁶⁵ Although this distinction leads to what some consider a counter-intuitive conclusion - that a person can do something they are unfree to do - I do not feel the force of this complaint (it merely derives from the difference between the divergent criteria that define restrictions on liberty). Thus, I might be able to commit arson (if I have the knowledge and skill to get away with it) but that does not mean I am free to burn down buildings. Similarly, it is consistent to claim that I am free but unable to something: I am free to swim in the Atlantic but I am almost certainly unable to traverse it.

The reason that freedom and ability are wrongly conflated pertains to the emptiness of liberty without the capacity or power to take advantage of it. As Cranston points out: "Truly there is little point in 'being free to' unless we 'have the power to', but it certainly does not follow from this that one is identical with the other."⁶⁶ Failure to recognise this distinction has led to a genuine conceptual error - the equation of freedom with power. T.H. Green made this mistake in his campaign against the poverty and destitution of the 19th Century. He suggested that a lack of material means is no less an obstacle to freedom than overt political persecution. Liberty should not refer to a mere opportunity, but to the capacity to take advantage of an opportunity: "the mere removal of compulsion...is in itself no contribution to true freedom...the ideal of true freedom is the maximum of power for all members of human society alike to make the best of themselves."⁶⁷ Green therefore argued for more than the formal freedoms coveted by classical liberalism - true freedom requires the capacity to realise one's ambitions. It is true, of course, that the injustices of the time - widespread poverty, disease, ignorance and squalor - should be criticised as symptoms of capitalist exploitation and greed. It is also true that people living in such

⁶⁵ Cranston, M., *Freedom*. Longmans, 1967, p.19

⁶⁶ *Ibid.*

⁶⁷ Green quoted by Berlin, I., 'Two Concepts of Liberty,' *Four Essays on Liberty*, Oxford University Press, 1969, p.xlix. For a critique of Berlin's view of Green, see Simphony, A., 'On Forcing Individuals to be Free: T.H. Green's Liberal Theory of Positive Freedom', *Political Studies*, 1991, p.303-20

squalor may well have been powerless. Yet, the absence of power (or means or capacity or ability), and the absence of liberty are different things. As Berlin reminds us: "Nothing is gained by a confusion of terms."⁶⁸ So let us condemn the systematic reduction of human well-being through poverty and destitution; but let us not call it an assault on liberty.

Indeed, critics such as Hayek contend that freedom is fundamentally misconceived when it is associated with the capacity to realise our ends. Hayek is particularly critical of the idea that wealth somehow brings freedom: "The penniless vagabond who lives precariously by constant improvisation is...freer than the conscripted soldier with all his security and comfort."⁶⁹ That is to say, the soldier's existence is much more limited in terms of his opportunity to act unconstrained by others; the soldier knows that if he refuses military service he will be incarcerated. By contrast, the penniless vagabond has significant scope to act without being coerced. Of course, it is true that the vagabond must eat, and it is true that food costs money, and if he were to illegally acquire food without paying, then he, too would be incarcerated. Yet, there is no intention to coerce the vagabond before he steals; the same cannot be said of the conscripted soldier before he absconds. For Hayek, then, it is no contradiction to be both poor and free. If a poor man were suddenly to acquire wealth, he would not become freer (even if he would become more powerful and even if he could enjoy his freedoms to a greater extent). More will be said on this point later.

Equating freedom and power has profounder difficulties still with regards to social policy. Hayek, speaking as a liberal, wants to ensure that everyone is entitled to the same legal freedoms; but if freedom is equated with power, this becomes impossible: power by definition cannot be distributed equally. This is because power is a relational concept: if X has power over Y then there is an inequality in terms of what X and Y are able to do. Yet, this contradicts with the basic liberal enterprise, which aims to ensure that individuals are equal under the law. In this sense, it would be a serious conceptual error to mistake freedom for power: legal opportunities can be equalised; the power to realise our goals cannot. Indeed, freedom understood as 'the power to achieve' tends towards omnipotence. If a man is not free unless he has the

⁶⁸ Berlin, I., 'Two Concepts of Liberty,' *Four Essays on Liberty*, Oxford University Press, 1969, p.125

⁶⁹ Hayek, F.A. Von, *The Constitution of Liberty*, Routledge, 1960, p.18

capacity to achieve his goals, then freedom will normally elude him. No social conditions could plausibly support such a characterisation of liberty; irrespective of what society we live in, human beings will always periodically fail in their enterprises, not least because of the interference of others. The reality is that our quest to achieve our goals will always be met with what Sartre described as a 'resisting world',⁷⁰ irrespective of the fairness or progressiveness of the social conditions that support freedom.

Freedom and Desire

In the introduction to *Four Essays on Liberty*, Berlin resolves to correct 'a genuine error' that had tainted his original lecture on negative freedom. He had initially suggested that liberty ought to be understood as "the absence of obstacles to the fulfilment of a man's desires."⁷¹ Yet, Berlin concedes that this definition is problematic: "If degrees of freedom were a function of the satisfaction of desires, I could increase freedom as effectively by eliminating desires as by satisfying them."⁷² This notion is tantamount to the Stoic sense of liberty, according to which a man is free when he is not dominated by desire. In other words, liberty is attained through self-denial - it exists where one abandons the urge to walk down a given path:

"This is the traditional self-emancipation of ascetics and quietists, of stoics or Buddhist sages, men of various religion or none, who have fled the world, and escaped the yoke of society or public opinion, by some process of deliberate self-transformation that enables them to care no longer for any of its values, to remain, isolated and independent, on its edges, no longer vulnerable to its weapons."⁷³

Berlin attacks this notion on two counts. First, the logical culmination of the process of destroying one's desire to act is suicide; total liberation is therefore conferred only by death. Second, even though certain individuals would uphold this form of ascetic self-denial since it makes them *feel* free, or since it nourishes them or gives them

⁷⁰ Sartre, J.P. "Being And Nothingness," Barnes, H.E., (trans.) Methuen and Co., 1957, p507

⁷¹ Berlin, I., *Four Essays on Liberty*, Oxford University Press, 1969, p.xxxviii

⁷² Ibid, p.xxxviii

⁷³ Ibid, p.135

spiritual strength, it is not the same as negative freedom – indeed, it is often the very antithesis of this. My prison walls do not disappear simply by wishing away my plans to ever walk outside them.

Negative freedom, then, is not simply the absence of frustration (for this may be attained by killing desires), but the absence of obstacles to possible choices and activities. The term ‘possible choices’ is important here – it is this condition that informs us of the presence (or absence) of liberty. If, in a country of absolute religious homogeneity, the practice of an alternative religion is prohibited, no one will have his or her religious customs frustrated, yet this in itself does not generate religious freedom. For Berlin, liberty depends not on whether I wish to walk down a certain road but on whether I have the opportunity to do so.⁷⁴ Ultimately, freedom refers to the relationship between an agent and an obstacle, not to an agent and his desires.

Nonetheless, critics such as G.W. Smith maintain that Berlin’s theory is inadequate. Smith considers the relationship between freedom and desire vis-à-vis the situation of a genuinely contented slave. If we define freedom by the range of options available to an agent (whether or not he wishes to pursue them), “it remains to be shown precisely how the range can be delimited in such a way as to guarantee that options are indeed relevantly foreclosed for the genuinely contented slave.”⁷⁵ Smith first considers an argument in favour of Berlin’s view, which, he reckons, is based on a weak counterfactual claim. By this account, the contented slave is unfree because if (contrary to the slave’s present intentions) he were to choose what his master forbids, he would be frustrated. In other words, whilst the slave might be happy at present, he might change his mind in the future; and because certain potential choices are precluded by slavery, we can therefore speak of the contented slave’s unfreedom. Yet, whilst this argument can be applied to a living slave, it loses its force when we consider a slave who lives and dies contented. According to Smith, here we can say with certainty that “the slave’s legal condition never presented a bar to doing whatever he wanted to do.”⁷⁶ To suggest otherwise would involve making a strong

⁷⁴ Ibid, p.xxxix

⁷⁵ Smith, G.W., ‘Slavery, Contentment, and Social Freedom’, *Philosophical Quarterly*, 1977, p.236

⁷⁶ Ibid., p.237

counterfactual claim: we would have to arbitrarily attribute to the slave desires he does not have, has never had, and perhaps is incapable of ever having.

Importantly, however, we can accept the slave's desires – or lack of them – without having to doubt that he is unfree; we need not deny that 'the slave's legal condition never presented a bar to doing whatever he wanted to do'. The important point is that the slave has had the opportunity to exit from his captivity removed (irrespective of his desire to remain); he is unfree in virtue of the fact that a possible opportunity has been restricted. Smith overlooks this point because he mistakes liberty with the value that we place on it. Freedom is only valued insofar as we wish to take advantage of the opportunity it provides. I am free to stand on my head for a time each day, even though I do not particularly want to do this. Yet, this freedom exists whether or not I choose to take advantage of it. Consequently, whilst the contented slave does not *value* freedom, such contentment does not thereby eliminate the very real constraints that bind his existence.

Moreover, the idea that freedom can be defined in terms of the absence of obstacles to the satisfaction of one's purposes is vulnerable to the desire-shaping effects of institutions, indoctrination, ideological re-education and so on. By this argument, an inmate who dreads the thought of returning to the outside world might find freedom by staying in his cell. It is with this in mind that Berlin writes, "there is a clear sense in which to teach a man that, if he cannot get what he wants, he must learn to want only what he can get may contribute to his happiness or his security; but it will not increase his civil or political freedom."⁷⁷ In other words, it is potentially serious to associate the provision of liberty with the machinery ultimately designed to limit it. A person's desires are irrelevant to the existence of an obstacle blocking a given path.

Constraints on Freedom: Restraint, Compulsion and Threat

In the introduction it was suggested that the term 'free' refers to the absence of some repressive or constraining force or obstacle, and hence that it is characterised by 'a

⁷⁷ Berlin, I., *Four Essays on Liberty*, Oxford University Press, 1969, p.xxxix

genuine negativeness'.⁷⁸ Berlin gives this initial suggestion more detail when he asserts: "The fundamental sense of freedom is freedom from chains, from imprisonment, from enslavement by others. The rest is extension of this sense, or else metaphor."⁷⁹ Berlin's examples of basic constraints on liberty concur with our linguistic intuitions. He points out that the most fundamental assault on liberty employs physical force, which might be manifest either as physical compulsion or physical restraint. The latter merely prevents, like prison bars or dungeon walls. The former involves physically making someone do something, like the master who whips his chained slaves to work. These are the basic senses of unfreedom as described by Berlin.

Berlin also refers to the extension of these basic phenomena. Most fundamentally, this alludes to the fact that involuntary obedience can be attained by threat. For instance, imagine that slaves are marched to the fields by gun-wielding guards; they comply because disobedience will result in being shot. In this context, threat restricts liberty just as effectively as compulsion or restraint. Indeed, it is for this reason that we must disagree with Locke and stipulate that all manner of laws – just and unjust alike – can be held to restrict freedom, for they operate on the principle that non-compliance will be punished. Of course, it might be said by existentialists such as Sartre that threat does not eliminate choice. Yet, we can still distinguish between free choice and forced choice. Berlin gives the example of a man living in a totalitarian state who chooses to betray a friend under threat of torture. For Berlin, this cannot be termed a free decision; this ultimatum is an example of coercion. Whilst the man could have chosen torture over compliance, "the mere existence of alternatives is not...enough to make my action free (although it may be voluntary)."⁸⁰ Threat, or coercion, is therefore a paradigm of unfreedom.

Now this is all well and good, but Hillel Steiner unsettles this view by considering the relationship between threat, desire and constraint.⁸¹ Like Berlin, Steiner argues that freedom ought to be defined independently of desire; liberty should not be thought of as our capacity to do as we please. Yet, this being the case, we must also accept that

⁷⁸ Ryan, A. 'Freedom', *Philosophy*, 1965, p.110

⁷⁹ Berlin, I., *Four Essays on Liberty*, Oxford University Press, 1969, p.lvi

⁸⁰ Ibid, p.130

⁸¹ Steiner, H., 'Individual Liberty,' *Proceedings of the Aristotelian Society*, 1974-1975

threat cannot place limitations on freedom, since this phenomenon cannot be adequately defined without referring to desire. If I am confronted with an ultimatum (e.g. 'Your money or your life!') then the coercer looks to affect the desirability of a given course of action such that I choose his preferred option. A threat, then, can be thought of as a sort of 'intervention' in which the coercer manipulates my mind-set such that I move from wanting to keep my money to the desire to part with it. It seems, then, that conventional theories of negative liberty must accept that by altering the appeal of a certain option, a man's freedom can be diminished. Yet, more than this, Steiner reckons conventional theories of liberty must accept that offers as well as threats can impact upon freedom, since offers also look to affect the desirability of a given course of action (and hence manipulate a recipient's behaviour, or compel a recipient to act in a certain way). Of course, this would seem to be counter-intuitive and hence Steiner settles on the view that neither threats nor offers can be said to diminish liberty. Since desire is irrelevant to freedom, we must accept that only humanly imposed obstacles that render action physically impossible can constrain in the required sense. The virtue of this view is that it allows us to make a clear judgement as to a person's freedom – if a person is physically able to do *x* then they are *free* to do *x*; it also avoids what some consider an awkward notion, namely, that one can be unfree to do something one has, in fact, done.

Steiner makes two contestable assertions in his broader argument. First, he claims that offers, like threats, can diminish one's freedom, inasmuch as they are designed to manipulate behaviour by altering the desirability of a given course of action. Admittedly, we often speak as if this were the case. For instance, if I am offered an enormous sum of money for my house, even though it is my family home, then I might justify my acceptance of the offer by claiming that I could not refuse such an enticing bid. Yet, such allusions cannot be equated with a lack of freedom. As Kristjánsson points out, not everything that affects someone's deliberations can be counted as a diminishment of freedom. Some sort of obstacle must exist, which impairs, narrows possibilities, or forecloses options.⁸² This is certainly the case when we examine the phenomenon of threat, which is expressly designed to limit our options. And whilst we might say that an irresistible offer does foreclose my options

⁸² Kristjánsson, K., *Social Freedom – The Responsibility View*, Cambridge University Press, 1996, p.52

(insofar as I would be foolish to refuse), it seems that this way of speaking is employed purely for its illocutionary force rather than to convey the literal truth. After all, offers are meant to expand our options, and hence enrich our freedom. There is a qualitative difference between having a possible choice restricted and having an alternative added to my current range of opportunities.⁸³ It is astounding that Steiner fails to acknowledge the force of this point.

The second point of contention that arises pertains to the premise of Steiner's thesis, namely, that we cannot refer to coercion without implicitly referring to the desires of the coerced. According to Steiner, if we accept that threat is a constraint on liberty, we are committed to the idea that freedom can be limited by making a given option undesirable. However, J.P. Day claims that this premise is wrong, and demonstrates this by considering the archetypal expression of coercion 'Your money or your life!'⁸⁴ In this situation, the desire of the coerced does not change; it remains the same both before and after the threat (to keep both his money and his life). Only, now the coerced *knows* he cannot keep both and therefore sacrifices the least valuable.⁸⁵ In other words, threat is manifest as an infringement of liberty simply because the coerced has a possible choice restricted (e.g. he can no longer keep both his money *and* his life). In this instance, the liberty of the coerced would be diminished even if he did not wish to keep both his money and his life.

Ultimately, the ways in which human beings speak and act do not necessarily support Steiner's argument. Freedom as a human value surely must include threat as a criterion of constraint. David Miller makes the example of a man who is imprisoned in a cage such that he is physically incapable of escaping – this, he claims, is a paradigmatic case of unfreedom. Yet, another man is instructed to stand in a square marked out on the ground and told that if he tries to leave this area he will immediately be shot (the guards have their rifles fixed on the prisoner). Does this man

⁸³ There are, of course, marginal cases in which it is unclear whether someone is provided with a threat or an offer. A woman who lives in poverty and who cares for her sick child might be offered family medical insurance by her employer so long as she becomes his mistress. Is this a threat or an offer? See Kristjánsson, K., *Social Freedom – The Responsibility View*, Cambridge University Press, 1996, p.55

⁸⁴ Day, J.P., 'Threats, Offers, Law, Opinion and Liberty', *American Philosophical Quarterly*, 1977, p.258

⁸⁵ This would seem to imply that an agent must have an appropriate epistemic base if he is to be moved by the threat. Indeed, it is exactly this knowledge base, composed of linguistic understanding and rational foresight, which is required to make threat effective.

not also have his freedom infringed?⁸⁶ The problem with limiting constraints on freedom to physical impossibility, then, is that it fails to comprehend the worth, broadly speaking, of the freedom to act *unhindered* by others. As Gray suggests, the physicalist language preferred by Steiner ignores the vital truth that the "subject matter of freedom is action rather than behaviour."⁸⁷ Human beings certainly resent being locked up in chains; yet, they are just as resentful of coercion, threat and other sinister manipulations.

The Dynamics of Threat

Having established that threat should be considered as a constraint on liberty, it follows that law is a restriction of freedom. Prohibition is little more than a generalised threat. If a citizen does not comply with the laws of his state, then he will be punished, perhaps by a custodial sentence, but increasingly by way of a financial penalty. In other words, law curtails a possible choice: I cannot break the speed limit and choose not to pay my fine if I am caught. Yet, what if I break the speed limit without being caught? Are laws freedom-denying only insofar as they are effective?

By one view, the freedom-denying effects of law would seem to rely on an interpretation of human nature. The curtailment of liberty asks how the average man would respond to the threat of punishment. This is the type of argument offered by Hayek, for whom a person is unfree when a given course of action is rendered unreasonable by threat or coercion. In a coercive situation, while it might be *possible* to pursue an unattractive option, nonetheless, the reasonable person would probably submit to the demands of the coercer. Therefore, even though a person of extraordinary resolve might choose the disagreeable option, this does mean the choice was free.

The problem with this argument is that it suffers from a moralised basis, insofar as constraint is contingent upon the acceptance of a contestable understanding of human

⁸⁶ Miller, D., 'Constraints on Freedom', *Ethics*, 1983. Again, the reason that we can speak of this man's unfreedom is that he *knows* he will be shot if he leaves the square.

⁸⁷ Gray, J., 'On Negative and Positive Liberty', *Political Studies*, 1980, p.515

nature or psychology. Consider the following extract from *The Constitution of Liberty*:

"Whether or not attempts to coerce a particular person will be successful depends in a large measure on that person's inner strength: the threat of assassination may have less power to turn one man from his aim than the threat of some minor inconvenience in the case of another. But while we may pity the weak or the very sensitive person whom a mere frown may 'compel' to do what he would not do otherwise, we are concerned with coercion that is likely to affect the normal, average person."⁸⁸

Now, the way in which the 'normal, average person' is conceived will determine whether a given act can be considered free. Yet, what characteristics typify the average person? Hayek goes so far as to say that minor annoyances that repeatedly wear a person down might be considered coercive. Hence, "it is not impossible for a hoard of cunning boys to drive an unpopular person out of town."⁸⁹ Yet, another person might say it is too strong to label a hoard of cunning boys coercive. A reasonable individual should be able to deal with such disruption without succumbing to the boys' mischief. 'Reasonableness' is therefore a difficult notion to pin down. Moreover, Hayek has difficulty in establishing when persuasion becomes coercion. For instance, would we judge the worker who has to cross a picket line as being coerced, or indeed the young teenager who is invited to smoke cigarettes against his better judgement with his friends? In both cases, a penalty might be incurred for non-compliance, namely, unhappy relations with a peer group. But how would the average, reasonable person act in this situation? Arguably, there is no answer to this in the abstract, meaning the standard of the average person cannot be meaningfully invoked. Finally, Hayek's argument cannot persuasively comprehend the problem of weak threats. Certain laws constitute a weak threat insofar as disobedience is a realistic or 'live' option.⁹⁰ For instance, many people ignore the law that requires us to wear a seatbelt when driving. A reasonable person might therefore choose to ignore the command to wear a seatbelt. By implication, they would then be free to ignore the

⁸⁸ Hayek, F.A. von, *The Constitution of Liberty*, Routledge & Kegan Paul, 1960, p.136

⁸⁹ Ibid, p.138

⁹⁰ Kristjánsson, K., *Social Freedom – The Responsibility View*, Cambridge University Press, 1996, p.42

law. The ultimate problem for Hayek is that his understanding of coercion contains an evaluative dimension that admits of different interpretations.⁹¹

It would make more sense to eliminate all evaluative criteria from the analysis of constraints on freedom. This, indeed, is the argument of Felix Oppenheim. He believes that judgements about liberty can be articulated without an evaluative dimension so long as we restrict the criteria of constraint to prevention and punishability. Hence, I am unfree if I am physically prevented from doing something or threatened with punishment for non-compliance. This accords to our most fundamental assumptions about liberty insofar as it allows us to judge the prisoner unfree and accept that law impinges on liberty (insofar as it is backed by threat). However, Oppenheim's commonsensical argument is undermined by his additional claim that a person must be dissuaded before a threat can be counted as coercive. Maintaining that one cannot do what one is not free to do, Oppenheim argues that constraints on liberty are a matter of degree, depending on the likelihood of punishment. This notion is taken to an unlikely extreme when he translates his theory into quantitative form. Thus, if 40 percent of all speeding motorists are caught and fined, it follows that drivers are unfree to speed to a degree of 0.4.⁹² However, it is patently bizarre to think of liberty in these terms. Irrespective of Oppenheim's strange and uninformative statistical approach,⁹³ his argument leads to the counter-intuitive conclusion that people who disobey the law are free (insofar as they are not deterred by the threat of punishment) whilst law-abiding citizens are unfree.

The most sensible judgement that can be rendered on this issue is that the effectiveness of a threat does not affect judgements about liberty. Where the threat is neither severe nor effective, I might say that I am more or less able to do X, but I remain unfree.⁹⁴ Admittedly, this argument requires that we can often do what we are unfree to do. Yet, this is not altogether against convention – as was asserted earlier,

⁹¹ Benn and Weinstein articulate a similar evaluative criterion, but suffer from the same difficulties. Benn, S.L., and Weinstein, W.L., 'Being Free to Act and Being a Free Man', *Mind*, 1971, p.208

⁹² Oppenheim, F., *Political Concepts: A Reconstruction*, Basil Blackwell, 1981, p.72

⁹³ What, after all, does Oppenheim's statistics tell us about our freedom to speed? I could not be sure on any given occasion that I would not be caught speeding. And, how, in real life, could we ever generate such a statistic? We would need to know either how many speeders avoided detection (and how could we know this?) or else ground our judgement upon how many drivers escape the pursuit of the traffic police.

⁹⁴ This point is made by Kristjánsson, K., *Social Freedom – The Responsibility View*, Cambridge University Press, 1996, p.47

the arsonist is not free to arbitrarily burn down property although he might have both the desire and ability to do this. I do not therefore feel the force of the objection that one cannot do what one is unfree to do.

The Agency and Intention of the Coercer

In the introduction, I suggested that the analysis of ordinary language is inconclusive regarding the source of a constraint on freedom: the Hobbesian argument, which holds that any natural impediment can restrict freedom, is not any less valid than the view that constraint must be humanly imposed, if ordinary language is our only source of reference. Yet, I am interested not only in the conceptual question of what liberty is, but also in the distributive question of what liberties should be protected by the state. Importantly, only humanly created obstacles are relevant to my thesis. There is not much point after all, in asking whether it is just for a fallen tree to obstruct my path. As Berlin points out, the right to freedom cannot be violated by non-human interference - if I fall and find my freedom of movement frustrated, I cannot be said to have suffered any loss of basic human rights.⁹⁵ To this extent, I am interested in constraints on freedom that emanate from human action.

In modern theory, three main schools of thought take their point of departure from these preliminary considerations. One of these, which I will refer to as the **moral responsibility view**, maintains that: "...an obstacle counts as a constraint on the freedom of an agent *B* if and only if another agent *A* can be held morally responsible for the creation or non-removal of the obstacle."⁹⁶ This view derives from an important paper by Benn and Weinstein, in which it was argued that obstacles to freedom generate normative charges that require rebuttal.⁹⁷ In other words, constraints on liberty must always be justified: if a human agent is constrained, he will require some kind of reason as to *why* he is constrained. Insofar as the issue of justification arises, we can sensibly talk about the restriction of liberty; this does not hold if the source of a constraint is amoral (e.g. caused by a natural event). Consequently, the appropriate criterion for the source of constraint on freedom is said to be moral

⁹⁵ Berlin, I., *Four Essays on Liberty*, Oxford University Press, 1969, p.xlix

⁹⁶ Quoted from Kristjánsson, K., "Social Freedom," Cambridge University Press, 1996, p.2

⁹⁷ Benn, S.L. and Weinstein, W.L., 'Being Free to Act, and Being a Free Man,' *Mind*, 1971

responsibility, since justificatory questions are meaningless unless they are directed at moral agents.

Proponents of the moral responsibility view hold that their argument is not moralised: they do not define freedom in terms of what is right or good; they merely identify moral responsibility as the most appropriate criterion regarding the source of constraints on freedom. By the moral responsibility view, then, I am unfree if I am constrained by the actions or inactions of a morally responsible agent, *even if those constraints are justified*. This distinction enables advocates to claim immunity against the traditional criticism of a moralised view of liberty, since they concede that one *can* have one's liberty taken by a just act. Thus, when the prison guard locks up a murderer, he is (contrary to the moralised account) taking the murderer's liberty.

However, the moral responsibility view is problematic in other ways. Most fundamentally, the introduction of evaluative criteria when making judgements about the source of constraints leads to a concept of liberty that is essentially contestable. For example, imagine that a small mountain community has been subjected to a hard and unusually long winter. A heavy snowfall has blocked the only road out of the town, though supplies are plentiful and communications are still intact. The government has little in the way of spare revenue and would rather not part with what money it has to clear the road – this operation would be expensive, time consuming and possibly futile (if another snowfall occurs). Yet, the mountain community, being politically astute, decide their plea to have the road cleared would carry more weight if they employ the language of freedom – whilst the government might not have caused the blocked road (the community accepts that governments cannot control the weather), nevertheless, it is responsible for the continued blockage, since this could be remedied through concerted effort. Importantly, by the criterion of moral responsibility, my freedom is not only at stake when a human agency deliberately imposes a constraint on me, but also when an agency negligently imposes such a constraint, or when an agent fails to remove such a constraint, despite having a duty to do so.⁹⁸ Hence, the mountain community claim the government is imprisoning them by its inaction.

⁹⁸ Miller, D., 'Reply to Oppenheim', *Ethics*, 95, 1985, p.310

Yet, how would we establish whether the government is morally responsible for the blockage? We might say that since it cannot be held responsible for the heavy snowfall, it is not diminishing the liberty of the mountain community. However, by the moral responsibility view, we must consider whether the government has been *negligent* in failing to clear the snow, despite the fact that it did not impose the constraint. Now, it is certainly true that the government could clear the blockage through concerted effort, but how do we decide whether the government's inaction constitutes a morally relevant omission? Will we not differ in our judgements as to whether the government has been negligent? Does the criterion of moral responsibility not burden our judgements on freedom with an ineliminable indeterminacy?

One solution to this problem, proposed by Miller, is to accept that the concept of freedom, being based upon controversial judgements about moral responsibility, is essentially contestable.⁹⁹ Hence, disagreement about the freedom of the inhabitants of the mountain village is bound to occur. Whilst some might not judge the government morally responsible as regards the predicament of the mountain community (and hence deny that there is an infringement of liberty), others will proffer the opposite judgement. Yet, Miller's argument will not do, since the moral responsibility view was originally cast as a means to settle disputes regarding the source of constraint on freedom.¹⁰⁰ If the idea of essential contestability is invoked, a perpetual indeterminacy will be generated in relation to judgements on liberty. The indeterminacy arises because this view of liberty requires that we make a value (as opposed to a mere causal) judgment vis-à-vis the source of constraint. Such a value judgement is irrelevant to the application of liberty. For instance, if I am deliberately locked in a room by a kidnapper who proceeds to take my child, then it is unquestionable that I have had my freedom impaired. However, if the culprit is caught and found not to be morally responsible (perhaps he is a small child himself, or mentally deranged) my situation cannot simply be redefined as mere inability. Even in circumstances where diminished moral responsibility is more or less accepted (as is the case with the mentally ill) the issue of freedom can still arise. Thus, the moral responsibility view

⁹⁹ Miller, D., "Constraints on Freedom," *Ethics* (94), 1983, p.70

¹⁰⁰ Kristjánsson, K., "Social Freedom," Cambridge University Press, 1996, p.71

invokes an elusive and inappropriate criterion when it proposes the essential contestability of judgements on freedom.

In order to avoid the indeterminacies of an evaluative criterion, Felix Oppenheim advocates the **causal responsibility view**. He maintains that "any obstacle for which human agents are in some way or other causally responsible should be regarded as a constraint on freedom."¹⁰¹ Thus, if I inadvertently or intentionally lock you in your office one night, you can claim to have had your liberty denied. This would not be the case however, if the wind had locked the door shut, or if you had fallen and were unable to open the door - physical and psychological inability, and natural obstacles to action should not be considered as constraints on freedom. In this regard, Oppenheim's argument coalesces with our linguistic intuitions about political and social constraints on freedom: we would not normally say that a lack of intelligence, or physical inability, or a natural obstacle to action amounts to a restriction of liberty.

However, Oppenheim's criterion generates rather broad conditions for the restriction of liberty. All manner of obstacles in our daily lives are humanly caused - the erection of a new building; increasing number of cars on our roads; increased flooding caused by global warming; and so on. Now, all of these developments or trends can be traced to human action, yet it is surely misleading to suggest that they somehow limit our freedom. This is why Oppenheim adds that freedom cannot be restricted by "incapacities caused by anonymous demographic or economic or institutional conditions."¹⁰² Unfortunately, this additional criterion is an appendage that bears no logical relation to the notion of human causation. Why should we exclude anonymous but humanly caused constraints as restrictions on liberty? And how do we determine what is to count as an anonymous act? Are political acts that result from a protracted and diffuse governmental process anonymous? And how do we determine human causation? Do humans cause global warming? Are we causally responsible for the absence of work or is there a 'natural' level of unemployment? Like the moral responsibility view, the criterion of human causation raises more questions than it answers. As such, if we were to argue that demographic, economic and institutional

¹⁰¹ Oppenheim, F., 'Constraints on Freedom' as a Descriptive Concept' *Ethics*, 95, 1985, p.306

¹⁰² *Ibid*, p.306

conditions do not limit freedom, we would do better to invoke the criterion of intentionality.

There is indeed a respected tradition in liberal circles that identifies constraints on liberty only with deliberately imposed obstacles. The **intentionality view** maintains that a person is free to the extent that he or she has the opportunity to act without the deliberate interference of others. This is the view that Berlin proposes in 'Two Concepts of Liberty': the restriction of liberty "implies the deliberate interference of other human beings."¹⁰³ Moreover, he quotes Rousseau with obvious support - 'the nature of things does not madden us, only ill will does'. Admittedly, Berlin's position is ridden with well-known inconsistencies and contradictions: he elsewhere writes that obstacles to freedom might be imposed "directly or indirectly, with or without the intention of doing so."¹⁰⁴ Indeed, the intentionality criterion seems to have been dropped in Berlin's later work on liberty, in preference for the broader criterion of alterability.¹⁰⁵ By this view, a man is unfree if the constraints he faces derive from an alterable human practice. Nonetheless, this latter view is inconsistent with the thesis Berlin develops in 'Two Concepts of Liberty', which calls for a clear distinction between coercion and other debilitating conditions. For instance, if the criterion of alterability is upheld, a phenomenon such as poverty potentially places limitations on freedom, inasmuch as it is an alterable human practice that debars opportunity. In order to rescue his initial (and more compelling) thesis, in which poverty is not counted as a constraint on liberty, Berlin must retreat to a position in which only intentionally imposed obstacles count as a constraint on liberty. The virtue of this account is that the notion of negative liberty becomes a tightly configured concept that is not conflated with other valuable goods, nor swollen to such an extent that constraints on freedom include any humanly derived object that delimits the opportunity to act.

Nonetheless, some critics maintain the intentionality criterion is fundamentally flawed. They claim that too many restrictions of freedom are ignored if we count only deliberate acts of coercion and persecution. Miller, for example, suggests there is little

¹⁰³ Berlin, I., 'Two Concepts of Liberty,' *Four Essays on Liberty*, Oxford University Press, 1969, p.122

¹⁰⁴ Berlin, I., *Four Essays on Liberty*, Oxford University Press, 1969, p.123

¹⁰⁵ *Ibid.*, p.x1

difference between, say, a law that expressly forbids me to travel outwith the borders of my country and a law that requires me to repay the costs of my professional training (which I cannot do without remaining in the country).¹⁰⁶ Yet, Miller's example is under-developed. If the law that requires me to repay the costs of my professional training specifically stipulates that I must remain in the country to repay my fees, then I am clearly unfree to leave. However, if I am afforded the legal opportunity to repay my fees from abroad (the law stipulates that my fees *can* be repaid from another country) but nevertheless lack the means to travel, then I am too poor to take advantage of this opportunity, but I am not unfree.

Other critics reject the intentionality view because it is insensitive to injustices that can arise from unintentionally restrictive practices. Yet, this complaint is unfounded – whilst there is always good reason to object to injustice, this does not have to be framed in terms of the denial of liberty. For instance, imagine that a disabled man, whose mobility is dependent on his wheelchair, is prevented from accessing a train due to its narrow doorway and high step. The disabled man launches a complaint against the rail authorities on the grounds that they are denying him his liberty. What can be said of his case? Those who disagree with the intentionality view will argue that the disabled man is unfree inasmuch as the narrow doorway is a remediable obstruction that prevents him from using the train. Although the interference is of an unintentional nature, its ultimate effect is to prevent the disabled man from accessing the rail network. This problem could be remedied if the rail authorities were to adapt their trains to allow for disabled access. Only then would the disabled gentleman have his liberty restored. However, this argument is unsuccessful, for it confuses the unjust treatment of disability with the conceptual issue of constraint on liberty. Simply because it is wrong not to provide for disabled access does not mean that this injustice must be expressed in terms of the curtailment of freedom. In other words, there might be a strong moral case for the rail authorities to provide disabled access, but not because the disabled are otherwise unfree; rather, it would derive from some other value, for instance, equality (non-discrimination), social justice (compensation for natural disadvantage), or regard for human welfare (empathic awareness of others). Relating this to our hypothetical example, we could say that whilst our sympathies are

¹⁰⁶ Miller, D., "Constraints on Freedom," *Ethics* (94), 1983, p.73

with the disabled man, he cannot be considered unfree: there is no individual interfering with him, and no evidence of coercion; in short, no-one is preventing him from entering the train, even if he is unable to do so.

Regarding the source of constraints on freedom, then, the intentionality view seems to be the least offensive to our linguistic intuitions and it also achieves the greatest degree of internal coherence. Paradigmatic instances of unfreedom pertain to the activities of over-zealous legislators, to despots, dictators, and oppressors. All of these phenomena are deliberate and should be highlighted as grave restrictions on liberty; unintentional restrictions of action, though potentially immoral, should not be thought of as denying liberty.

Let us recap on the argument thus far. I am free to the extent that I am not *compelled, restrained or threatened* by the *deliberate actions* of other *human beings*. Furthermore, negative liberty is fundamentally concerned with the opportunity to act; it is not concerned with the satisfaction of desire, or with the ability to act, or with the capacity to resist threat. These criteria allow us to claim that prisoners are unfree (insofar as escape is physically prevented), as well as uphold the notion that law restricts freedom (insofar as non-compliance is punished). Indeed, if this latter truth is not upheld, the essence of liberty can easily be overlooked. This is an important issue, as we will see below.

Part II: Law and the Limitation of Liberty

"Liberty then is neither more nor less than the absence of coercion... It exists without Law, not by means of Law." -- Jeremy Bentham¹⁰⁷

The central question I now want to consider is whether my liberty is restricted when I am prevented from doing wrong. In the history of ideas, only a few theorists have been willing to uphold this view. Isaiah Berlin is perhaps the best known. He accepts that the imposition of any law, irrespective of whether this is good or bad, involves *some* loss of liberty. Berlin traces this line of argument to Bentham, who asked

¹⁰⁷ Attributed. See Randall, J., (ed.) *Bloomsbury Anthology of Quotations*, (London: Bloomsbury, 2002), p.255

rhetorically: "Is not liberty to do evil, liberty? If not, what is it? Do we not say that it is necessary to take liberty from idiots and bad men, because they abuse it?"¹⁰⁸ In short all laws restrict liberty and it is a great confusion to think otherwise. In order to demonstrate this point more forcefully, let us consider the conceptual ruminations of Hayek and Dworkin.

Hayek's Non-Coercive Law

Hayek defines liberty as the absence of coercion. Coercion is by definition intentional, and occurs "when one man's actions are made to serve another man's will."¹⁰⁹ I am thus coerced when "the alternatives before me have been so manipulated that the conduct that the coercer wants me to choose becomes for me the least painful one."¹¹⁰ In this sense, although the fact that I am coerced still leaves me with a choice, this choice is not sufficient to make my action free. One of Hayek's primary concerns is to understand the type of coercion employed by the state. Here he argues, "True coercion occurs when...the state threatens to inflict punishment and to employ physical force to make us obey its commands."¹¹¹ By this definition, it would seem that most state acts are either overtly or tacitly coercive, insofar as they are made effective by the threat of punishment. Of course, there are certain state acts that do not exhibit coercion. In the UK for instance, the state recommends to parents that their children are immunised against various diseases but this is not mandatory. However, in some instances the state is openly coercive. For example, Hayek considers taxation or forced conscription to be coercive, even if both of these state acts can be justified under certain circumstances. Thus we might differentiate between advice and law: the government advises me not to go on holiday to Chechnya, but imposes no penalty if I choose to do so; by contrast, the government requires that I part with a proportion of my earnings in taxation each month and threatens to punish me if I fail to comply.

However, Hayek unsettles this view by arguing that 'true laws' are *not* coercive. This argument is initially grounded on a distinction between rules that command and rules

¹⁰⁸ Bentham quoted in Berlin, I., 'Two Concepts of Liberty,' *Four Essays on Liberty*, Oxford University Press, 1969, p.148

¹⁰⁹ Hayek, F. A. von, *The Constitution of Liberty*, Routledge and Kegan Paul, 1960, p.133

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*, p.137

that prevent. The state coerces when a law *makes* us undertake certain activities, but does not when a law merely *prevents* us from doing something. For instance, forced conscription is undoubtedly coercive (insofar as it is manifest as a positive requirement), but laws that protect the private sphere are not since they only prevent certain actions (and hence only admit of a negative requirement). If I respect other people's property and physical integrity, I need not be coerced (for I am left as a free agent), but as soon as I do not respect this, I am at the mercy of state coercion. In other words, if I know that by placing myself in a particular position I will be coerced, and if I can avoid putting myself in such a position, I need never be coerced.

Now, Hayek is undoubtedly correct that a command is more directly coercive than a preventive law, insofar as the latter leaves us as free agents, capable of following our 'own predilections'. However, that is not to say preventive law cannot impinge on our liberty. For instance, consider the Jew living in a ghetto in Germany towards the end of the 1930s. The Jew knows that if he tries to leave the ghetto he will be punished; nevertheless, he knows that he need not put himself in such a position since he can stay within its demarcation. The problem for Hayek is that he must decide whether this is an instance of coercion or prevention. If we were to consider the law as merely preventive (i.e. if we interpret the law as imposing only a negative requirement), then we are led to the puzzling conclusion that the laws of Nazi Germany in this respect did not diminish the freedom of the Jewish community. This, of course, does not sit easily with our intuitions – laws that admit only of a negative requirement are not necessarily incompatible with an extensive system of prohibition that places clear restrictions on liberty. Of course, Hayek might object – the preventive nature of non-coercive law is merely one characteristic of what he calls 'rules of just conduct', which involve three criteria. Hayek contends such rules are: "almost all negative in the sense that they prohibit rather than enjoin particular kinds of action," that they "protect ascertainable domains within which each is free to act as he chooses," and that they "can be ascertained by applying...a test of generalisation or universalisation."¹¹² According to Hayek, then, insofar as we obey a preventive law that protects the private sphere, and which has a general and equal application, we cannot claim that our liberty is restricted.

¹¹² Hayek, F.A. von, *Law, legislation and Liberty*, vol.2, Routledge & Keegan Paul, 1973, p36

Yet, it is not clear that this is the case - we have already witnessed in the ghetto example that a rule admitting only of a negative requirement does not guarantee the absence of coercion. Neither does the universality of a law preclude the violation of freedom. According to Hayek, a true law must express a general rule that applies equally to everyone, thus admitting of abstractness.¹¹³ However, such generality is entirely compatible with the extensive infringement of liberty. For instance, the prohibition laws in the US satisfied this criterion and yet significantly restricted the freedom of the individual.¹¹⁴ Indeed, this is a common and powerful criticism brought against Hayek's understanding of liberty, to the extent that he reconsiders his initial opinion in *Law, Legislation and Liberty*: "even rules which are perfectly general and abstract," he writes "might still be serious and unnecessary restrictions of liberty."¹¹⁵ Thus, even if universalisability might be an essential criterion for a just law, this criterion does not debar assaults on freedom.

Hayek's third criterion, on which his entire defence must rest, is that a non-coercive law protects a private sphere in which an individual can act unhindered by others. In this sense, we can discriminate between laws designed to uphold the freedom of the individual and those such as the prohibition laws in America, which were abstract, general and preventative and yet which still placed limitations on liberty. For Hayek, rules of just conduct, which necessarily include the protection of the private sphere, actually *provide* freedom. This, of course, is not a new idea. As long ago as Locke it was argued that 'where there is no law there is no freedom'. Similarly, for Hayek, if a law is designed to protect freedom, it can hardly be said to constrain at the same time. He writes "in defining coercion we cannot take for granted the arrangements intended to prevent it."¹¹⁶ Without the demarcation of a private sphere and the protection of personal property, an individual would be vulnerable to arbitrary coercion by others.¹¹⁷

¹¹³ Hayek, F. A. von, *The Constitution of Liberty*, Routledge and Kegan Paul, 1960, p. 153

¹¹⁴ This example is provided by Miller, D., *Liberty*, Oxford University Press, p. 15

¹¹⁵ Hayek, F. A. von, *Law, legislation and Liberty*, vol. 1, Routledge & Kegan Paul, 1973, p. 101 Hayek, also admits as much in *The Constitution of Liberty*, though clearly with some reservation: "It is not to be denied that even general, abstract rules, equally applicable to all, may possibly constitute severe restrictions on liberty. But when we reflect on it, we see how very unlikely this is." Hayek, F. A. von, *The Constitution of Liberty*, Routledge and Kegan Paul, 1960, p. 154

¹¹⁶ Hayek, F. A. von, *The Constitution of Liberty*, Routledge and Kegan Paul, 1960, p. 139

¹¹⁷ *Ibid.*, p. 140

Of course, this fits nicely with Hayek's broader libertarian argument. If I want to uphold the sanctity of property, for instance, I will tell you that the laws in question do not coerce – such laws uphold private life, the bastion of individual freedom; and if these laws are good, they cannot be coercive at the same time, since coercion is inherently evil. Is there not some truth to this argument? How can laws designed to protect freedom contribute to an increase in the level of coercion in a given society? The answer to this, of course, is that they probably do not. For instance, a law that prevents censorship would increase the total amount of liberty in a society, *ceteris paribus*, inasmuch as it protects the publisher against unwanted interference; yet, that is not to say a specific liberty (i.e. the freedom to censor) has not been infringed. In other words, every law seems to curtail some liberty, although it may be a means of increasing another.

Yet, this raises another question – what combination of laws provides the greatest amount of freedom? This question is impossible to answer in the abstract. We might argue that Danish citizens are, all things considered, freer than the citizens of North Korea; we can cite numerous examples to give credence to this notion – a freer press, a stronger tradition of civil liberties, free elections. Building on these considerations, we may well judge that Hayek's rules of justice provide a matrix of laws under which the freedom of the individual is maximised. If laws protect an extensive arena in which the individual can act unobstructed by others (both economically and socially), then no doubt the freedom of the individual would be extensive. Yet, whether the maximisation of liberty should be our only priority is another matter. As Berlin points out, individual freedom might be good, but it is not the only good. As it is, Hayek finds considerable problems in defining freedom in terms of justice. If the two concepts are not carefully delineated, limitations on freedom could easily be overlooked. The articulation of laws of just conduct must not conceal the fact that those laws will curb some form of liberty, even if they expand freedom in other directions. This is the vital truth that Hayek fails to appreciate – no laws are without a loss to freedom. To this extent, his argument rests on a fatal conceptual confusion.

Dworkin is another who provides a moralised conception of liberty, yet his argument is slightly different from that of Hayek. Whereas Hayek contends that just laws do not coerce (insofar as they leave the individual as a free agent), Dworkin suggests that only those laws that are morally wrong can be judged to impinge upon freedom. Yet, both ultimately understand liberty in terms of justice. Dworkin defines liberty as the opportunity "to do whatever you like so long as you respect the moral rights, properly understood, of others." He continues, "Your liberty doesn't include freedom to take over the resources of someone else, or injure him in ways you have *no right to do*."¹¹⁹ Of course, Dworkin's definition fits nicely with his broader philosophical position - by this account, the liberty of the wealthy is not compromised by taxation, since the "property taken from them in taxation is not rightfully theirs."¹²⁰ That Dworkin can come to this conclusion is a derivative of what he considers the central issue to be addressed in a discussion on liberty, that is, whether a just law can be properly termed a denial of freedom. The basic intuition that informs Dworkin's position is that a conception of liberty is unsuccessful when it forces us to describe some event as an invasion of liberty when no wrong has occurred. He develops this point by arguing that we all want to claim liberty as good; but not only liberty: also equality, democracy, justice and the rest. Of course, all of these porous terms are contestable when in substantive form, but nonetheless we agree, says Dworkin, that to compromise on these values is bad. As such, and contrary to the likes of Isaiah Berlin, Dworkin looks to define the central terms of political philosophy in such a way that value-conflict is eradicated (injustice, he reckons, is unavoidable so long as we accept that conflict exists between values). For instance, if liberty and equality are deemed to conflict, then the wealthy are wronged through taxation (insofar as their liberty is infringed).¹²¹ Yet, if liberty is defined in terms of the rights of others, this need not be the case - we could satisfy the demands of equality without contravening the demands of liberty. In other words, Dworkin contends we should define liberty in such a way

¹¹⁸ This neat expression (the gerrymandering of liberty) was coined by Richard Woltheim in his contribution to *The Legacy of Isaiah Berlin*, Dworkin, R., Lilla, M., Silvers, R., (eds.) New York Review of Books, 2001, p. 135

¹¹⁹ Dworkin, R., 'Do Liberal Values Conflict?' *The Legacy of Isaiah Berlin*, Dworkin, R., Lilla, M., Silvers, R., (eds.) New York Review of Books, 2001, p.84 Emphasis added.

¹²⁰ Ibid., p85

¹²¹ This is in contrast to the likes of Berlin, who would argue that even though the liberty of the wealthy has been infringed, this does not amount to an injustice.

that one suffers no loss of liberty when one is prevented from doing something that is wrong.

Dworkin looks to demonstrate the intuitive appeal of his argument by asking whether a law that prevents murder limits liberty. Surely, Dworkin asks, such a law wrongs no one, and if no one is wronged, how can we seriously speak of a denial of liberty? This argument is unambiguously based on the idea that a just law cannot be deemed an infringement of liberty - coercion is inherently wrong and therefore any law that is not wrong cannot be judged coercive. The idea that liberty can be legitimately removed when in the interests of the greater good certainly sits uneasily with Dworkin; he would sooner avoid situations in which the language of conflict, loss and curtailment is used. Thus, rather than describe the wealthy taxpayer as having his liberty lessened, Dworkin would re-define the boundaries of liberty such that this difficult truth is glazed over. The curtailment of liberty describes a situation in which one is prevented from acting within one's rights; and the wealthy have no right to live in luxury while their brothers live in squalor. The question of what is just is therefore prior to the establishment of a definition of freedom; liberty can only be understood in terms of what is right.

Yet, as Bernard Williams demonstrates, this is no solution at all; the taxpayer will still feel aggrieved at having his earnings forcibly taken, a frustration that will not be appeased simply by explaining to him that he has not truly understood the meaning of liberty.¹²² The term 'liberty' cannot simply be extracted from its moral roots and re-applied using the concept of justice; it is firmly embedded in our moral sense, invoked when we want to protest against those who would prevent us from pursuing our goals, or, indeed, force us to pursue their goals. Thus, when people claim that their liberty is being denied, such a remark implicitly refers to the resentment they feel at being prevented by others from undertaking an act.

Indeed, it seems that Dworkin's argument presupposes a basic concept of freedom that is amenable to the requirements of his theory of justice. Dworkin certainly does not contend that liberty and justice amount to the same thing. What, then, would be

¹²² Williams, B. 'Liberalism and Loss', *The Legacy of Isaiah Berlin*, Dworkin, R., Lilla, M., Silvers, R., (eds.) New York Review of Books, 2001, p.101

left if we distilled Dworkin's alloyed definition of liberty such that all references to justice were removed? Would this not provide us with the essence of liberty? Consider the following example. A society decides that it is right that all women should be required to wear certain clothing in public, such that no bare skin is exposed; further the women are not allowed to engage in the same leisure pursuits that men enjoy – sport, gambling etc. Finally, women are forbidden to work.¹²³ Now, we all know that such a society is not unimaginable. We also know that such a society could be described as following a substantive system of justice; it might not be our preferred system but it would nevertheless accord to the requirements of that generic concept (insofar as it details what it considers to be the right distribution of goods in society). Now, what if we were to complain about the status of women in such a society – how would we phrase our objections? In the first instance, we might say that women are suffering injustice; the society's formulation of justice is wrong and outmoded. Yet, this raises the question, 'what injustice are they suffering?' Faced with this question we would surely be inclined to make reference to the denial of their liberty – women are not given the opportunity to dress, work, or socialise as they please; they are horribly oppressed. Yet, if we phrase our objections in this manner, does this not demonstrate that liberty is an independent value that we use when we wish to describe the opportunity a person has to act unobstructed by others?¹²⁴ Does this not also demonstrate that we must have an idea of what liberty is *before* we talk about rights? And does this not demonstrate that any attempt to redefine liberty to meet the demands of justice is motivated by a purely tactical or justificatory concern? If so, does it not follow that the same sleight of hand might be employed to make liberty amenable to a less desirable system of justice, one that forbids women to work, dress and socialise as they please?

Let us re-consider Dworkin's argument in the light of these objections. We have witnessed that an intuitive, independent understanding of liberty must be established in order to furnish Dworkin's moralised definition of liberty. Now, the only reason Dworkin provides for altering the initial definition is to make it fit with his broader

¹²³ This example could be used in opposition to Hayek insofar as it demonstrates that a comprehensive system of prohibition (based on a series of negative requirements) can be just as oppressive as a rule that is based on a positive requirement (such as conscription). To this extent, the situation of the woman living under such prohibitive laws is similar to the Jew living in a ghetto.

¹²⁴ Frances Kamm raised a similar objection in a discussion of Dworkin's understanding of liberty. See *The Legacy of Isaiah Berlin*, Dworkin, R., Lilla, M., Silvers, R., (eds.) New York Review of Books, 2001, p.132

account of justice; but this being the case, Dworkin is actually forwarding a definition of *justice*, not liberty. It is certainly *just* that the liberty to kill is restricted, but that does not thereby mean no liberty is infringed. Furthermore, in the elaboration of this theory of justice, Dworkin begins to twist the essence of liberty to such a degree that it becomes deprived of its fundamental characteristic, that is, the opportunity to act unhindered by others; and if Dworkin can do this, then presumably the same option is available to those favouring a less enlightened system of justice. By this token, a commitment to liberty could soon be claimed by the most frightening regimes.

§

The capacity to distinguish freedom from other social goods is the great legacy of Berlin's argument on freedom. The virtue of his thesis is that the concept of negative liberty can be applied unproblematically without having to consider issues of justice or equality and so on. It is somewhat ironic, then, that Dworkin articulates a particularly succinct description of the strength of Berlin's position:

"[The] conception of liberty as license is neutral amongst the various activities a man might pursue, the various roads he might wish to walk. It diminishes a man's liberty when we prevent him from talking or making love as he wishes, but it also diminishes his liberty when we prevent him from murdering or defaming others...

Dworkin continues,

"Liberals like Berlin are content with this neutral sense of liberty, because it seems to encourage clear thinking. It allows us to identify just what is lost, though perhaps unavoidably, when men accept constraints on their actions for some other goal or value. It would be an intolerable muddle, on this view, to use the concept of liberty or freedom in such a way that we counted a loss of freedom only when men were prevented from doing something they ought to do." ¹²⁵

So let us agree with Bentham and Berlin that all laws are restrictive of liberty, even if certain laws can be justified in terms of the greater good. Coercion is not a morally loaded term; coercion can exist for good or bad purposes. As soon as we adapt the

¹²⁵ Dworkin, R., *Taking Rights Seriously*, Duckworth, 1977, p.267-8

definition of liberty to suit the demands of justice or morality, we find ourselves in a great muddle. As soon as liberty is imbued with what one ought to do, the essence of freedom is easily lost, over-looked, or denied.

Conclusion

This chapter began by constructing a definition of negative liberty. I am free to the extent that I am not *compelled, restrained or threatened* by the *deliberate actions* of other *human beings*. Furthermore, negative liberty is fundamentally concerned with the opportunity to act; it is not concerned with the satisfaction of desire, or with the ability to act, or with the capacity to resist threat. These criteria allow us to claim that prisoners are unfree (insofar as escape is physically prevented), that slaves are unfree (insofar as they are compelled to labour), and that law restricts freedom (insofar as non-compliance is punished). Indeed, if this latter truth is not upheld, the essence of liberty can easily be overlooked.

The central message of the second part of this chapter warned against moralised understandings of liberty, according to which certain types of laws do not restrict freedom. Hayek pursues this line of argument vis-à-vis his rules of just conduct, while Dworkin offers a rights-based account of liberty. Both of these arguments are dangerous because they can blind us to the very real constraints that an individual faces in a society governed by law. Such systems of law are upheld by the threat of punishment, and hence all diminish liberty to some extent. It is therefore misleading to suggest that just laws are not coercive.

Chapter 3 – Capitalism, Poverty and Liberty

“The obligation to promote education, health, justice, to raise standards of living, to provide opportunity for the growth of the arts and sciences, to prevent reactionary political or social or legal policies or arbitrary inequalities, is not made less stringent because it is not necessarily directed to the promotion of liberty itself, but to conditions in which alone its possession is of value.”

– Berlin, ‘Four Essays on Liberty’¹²⁶

Introduction

In the last chapter, I concluded that all laws coerce and hence deny liberty, even if the effect of a law is to increase liberty in other directions. This chapter will be devoted to an exploration of capitalism, to ascertain whether and to what extent it coerces. I argue that capitalism *is* coercive and that it should be exposed as such (inasmuch as it functions upon coercive law). Yet, within a capitalist context, wealth and class do not affect one’s liberty. Although the poor and dispossessed may experience the coercive nature of capitalism more keenly than their bourgeois adversaries do, that is not to say they are less free. Rather, the *worth* or *value* of freedom is undermined by a lack of social goods such as wealth or income, education, and social opportunity. I thus pursue the argument that legal freedoms are meaningless unless they are supplemented with an array of primary goods. This idea will be defended against the libertarian suggestion that the remit of the state should be limited to protection against force, theft, fraud, and enforcement of contract.

Cohen on Socialist Freedom

G.A. Cohen is adamant that the capitalist system of production, being upheld by restrictive law, is freedom-denying. For Cohen, this coercion is played out at the level of private property. He argues quite plainly that if the state places limitations on what I am allowed to do then my freedom is at stake. If I wish to acquire or use your property without permission then the state will intervene on your behalf. For instance,

¹²⁶ Berlin, I., *Four Essays on Liberty*, Oxford University Press, 1969, p.iii

I cannot simply take your lawn mower from your garden but without first acquiring your consent; and if you decide not to lend me your lawn mower then I have no legal right to object. Thus, whilst capitalism might afford private owners the freedom to do as they wish with their property, it also debars non-owners from acquiring or using property that does not belong to them. Consequently, and contrary to the likes of Hayek, "to think of capitalism as a realm of freedom is to overlook half of its nature."¹²⁷

Cohen is undoubtedly on solid ground here. As we pointed out in the last chapter, it is deceitful to claim that laws designed to uphold capitalism somehow embody freedom, for whilst such laws protect certain freedoms they also restrict or debar others. At the same time, it is important to recognise that an alternative social arrangement would similarly reduce freedom. As John Gray remarks "*All* property institutions – capitalist, socialist, feudal, or whatever – impose constraints on the liberties of those who live under them."¹²⁸ If, in a socialist society of communal ownership, I attempt to claim exclusive rights to something (perhaps a field that I wish to plough and sow), I will find my efforts frustrated. It is clearly set out in the laws of this society that individuals cannot claim property as their own; these rules give each person the right to farm common property, and the rewards will be reaped equally. Thus, I cannot farm the field as my own, nor acquire the fruits of my labour as my own, nor sell the fruits of my labour for profit. Irrespective of the justice or desirability of such a society, it is clear that it functions on coercion and hence restricts certain liberties.

Admittedly, there is the logical possibility that an anarchical society might exist in which human beings live collectively but without law and hence without the legal restriction of liberty. Whilst all recognisable societies are formed on the acceptance of rules of justice, which are upheld by the threat of punishment and which therefore reduce freedom, an anarchical society would not be encumbered with such rules. Yet, even then, individual members of such a community might still experience instances of unfreedom. We do not need to affirm Hobbes's sceptical conclusions about a war of all against all to accept that such a society might produce occasional conflict. For

¹²⁷ Cohen, G.A., *History, Labour and Freedom: Themes from Marx*, Clarendon Press, 1988, p.294

¹²⁸ Gray, J., 'Against Cohen on Proletarian Unfreedom' *Capitalism*, Paul, F.F., Miller, F.D., Paul, J., and Ahrens, J., (eds.) Blackwell, 1989, p.79

instance, if another person or group forcibly prevents me from reaping the rewards of my labour, my liberty is at stake; if there are no rules that debar such activity, then it would seem my efforts could be in vain. To avoid the conclusion that anarchical societies potentially limit freedom, one must subscribe to an improbable view of human nature in which all conflict between individuals is eradicated; by this view *all* individuals are *necessarily* respectful of, and non-interfering with, the physical integrity and labour of others. For those of us who contest such a portrayal of the human being, the idea of complete social freedom is fanciful.

✽

Let us return to the restriction of liberty that occurs under social rules, and to Cohen's argument in favour of socialism. Cohen is an exceedingly honest thinker and hence accepts that socialism coerces. At the same time, he is convinced that it coerces *less* than capitalism. In order to demonstrate this point, Cohen imagines a scenario in which two neighbours decide to share their tools. Each may use the other's tools without permission assuming the other is not using them and so long as the tools are returned after use. For Cohen, such an agreement expands the freedom of both, even though "some freedoms are removed by the new rule." Neither neighbour is "as assured of the same easy access as before to the tools that were wholly his... Nor can either now charge the other for use of a tool he himself does not require."¹²⁹ It would seem, then, that whilst the new arrangement generates additional freedoms, this is at the expense of other freedoms previously held. Yet, how do we tell whether the domain of liberty has been expanded? For Cohen, it is a simple matter of quantity. The number of tools available to each individual under the new system exceeds the number of tools available under the old.

Yet, this argument will not do. The issue of comparative freedom is not a quantitative matter; it cannot be settled in a non-evaluative fashion. Consider an argument formulated by Charles Taylor: an apologist of the former Communist dictatorship in Albania claims that the citizens of Tirana were freer than those living in London because there were more traffic lights in London, even though Albanian citizens were not allowed to practice religion. The apologist rests his argument on the fact that the sheer quantity of restricted acts would have been far greater in London than in Tirana

¹²⁹ Cohen, G.A., 'Capitalism, Freedom, and the Proletariat', *Liberty*, Miller, D. (ed.) Oxford University Press, 1991, p.173-4

(since we practice religion relatively infrequently compared to the number of times we are stopped at traffic lights). Of course, every intuition that we have about freedom resists this type of argument: we understand that the prohibitions enacted by the former Albanian government more seriously assaulted freedom than did the prohibitions in the UK. Hence, a purely quantitative analysis of comparative freedom can be misleading.¹³⁰

Relating this to Cohen's thought-experiment, the question is not whether the freedom of the two neighbours has expanded but whether the freedoms generated by their agreement are more important to them than the freedoms lost. Given that the two neighbours entered into the agreement willingly, we can assume both are happier with the new freedoms. Does this imply, as Cohen insinuates, that the freedoms protected by the socialist state are more valuable than those protected under capitalism? Perhaps not: Cohen's thought-experiment only generates the outcomes he desires by rigging the issue to begin with; he looks to establish the superiority of the communal system by supposing the two neighbours are equally content with its framework. However, imagine that the relationship of the neighbours begins to sour, and that the agreement in place is non-revocable. Neighbour A is annoyed that Neighbour B constantly borrows his chainsaw since its rather expensive blade is beginning to blunt. Moreover, A has been unable to access his chainsaw as much as he would like (he did not suspect beforehand that B would make such a high demand of this tool). B has clearly benefited from the arrangement in a way that A has not, meaning A regrets giving up his previous freedom (from a purely prudential point of view). This demonstrates that if the variables of Cohen's thought-experiment are altered an alternative outcome may be generated; by the variables I selected, it is better (at least for Neighbour A) to remain a private owner. Indeed, if a set of variables were selected such that *both* A and B benefited from remaining private owners, the new laws that enforce communal ownership would greatly diminish the freedom of the neighbours. Now, my point is not that this thereby demonstrates the superiority of capitalism. Rather, I suggest that this thought-experiment cannot proffer judgement on the relative worth of the different freedoms secured by socialism and capitalism in a neutral fashion.

¹³⁰ Taylor, C., 'What's wrong with Negative Liberty', *Liberty*, Miller, D., (ed.) Oxford University Press, 1991, p.150

Cohen on the Collective Unfreedom of the Proletariat

Even if Cohen does not succeed in his attempt to demonstrate the superiority of socialism in relation to the freedom of the individual, he nevertheless offers a searching and sustained critique of capitalism. In accordance with Marx, Cohen would like to argue that the poor under capitalism are forced to sell their labour. He begins in this quest by criticizing the moralised understanding of freedom proposed by Robert Nozick, where liberty is defined in terms of individual rights. According to Nozick: "Other people's actions place limits on one's available opportunities. Whether this makes one's resulting action non-voluntary depends on whether these others had the right to act as they did."¹³¹ For Cohen, when one combines this rights definition of freedom with a moral endorsement of private property, it follows that the legitimate protection of private property cannot be said to restrict freedom. However, for Cohen, this will not do, since "even justified interference reduces freedom."¹³² This is an argument I made at length in the previous chapter.

Yet, even if Cohen demonstrates the inadequacy of Nozick's moralised understanding of liberty, and hence undermines the claim that capitalism does not coerce, what arguments does he offer in favour of the view that capitalism renders *the worker* unfree (in comparison to the capitalist)? He begins his case on an abstract plane, by stating that one can be free to do something and yet also be unfree not to do it. For instance, Australians are free to vote in elections, although they are not free not to vote (voting is mandatory). Relating this to the coercive nature of capitalism, Cohen suggests that whilst workers are completely free to sell their labour (unlike, say, peasants under feudalism), they are not free not to sell it, meaning they are forced to sell it. This is in contrast to capitalists, who do not have to sell their labour. This argument attains significant force when considered in the context of the laissez-faire economy. Let us imagine a capitalist system of the type that existed in Victorian Britain, with all its injustices: workhouses, poverty and exploitation. Now, if a man is threatened with starvation and if he subsequently accepts the conditions of a workhouse solely as a means to satisfy his hunger, can we not say that he was forced

¹³¹ Nozick, R., *Anarchy, State, and Utopia*, Blackwell, 1974, p.262

¹³² Cohen, G.A., 'Capitalism, Freedom, and the Proletariat', *Liberty*, Miller, D. (ed.) Oxford University Press, 1991, p.171; Cohen, G.A., *Self-ownership, Freedom and Equality*, Cambridge University Press, 1995, p.59

into the workhouse? After all, there are no acceptable alternatives. By contrast, the owner of the workhouse does not need to labour and yet lives in relative luxury; he does this by extracting the surplus value from his manufactured goods.

What can be said of Cohen's argument? In the first instance, it would seem to rely upon a moralised account of freedom as *acceptable opportunities*. Whereas the workhouse owner has an array of enticing options from which to choose, the worker must choose between two undesirable alternatives; and because death by starvation is not a reasonable course of action for any individual, it follows that the worker is forced to accept a position in the workhouse. Yet it is somewhat hypocritical that Cohen should criticise Nozick for colouring the definition of liberty with a moralised view of justice when he commits the same error. Cohen might object that his account of the poor man having to choose between starvation and the workhouse is much the same as the unfortunate traveller who has either to surrender his money or his life to the highway robber. However, the examples are different, for two reasons. First, the highway robber is coercive insofar as he restricts a possible choice for the traveller, i.e. to retain both money and life. This is not quite the case for the poor man whose only restriction of choice is the opportunity not to enter the workhouse and not to starve; yet another person does not force this restriction upon him. That is to say, the restriction of this choice is not coercive because it is not manifest as a deliberate threat prosecuted by a human agent or institution. It is not coercive because there is no punishment threatened for non-compliance. Even if the poor man's choices are morally unacceptable, that is not to say he suffers from a curtailment of liberty.

By the non-evaluative account of liberty that I prefer, freedom is independent of the desirability of the opportunity it comprehends. The extent of one's freedom is decided purely on the existence or non-existence of opportunity. That the opportunities available to me are undesirable is not sufficient to demonstrate my freedom is at stake; I have to show, in addition, that I am being prevented or threatened in some regard. Thus, contrary to Cohen's honourable morality, the worker's situation cannot be properly described as a denial of liberty. As Nozick points out, "A person's choice among differing degrees of unpalatable alternatives is not rendered nonvoluntary by the fact that others voluntarily chose and acted...in a way that did not provide him

with more palatable alternatives."¹³³ Consequently, the worker's freedom is not at stake, even though we can sympathise with his situation. Indeed, it is important to separate the question of justice from the question of freedom. The situation of the worker is clearly unjust: offered no prospect of decent employment, his vulnerability is exploited by the morally bankrupt owner of the workhouse. Yet, crucially, he is not coerced or threatened with punishment if he does not agree to work under these conditions.

Perhaps a better argument of Cohen's is that members of the proletariat are *prevented* from escaping their class predicament. This argument identifies the existence of a *constraint* and hence conforms to the accepted structure of liberty. Yet, in what sense are workers prevented from acquiring bourgeois status? Historical evidence shows that proletarians have often climbed the class ladder and become bourgeois. So how can Cohen claim that members of the proletariat are condemned to servitude if there is fluidity between social classes? Cohen recognises this as a problem. He is aware that through hard work, skill and luck, it is possible for workers to transcend class barriers. In order to overcome this difficulty, Cohen maintains that whilst proletarians are individually free, they are collectively unfree. What exactly does this mean? For Cohen, the unfreedom of the proletariat is due to the fact that they are individually free to become a member of the bourgeoisie "only on condition that the others do not exercise their similarly conditional freedom."¹³⁴ In other words, although one might ascend the class ladder (and thus become a property owner through hard work, skill and luck), insofar as capitalism requires "a substantial hired labour force," it follows that "the proletariat is collectively unfree, an imprisoned class."¹³⁵

In order to demonstrate this point, Cohen imagines a situation in which ten people are locked in a room. There is a single key, lying on the floor, which will open the door, but the door will stay open long enough only for a single person to escape. Thus, whilst one person can exit, nine are condemned to remain. The person who uses the key to escape becomes free only on the condition that the nine other people do not. Though all are free to leave *as an individual*, the members of the group are

¹³³ Nozick, R., *Anarchy, State and Utopia*, Blackwell, 1974, p.263

¹³⁴ Cohen, G.A., 'Capitalism, Freedom, and the Proletariat', *Liberty*, Miller, D. (ed.) Oxford University Press, 1991, p.182

¹³⁵ *Ibid*, p.181

collectively unfree.¹³⁶ However, Cohen's thought experiment does not easily translate into the real example of class barriers. In the thought experiment, one can easily comprehend the barrier faced by the unfree, namely, the prison door. Yet, what barriers do the poor face under capitalism, and do these barriers translate as a restriction of liberty? Let us examine the obstacles Cohen identifies vis-à-vis the unfreedom of the proletariat. Asking why the proletariat are individually capable of escaping though many do not, Cohen settles on the following view:

1. It is possible to escape, but it is not easy, and often people do not attempt what is possible but hard.
2. There is also the fact that long occupancy, for example from birth, of a subordinate class position nurtures the illusion, which is as important for the stability of the system as the myth of easy escape, that one's class position is natural and inescapable.
3. Finally, there is the fact that not all workers would like to be petty or trans-petty bourgeois... It is sometimes true of the worker that, in Brecht's words, 'He wants no servants under him, and no boss over his head'.¹³⁷

Yet, none of these barriers restricts liberty in a meaningful way. In the first instance, our freedom is unaffected by the likelihood of success. I have the opportunity to play the lottery each week, and though my remote chances of success may stop me from buying a ticket, this does not amount to the curtailment of my liberty. To maintain otherwise would be to confuse unfreedom and inability. Similarly, I might be ignorant about my opportunities and be apathetic about the prospect of change, yet this does not render me unfree. I may in my apathy refrain from voting in the next general election, given the expected Labour victory; yet, that does not thereby cancel my freedom to vote. Freedom amounts to the opportunity to act, not to my aspiration to act. This truth also tells against Cohen's final assertion. Simply because I do not desire to become bourgeois (because of my values) it does not follow I am thereby unfree. In other words, Cohen mistakes the psychologically and socially debilitating

¹³⁶ Cohen is clear that the freedom of which he talks is manifest in terms of an individual's opportunities and he thus avoids the charge of reification. And an individual can clearly be rendered unfree in virtue of belonging to a group. Black people living in South Africa during the early 1980s were forced to carry an identity card, meaning their unfreedom was contingent upon their (racial) group status. In other words, the logic of Cohen's argument seems to be intact.

¹³⁷ Cohen, G.A., 'Capitalism, Freedom, and the Proletariat', *Liberty*, Miller, D. (ed.) Oxford University Press, 1991, p.181-2

effects of poverty for the absence of opportunity. He attributes the proletariat's imprisonment to a combination of apathy, learned helplessness, ignorance and moral indignation - yet none of these phenomena (regrettable though some of them are) can be said to restrict liberty.

Why Poverty does not reduce Liberty

In spite of Cohen's best efforts, he has failed to demonstrate that the proletariat is less free than the capitalist. Nonetheless, it remains true that the experience of capitalism is entirely different for those with money and those without. It is in this regard that Cohen launches a final argument: in a capitalist society, the absence of money amounts to a restriction of liberty. Cohen's view is in contrast to the liberal argument which insists that to be poor is not to be unfree; simply because I do not have the money to dine at an expensive restaurant does not mean I am prohibited from doing so. I am free to dine, even though I do not have the resources to take advantage of this. My inability is attributable to a lack of means, not to a lack of freedom. Yet, for Cohen, this argument commits an error of reification. The absence of wealth cannot be seen as mere inability - money is unlike intelligence or strength, which are properties of a human being and which do not impinge upon the extent of one's freedom. In truth: "To have money *is* to have freedom, and the assimilation of money to mental and bodily resources is a piece of unthinking fetishism, in the good old Marxist sense that it misrepresents *social relations of constraint* as *things* that people lack."¹³⁸

In order to demonstrate his point, Cohen imagines a society in which the courses of action available to people are written in law. As a means of regulating this, each person is issued with a set of tickets detailing what he or she is allowed to do. One ticket might permit us to go to the opera, another to walk on a given piece of land. If I attempt to undertake a course of action without a ticket, the authorities will arrest me. In short, my freedom is contingent upon my having the requisite ticket. Cohen's point is obvious -- money is just a highly generalised form of such a ticket, and as such, the absence of money amounts to the absence of freedom. Relating this argument to the

¹³⁸ Cohen, G.A., *Self-ownership, Freedom and Equality*, Cambridge University Press, 1995, p.58

reality of capitalism, Cohen imagines a woman who is too poor to travel to see her sister in another town. Her lack of money debars her from taking the trip; if she attempts to board the train or bus without having the money to pay for her journey, she will be physically ejected and perhaps charged by the police. In this instance, the absence of money is manifest as a restriction of freedom.¹³⁹

Nonetheless, Cohen's argument is unsuccessful inasmuch as he confuses an enabling condition (the ticket or money) for the restrictive law that requires its use (the prohibitive, or freedom-denying mechanism). It is the legal barriers designed to uphold the principles of capitalist exchange that constrain my freedom, not my lack of money. Poverty might be degrading and undermine the capacity of an individual to live autonomously, yet it does not in itself reduce freedom. As I pointed out earlier, freedom must involve the *absence* of some external constraint, if we are to distinguish it from mere capacity. In social terms, my freedom is contingent upon the *absence* of law, not on the *presence* of an enabling condition (e.g. money). Laws designed to uphold capitalist exchange are prohibitive measures backed by the threat of punishment and hence necessarily impinge on freedom. Yet, this affects both the poor and the wealthy. A millionaire who is not sufficiently wealthy to buy a small Caribbean island faces the same obstacle as the poor man without the means to buy a new hat. Both men are unfree with respect to the law that prevents the acquisition of goods or land without payment. Indeed, if the millionaire were to take the hat without paying for it, even though he could easily afford it, he would nonetheless be prosecuted for theft.

As Benn and Weinstein point out, the difference between exacting a monetary charge for the goods one is selling and exacting a monetary charge, say, for breaking a speeding law, is that the former is not designed to prevent people from acting in a certain way; indeed, the monetary exchange is actively encouraged. By contrast, a speeding fine takes the form of a penalty, which is *intentionally designed to deter people* from breaking the limit; it dictates the acceptable behaviour of the individual. In other words, we must discriminate between those instances in which a person or group compel the individual to act in a certain way by threatening punishment for

¹³⁹ Rodger Beehler also argues that a lack of money in a capitalist environment amounts to a constraint on liberty. See Beehler, R., 'For One Concept of Liberty', *Journal of Applied Philosophy*, 1991

non-compliance (for instance, we will ultimately be imprisoned if we fail to pay a speeding fine) and those instances in which the individual is simply missing an enabling condition (such as those who are too poor to make a desired purchase).¹⁴⁰ The distinction between coercive law and the enabling conditions that enrich our freedom is crucial in my mind.

This discrimination is not merely pedantic, and it works just as well in other areas of social consequence. If I claim that I am unfree to work, I mean some person or institution is preventing me from doing so – perhaps I do not have rights of citizenship and hence I am forbidden to work by the government. Yet, this is not the same as being unemployed due to a debilitating physical condition or an unattractive curriculum vitae; to use the term ‘unfree’ in the latter instance would surely be a misuse of the term.

It is important to make this distinction, lest we confuse liberty with those social conditions that make its exercise possible and fruitful. Property, education and wealth all affect the value of liberty to some degree - liberty has little meaning unless certain material and social resources accompany it. Yet, that is not to say an increase in those resources will liberate or that the absence of these resources will coerce. As Berlin claims, “if a man is too poor or too ignorant or too feeble to make use of his legal rights, the liberty that these rights confer upon him is nothing to him, but it is not thereby annihilated.”¹⁴¹ In fact, it is the permissive/prohibitive dimension of state activity that pertains to liberty - the legal freedoms each individual has conferred on them, the extent to which an individual can act without being interfered with by the state or other people.

Consider the distribution of freedom in Britain around the time that Mill wrote ‘On Liberty’ (1859). Important freedoms, such as the right to vote, remained a privilege of the minority. There was a clear bias in the political system in favour of the propertied classes; political freedom was solely an instrument of the wealthy. To this extent, the particular matrix of laws that existed at the time favoured those in power. Yet,

¹⁴⁰ I think it is important to point out that my liberty is not only a stake when an individual intentionally makes me do something, which is the line Hayek takes. More broadly, my liberty is infringed when I am threatened for non-compliance. It is in this regard that I claim *all* law restricts liberty.

¹⁴¹ Berlin, I., *Four Essays on Liberty*, Oxford University Press, 1969, p. lili

political liberties aside, all citizens had the same civil liberties under the law: freedom of conscience and religion, freedom of speech, the freedom to buy and sell goods, freedom of association. This allowed citizens to manage their personal and economic affairs without state interference. As A.J.P. Taylor recounts:

"A sensible, law abiding Englishman could pass through life and hardly notice the existence of the state, beyond the post-office and the policeman. He could live where he liked and as he liked. He had no official number or identity card. He could travel abroad or leave his country forever without a passport of any sort of official permission. He could exchange his money for any other currency without restriction or limit. He could buy goods from any country in the world on the same terms as he bought goods at home. For that matter, a foreigner could spend his life in this country without permit and without informing the police. Unlike the countries on the European continent, the state did not require its citizens to perform military service... It left the adult citizen alone."¹⁴²

For some, such as Mill, these liberties allowed for the free expression of individual character; it allowed for diverse experiences. Mill himself spent half his time living in France, half in England. He experimented in his professional life, working variously as a critic and editor, civil servant, writer, campaigner, university governor, and Member of Parliament. He was able to devote himself to his personal affections and nurture his higher faculties. Yet, for others, this freedom was meaningless, not because the opportunities did not exist, but because they lacked the requisite means to take advantage of their liberty. The value of freedom for many was eroded by misery and poverty; many were unemployed, others condemned to workhouses; most lived in dilapidated housing and were exposed to fatal diseases (Mill himself could not escape this scourge). In short, few people had the capacity to take advantage of their liberty and live in accordance with a conception of the good.

I raise these truths not to satirise the emptiness of negative freedom. For as Berlin points out, to sacrifice a degree of freedom in the face of misery and destitution is right and proper, in order to generate a fairer society. Yet, we should not lose sight of

¹⁴² Taylor, A.J.P. quoted in Gray, J., *Liberalism*, Oxford University Press, 1995, p.26

the fact that an absolute loss of liberty occurs: "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."¹⁴³ To be poor – as terrible and undesirable as it might be – is not to lack freedom. Poverty might debar me from pursuing my dreams, or it might rob me of my dignity and autonomy; but it should not be confused with a lack of freedom. And yet, it is true that poverty and freedom are not unconnected, for unless I have the capacity to take advantage of my freedom, then it is useless to me. To enjoy my freedom I need an income, a job, and state support when this is absent; I need education, a chance to gain qualifications of some sort, to be aware of my opportunities. In short, I need those material and social conditions that were almost entirely absent from the lives of the poor in the 19th Century.

Britain during this era has been lauded for its aversion to legislation – arguably it came as close as any society ever has to the ideal of *laissez-faire*. This society provided extensive legal freedoms, insofar as state interference with the individual and groups was minimised. Should we therefore implement the principles of *laissez-faire* in order to protect individual liberty? Of course not, for freedom in a capitalist economy is worthless unless accompanied by the economic capacity to enjoy it. Whilst the *laissez-faire* model might produce great freedom, it also produces great misery, disenchantment and poverty for a great many people. If our freedom is valuable as a means to pursue our purposes, then there is a strong moral case to satisfy the conditions that make the pursuit of our purposes viable.

Against Libertarianism

If freedom is to be of any value to its possessors, it must be accompanied by certain all-purpose means; that is the implication of the argument I have sketched above. To this extent, interventionist government is justified in order to provide the social conditions in which people are able to take advantage of their legal freedoms. General taxation ought to be used as a means to generate a fair distribution of social goods, which is required to effectuate a system of basic liberties.

¹⁴³ Berlin, I., *Four Essays on Liberty*, Oxford University Press, 1969, p.125

Yet, libertarians contest this argument, suggesting it is unjustified to provide social goods without the direct consent of those who fund their provision. By this view, a welfare state supported by general taxation imposes a condition of forced labour upon those who fund the welfare system. When a government takes from me in taxation, it is effectively forcing me to work for the good of another person. The most notable advocate of this view is Robert Nozick, for whom the redistribution of wealth through taxation involves "the violation of people's rights."¹⁴⁴ More generally, Nozick argues that "a minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts...is justified," and that "any more extensive state will violate persons' rights not to be forced to do certain things."¹⁴⁵ Consequently, "the state may not use its coercive apparatus for the purpose of getting some citizens to aid others."¹⁴⁶

Yet, how does Nozick arrive at these rules of justice? Despite his famous Lockean defence of private property, and despite his failure to detail the normative foundations of his libertarianism,¹⁴⁷ the moral sentiment that underpins Nozick's theory can roughly be categorised as Kantian - he upholds the maxim that human beings should be treated as ends in their own right, and should never be used simply as a means to an end. For Nozick, this sentiment entails certain moral constraints, which "reflect the fact of our separate existences. They reflect the fact that no moral balancing can take place among us; there is no moral outweighing of one of our lives by others so as to lead to a greater overall social good. There is no justified sacrifice of some of us for others."¹⁴⁸ For Nozick, the moral constraints specified by the Kantian maxim are best realised through the laws of the minimal state. Any more extensive state will inevitably offend against the Kantian principle by forcing some citizens to labour for the good of others. All such states ignore the fact that "there are only individual

¹⁴⁴ Nozick, R., *Anarchy, State, and Utopia*, Blackwell, 1974, p.168

¹⁴⁵ Ibid, p.ix

¹⁴⁶ Ibid, p.ix

¹⁴⁷ That the moral foundations of Nozick's rights-based argument is left under-developed is freely admitted by Nozick himself: "The completely accurate statement of the moral background, including the precise statement of the moral theory and its underlying basis, would require a full-scale presentation and is a task for another time." Ibid, p.9 Many of Nozick's opponents have taken him to task over this admission. See, for example, Nagel, T., 'Nozick: Libertarianism Without Foundations' *Other Minds: Critical Essays 1969-1994*, Oxford University Press, 1995, p.137-149

¹⁴⁸ Nozick, R., *Anarchy, State, and Utopia*, Blackwell, 1974, p.33

people, different individual people, with their own individual lives."¹⁴⁹ Any attempt to impose a distributive 'pattern' on society will inevitably transgress the moral truth that there is no justified sacrifice of one person for another. Consequently, coercive taxation cannot be used to fund, say, unemployment benefit without violating the right of the individual not to be forced to subsidise the life of another person. To force a person to labour for the good of another "does not sufficiently respect and take account of the fact that he is a separate person."¹⁵⁰

However, it seems that Nozick derives the wrong conclusion from his premise (irrespective of the justifiability of that premise). He suggests that human beings should be respected as ends in themselves because we are all agents capable of giving our life meaning.¹⁵¹ Yet, an appeal to agency would seem to justify a more interventionist approach to government that Nozick allows. After all, the capacity to live a meaningful life in a capitalist society requires more than rights to own property and personal freedom; rather, as Simon Scheffler points out, it requires sufficient access to those distributive goods "whose enjoyment is necessary to have a reasonable chance of living a decent and fulfilling life."¹⁵² In other words, Nozick's theory of rights is unlikely to achieve its aim, since an unrestrained capitalist economy provides little means for the vulnerable and disadvantaged to construct a meaningful life. If freedom is to be worth anything to the individuals who possess it, it must be accompanied by certain all-purpose means; yet, the libertarian society does not provide for these.

Furthermore, it is unreasonable of Nozick to suggest that taxation *necessarily* disallows a meaningful life for affected taxpayers. Only if the level of taxation were particularly severe (leaving me unable to exercise discretion over how my income is spent), would Nozick have a case. Yet, in reality, a modest level of redistributive taxation (enough, say, to fund a comprehensive health service, unemployment benefit, public education and so on) does not disallow affected taxpayers from living

¹⁴⁹ Ibid, p.33

¹⁵⁰ Ibid, p.33 Importantly, Nozick suggests that redistributive taxation is justified as a means to fund the protection of individual rights (i.e. where is used to fund the coercive apparatus of the minimal state, which merely protects the integrity of the individual and his property). This does not violate the rights of the individual since the taxpayer is compensated by the institution of a protective minimal state.

¹⁵¹ Ibid, p.50

¹⁵² Scheffler, S., 'Natural Rights, Equality, and the Minimal State,' *Reading Nozick*, Paul, J., (ed.), Rowman & Littlefield, p.159

meaningfully. No matter how strongly Nozick promotes his libertarian utopia, he must accept that it is possible to have part of our earnings taken from us and yet still live well.

The Value of Liberty and Egalitarian Liberalism

According to Berlin, freedom is not an inviolable good. Recognition of the importance of negative liberty need not lead to libertarianism or anarchism, for freedom is not the only good that can be pursued: "If the liberty of myself or my class or nation depends on the misery of a number of other human beings, the system which promotes this is unjust and immoral."¹⁵³ Coercion may be inherently evil, but it is not the only evil, nor even the greatest, and thus may be justified in order to protect a more important good. Berlin champions the importance of liberty, but he is also in favour of the welfare state, a basic standard of living, the alleviation of poverty, and other goods that combat human suffering. Thus, it is justified to sacrifice a certain degree of individual liberty in order to protect a minimum of human dignity. Indeed, for Berlin, the *value* of liberty is partially contingent upon certain other goods. As he writes:

"To offer political rights, or safeguards against intervention by the state, to men who are half-naked, underfed, and diseased is to mock their condition; they need medical help or education before they can understand, or make use of, an increase in their freedom. What is freedom to those who cannot make use of it? Without adequate conditions for the use of freedom, what is the value of freedom?"¹⁵⁴

Thus, in order to make use of freedom, an individual must also have access to certain other social goods such as education and wealth or income. Perhaps it is for this reason that Berlin writes: "the case for social legislation or planning, for the welfare state and socialism can be constructed with as much validity from considerations of the claims of negative liberty as from those of its positive brother."¹⁵⁵

¹⁵³ Berlin, I., *Four Essays on Liberty*, Oxford University Press, 1969, p.125

¹⁵⁴ *Ibid.*, p.124

¹⁵⁵ *Ibid.*, p.xlvi

Therefore, Berlin does not look to defend a libertarian perspective, which (at its most extreme) contends that natural human characteristics and socially created disadvantage should not be altered or compensated for. According to the libertarian, individuals should be left free to determine their own affairs, for better or worse. Government has no business in taking the wealth of some in order to better the conditions of others. Yet, as Berlin realises, such a rigid position will lead to massive suffering, desperation and misery. As he points out, one of the great evils of laissez faire economies is that they fail to provide "the minimum conditions in which...any degree of 'negative' liberty can be exercised by individuals or groups." Hence, without some form of social justice, negative liberty "is of little or no value to those who may theoretically possess it."¹⁵⁶ In this regard, Berlin illuminatingly distinguishes between freedom and the conditions that make its exercise meaningful.

The distinction between liberty and its worth to individuals is not only highlighted by Berlin; it also features prominently in the work of Rawls. Consider the following passage from *A Theory of Justice*:

"The inability to take advantage of one's rights and opportunities as a result of poverty and ignorance, and a lack of means generally, is sometimes counted among the constraints definitive of liberty. I shall not, however, say this, but rather I shall think of these things as affecting the worth of liberty."¹⁵⁷

In other words, we should not consider poverty to be a constraint on freedom, but rather as a scourge on its value to individuals. This distinction is crucial, not only in Rawls, but also in the general literature more broadly, for once we acknowledge that poverty erodes the value of liberty, there is a case to be made for an egalitarian distribution of social goods. Only then will the fair value of liberty for all be secured.

This belief has been central to the rise of egalitarian liberalism, an ideological hybrid that has fused respect for individual freedoms (classical liberalism) with the quest for a fair dispersal of social goods (socialism). J.S. Mill was among the first to integrate

¹⁵⁶ Berlin, I., *Four Essays on Liberty*, Oxford University Press, 1969, p.xlvi. Indeed, one of Berlin's lasting regrets was that "Two Concepts of Liberty" did not fully express the evil of a laissez faire society. According to Berlin, "I ought to have made more of the horrors of negative liberty and what that led to...The sufferings of children in coal mines or poverty." Berlin quoted from Lukes, S., 'In Conversation with Isaiah Berlin,' *Salmagundi*, 120, 1998

¹⁵⁷ Rawls, J., *A Theory of Justice*, Clarendon Press, 1972, p.204

these ideas when he began to think of personal freedoms in terms of individual welfare. Although many commentators now suggest that his project to marry liberalism and utilitarianism failed, he was crucially aware that individual pursuits and experiments in living required more than just diversity and liberty; it also required social goods, like education, equal opportunity, and income and wealth. Still, the notion that individuals ought to be *empowered* in their pursuits was left underdeveloped by Mill. Arguably T.H. Green came closer to this ideal, although his argument was undermined by a fatal conceptual confusion: he mistook the empowerment of the individual for the expansion of liberty. In truth, empowerment does not liberate, it makes existing liberties more valuable. Still, Green represented an important step in liberal egalitarianism, inasmuch as he confirmed the importance of material resources to personal freedom. The Fabians took this further in their quest for a fairer distribution of wealth and income, and in their support of a welfare state. However, Fabian thinking was often more 'socialist' than it was 'liberal',¹⁵⁸ and many honourable goals – a higher standard of living for the working class, the expansion of education, and the welfare state – were justified in collectivist terms: progressive aims were held to be good for 'society' rather than individuals, a notion that Hayek soon put paid to.

Nonetheless, much of the Fabian agenda was assimilated into liberal thought, which was increasingly concerned with piecemeal social engineering. People like Karl Popper, Isaiah Berlin, Bernard Williams, Thomas Nagel and, of course, John Rawls consolidated the idea of egalitarian liberalism: they proposed that a system of individual liberties should be supported by an empowering state. Of this group, earlier proponents like Popper and Berlin – both born in the first decade of the 20th Century – were rather cautious in the egalitarian component of their liberalism, confining themselves to a broad support of the welfare state. Yet, as the school of thought grew more self-confident, so theorists became more ambitious in their quest for fairness, culminating with Rawls' *A Theory of Justice*. Indeed, it was in this work that egalitarian liberalism began to explore one of its central tenets, namely, that basic liberties ought to be supplemented with all-purpose means, such that everyone has the

¹⁵⁸ The Fabians were split on the respective importance of liberty and equality. Critics such as Sydney Webb favoured a collectivist ideal, which was prepared to relegate the primary status of individual freedoms; by contrast, Tawney held firm to the liberal democratic ideal. See Gutman, A., *Liberal Equality*, Cambridge University Press, 1980, Chapter 3.

capacity to take advantage of their freedom and pursue a vision of the good. Individuals in a capitalist society cannot be left alone to acquire these resources by themselves, since some will not have the requisite financial, physical or intellectual capacity. To this end, there ought to be a fair distribution of primary goods that empower the individual to act in accordance with his plan of life, whatever that plan may be. This generic argument is set out by Rawls in the following manner:

“Liberty and the worth of liberty are distinguished as follows: liberty is represented by the complete system of the liberties of equal citizenship, while the worth of liberty to persons and groups is proportional to their capacity to advance their ends within the framework the system defines. Freedom as equal liberty is the same for all; the question of compensating for a lesser than equal liberty does not arise. But the worth of liberty is not the same for everyone. Some have greater authority and wealth, and therefore greater means to achieve their aims. The lesser worth of liberty is, however, to be compensated for... The basic structure is to be arranged to maximise the worth to the least advantaged of the complete scheme of equal liberty shared by all. This defines the end of social justice.”¹⁵⁹

Rawls' *Theory of Justice* is a remarkable work, which has rightly received significant attention, yet the justificatory role of the principle identified above – that the basic liberties must be made meaningful by egalitarian principles of distributive justice – has received insufficient attention. My aim in the next section is to consider how this rubric is woven in to the fabric of egalitarian liberalism. To this extent, my investigation now turns to the very foundations of liberalism, to the sacred values that underpin its existence.

Conclusion

In the final chapter of this section, I suggested that although capitalism reduces certain freedoms, it also generates and sustains other freedoms. Capitalism might deny me the opportunity to use my neighbour's property without consent, but it also allows me certain freedoms debarred under alternative social arrangements, the most important of which refers to the freedom to buy and sell. The injustices of capitalism have

¹⁵⁹ Rawls, J., *A Theory of Justice*, Oxford University Press, 1971, p.204

motivated critics from the left to argue that poor people are often not free to buy and sell, or at least not beyond a bare minimum; the poor consequently face greater constraints on liberty than the wealthy. To this complaint I offer a familiar response: the poor are not interfered with any more than the wealthy and hence are not any less free; simply because the poor lack resources does not mean they are unfree. Rather, they lack the resources that would allow them to take advantage of their liberties in pursuit of a conception of the good. Importantly, however, the inability that comes with poverty matters as much as the unfreedom that comes with persecution. Consequently, I suggest that a commitment to individual freedom requires a commitment to other social goods, upon which the *value* of liberty is contingent. This position was defended against libertarianism, which holds that a redistributive welfare state offends against the Kantian principle that human beings should never be treated merely as a means to an end. In response, I argued that the redistributive state does not treat taxpayers as mere means, so long as they are allowed a minimum of economic freedom. Indeed, such redistribution is necessary if every citizen is to be given access to the conditions under which it is possible to exercise liberty in a meaningful way.

Section II - Justifications

As mentioned, the broader aim of this thesis is to examine the idea that a system of basic liberties ought to be supplemented with all-purpose means, such that everyone has the capacity to take advantage of their freedom and pursue a vision of the good. This, I argue, is among the defining characteristics of egalitarian liberalism. Yet, I am anxious not depict a false sense of cohesion within this school - egalitarian liberals do not share identical views; their justificatory schemes are very different. To this end, this section focuses on the issues that divide egalitarian liberals. I will pick up again on the unifying aspiration that individuals should be empowered in their pursuit of the good towards the end of this section.

Before that, the morality of freedom will be examined. Is liberty a universal moral value, a minimum of which every human being has a right to? Or is liberty merely a cultural norm, and hence lacking in universal prescriptive force? Moreover, is liberty valuable because it forms part of a specific character ideal, or vision of the good? Or is liberty valuable merely because it allows us to choose the ends that we prefer, irrespective of what those are? Finally, what is the relationship between freedom and other social values? These basic questions will be addressed by examining the arguments of four eminent theorists who have written on the subject of freedom (and liberalism more broadly): Joseph Raz, Isaiah Berlin, Alan Gewirth, and John Rawls.

Each author has his own chapter, and each chapter has a different focus. The chapter on Raz investigates the relationship between liberty and autonomy and asks which of these values is the energising force of liberalism. The chapter on Gewirth focuses on his unique form of dialectical reasoning and asks if it truly delivers the conclusions he suggests; to this extent, the focus is on the logical consistency of his justification. When discussing Berlin, I spend considerable time on the meta-ethics that underpins his commitment to personal freedom; this involves an extended discussion of his view on human nature. Finally, with Rawls, I look in detail at the fair value of liberty in relation to the issue of distributive justice. Thus, the four chapters do not necessarily cover the same ground, although all are broadly concerned with the value of freedom.

I should perhaps say a final word on prominent egalitarian liberals that I have decided to exclude from this section: Ronald Dworkin, Amartya Sen, Thomas Nagel, Bernard Williams and Richard Rorty. Dworkin and Sen have been left out since neither subscribes to the understanding of liberty forged in the first section of the thesis, and since both construct their liberalism on the foundational value of equality.¹⁶⁰ Thomas Nagel was omitted because of his affinity to Rawls, and Williams was excluded because of his affinity to Berlin. By contrast, Rorty was left out - despite his interest in questions of justification - because he fails to engage with the specifics of the issue at hand: What makes liberty valuable? What other social goods are required to make it meaningful?

¹⁶⁰ In spite of this, both have important contributions to make on the subject of distributive justice, and hence will be considered more broadly in the final section of the thesis.

Chapter 4: Autonomy and the Search for Perfection

"Having said that...it is only the cultivation of individuality which produces, or can produce, well-developed human beings, I might here close the argument: for what more or better can be said of any condition of human affairs than that it brings human beings nearer to the best thing they can be? Or what worse can be said of any obstruction to good than that it prevents this?" - J.S. Mill, 'On Liberty'¹⁶¹

Introduction

Joseph Raz is the most eloquent modern day advocate of Millian liberalism. He starts from the position of the concrete human agent, from the individual who has substantive plans and ideals. He elicits a specific vision of human excellence and regards the autonomous life as an integral part of the good. Yet, he does not, for all that, merely repeat what Mill said a century before. Most notably, he rejects the utilitarian foundation of Mill's liberalism. For Mill, autonomous choice is a constituent component of well-being and as such, it should be developed; this development attains its normative force in Mill insofar as it maximises utility. For Raz, the liberal way of life does not flow from the maximal aggregation of individual well-being, but from the fact of value-pluralism. He believes, with Berlin, that there exists a myriad of incompatible ends that might constitute human happiness and that there are many human values that underpin these. According to Raz, Mill's venture is bound to fail, since utilitarianism presupposes the ranking of ends and values that are potentially incomparable and incommensurable.

The central idea I wish to consider in this chapter is that liberty is valuable as a constitutive ingredient of personal autonomy, and that this correspondingly entails a commitment to certain social conditions designed to promote individual well-being. This idea can be found in foetal form in Mill, who claims that freedom is valuable as an intrinsic component of individuality. Yet, Raz articulates this thesis more persuasively, or at least more extensively, inasmuch as he identifies a specific relationship between freedom, autonomy, and the social conditions upon which human well-being is contingent. Raz casts his argument as a form of perfectionism.

¹⁶¹ Mill, J.S., *On Liberty and Other Essays*, Oxford University Press, 1991

He thus distances himself from the other theorists I will consider, inasmuch as he portrays government as having to provide more than the basic social conditions that will empower individuals in living free lives. Rather, he appeals to human excellence. He suggests that the purpose of government is to actively promote human well-being, which entails the sponsorship of an array of valuable opportunities. However, in spite of the many truths espoused by Raz on this matter, I ultimately disagree with his argument on the scope of governmental responsibility. Contrary to Raz's perfectionist inclinations, I suggest that government must only provide the conditions for the exercise of freedom; it should not promote or recommend the specific ends at which freedom should be directed.

J.S. Mill on Individuality and Well-Being

Mill understood very well the instrumental value of freedom. He claimed that liberty was a means to truths of science and reason, just as it was a means to realise our subjective ideals. Mill rejected any vision in which men were fitted with straightjackets, instructed as to the absolute ends of life; human life need not have a particular shape or structure in order to attain fulfilment. For Mill, the ends of life were many, diverse, and could not be apprehended by a utopian blueprint. Just as different flowers flourish in different conditions, so too for human beings. He realised that not all paths lead to the horizon. Visions of the ultimate, truest, or happiest life for the human being could not be uniformly understood. He maintained that if a man could not get a coat or pair of boots to fit unless they are made to measure, then this must also be the case for human lives as a whole. The best life could not be known in the abstract. Diversity of preference alone was reason enough for not shaping humanity after one model. He was to this end essentially pluralistic, claiming: "the only freedom which deserves the name, is that of pursuing our own good in our own way."¹⁶² Hence, there is no reason that all human existence should be constructed on a 'small number of patterns'. The sanctity of individual choice was, for Mill, a good basis from which to defend our commitment to liberty. He was suspicious of the collective freedom propagated by Rousseau and his followers, who offered a paternalistic understanding of liberty, and was distinctly aware of the tyranny that an

¹⁶² Mill, J.S., *On Liberty*, Oxford University Press, 1991, p.17

elected majority could impose on a dissenting minority. Undoubtedly, then, Mill defended the importance of negative liberty, celebrating the private space in which an individual could act unhindered by other people. In short, his embrace of pluralism fits nicely with the instrumental value of freedom as want satisfaction.

Yet, it is also true that Mill viewed liberty as having a constitutive value, which follows from his perfectionist inclinations. Liberty is a constituent part of a specific character ideal, namely, individuality. Mill cites, with obvious support, Wilhelm von Humboldt's claim that the object 'towards which every human being must ceaselessly direct his efforts...is the individuality of power and development.' Every man should strive towards 'the highest and most harmonious development of his powers to a complete and consistent whole.' The requirement for this is freedom and a diverse environment - whereas freedom allows for individual choice, a diverse environment secures the authenticity of that choice. It was this seed (planted in Mill's mind by Humboldt and other romantics such as Goethe) that engenders an original vision of liberal morality, which incorporated a perfectionist account of human flourishing. Broadly speaking, Mill believed that human beings excelled when they strived to develop their uniqueness. He was consumed by the idea of spiritual independence: the capacity to resist convention, to swim against the tide; to live a life full of expression, experimenting in different forms of existence; to realise through autonomous thought and choice a form of life in which one's individual needs, ambitions and eccentricities are realised. The individual alone must decide on his understanding of the good, in line with his critical, thinking capacities. Truths must be examined, questioned, and disassembled in order to search for any flaws or ambiguities. Self-awareness, rationality, and intellectual growth are therefore the foundation stones of Mill's sermon on human perfection.

For as much as Mill's argument reverberates down the ages, it has also been subjected to detailed criticism. For one, Mill's vision of the good life is loaded with a highly particularised morality. He could not bring himself to accept the intrinsic worth of unexamined or sensual ends, for it was plain, he thought, that those with greater experience would settle on a life of higher pursuits. He argued that the boundaries of the good life were objectively discernable by a competent judge. Mill was convinced that those who had experimented in living would settle on the pursuit of intellectual

and spiritual ends as their preferred way of life,¹⁶³ a notion that seems empirically unfounded in our own age. Mill's Victorian sensibilities are reflected by his devotion to education and all things cerebral; yet, these also betray a broader prejudice against physical and sensual pleasure. Indeed, it is from this historically localised morality and from a quasi-Aristotelian vision of the good life that Mill's perfectionist inclinations are revealed.

His suspicion of tradition, popular opinion and social convention have been criticised as little more than a type of fetishism. To ground one's life in social convention is not necessarily to live without individuality. As Anschutz points out, Mill's mistake was to consider that a "man is only himself when he succeeds in being different from other men, as if individuality meant peculiarity and idiosyncrasy."¹⁶⁴ Mill's fundamental point — if only he was clearer on this — is that the acceptance of dogma without thought or reflection amounts to a betrayal of individuality. Yet, there is no reason to suggest, as Mill often implies, that an independent person cannot think critically about social norms before accepting their validity. Burke was undoubtedly a great social critic, endowed with a sense of his own individuality, yet he found his values coalesced with the traditions and conventions of his country. Mill, then, arguably overstates the corrosive effects of social convention on individuality. His enemy is not tradition or convention but dogma; yet, he fatally confuses these phenomena.

Mill's hatred of dogma is made clear when he warns that the demise of the independent mind is the great danger facing humanity. Convention renders our ideas dull, unoriginal and pedestrian. On what basis can we claim to prize our individuality, if, at every turn, we seek shelter in conformity, if our identity is shackled to a conception of what others think? Mill was certainly aware of the lure of the tribe, yet looked on this with disdain:

"It does not occur to them to have any inclination, except for what is customary. Thus the mind itself is bowed to the yoke: even in what people do for pleasure, conformity is the first thing thought of; they like in crowds; they exercise choice only among things commonly done:

¹⁶³ Mill, J.S., 'Utilitarianism' *On Liberty and Other Essays*, Oxford University Press, 1991, p.139

¹⁶⁴ Anschutz quoted in Ten, C.L. *Mill On Liberty*, Oxford University Press, 1980, p.70

peculiarity of taste, eccentricity of conduct, are shunned equally with crimes...Now is this, or is it not, the desirable condition of human nature?"¹⁶⁵

Mill thus recognised that many people lived in conformity, and considered humanity the worse for it; what he failed to appreciate was the genuine value that many people derive from life in the herd. Many people aspire to, indeed actively pursue, conformity. Everywhere we look, we are confronted by the predominance of the tribe. Mill's mistake was to think that this deep spiritual need to belong could simply be wrenched from our nature; our self-identity is as much bound up with our relationships with others as it is with individual self-expression. At the same time, we should not, in taking Mill to task over his distaste for popular opinion, tradition, and social convention, forget his ultimate point. He asks that we cast a critical eye on the general sentiments of society, to choose for ourselves rather than accept - simply for the sake and safety of conformity - the dogmatic braying of our peers.

There are other problems with Mill's thesis, which pertain to his perfectionist view of the human being. How can Mill square his belief that we should each pursue our own good in our own way with the idea that there is an ideal form of life, which is - roughly speaking - that which involves the higher faculties? On the one hand, it is important not to overstate Mill's perfectionism, which stops well short of a definitive theory of the good. Indeed, the only substantive claim Mill makes is that individuality and an independent mind are more valuable than heteronomy and dependence, a claim many liberals would find hard to condemn. Nonetheless, Mill's perfectionism does generate some awkward conclusions, which are difficult to square with some of his more liberal principles. As we witnessed above, in order to defend his argument vis-à-vis the value of higher pleasures, Mill invokes the dubious suggestion that those who have experienced both lower and higher pleasures are bound to favour the latter. In this fashion, Mill's argument can accommodate both the value of choice and an objective understanding of the good life - there will be a tendency among autonomous human beings to *choose* the higher pleasures. Yet, in making this argument Mill is presented with a problem, since there are certain individuals who, having experienced

¹⁶⁵ Mill, J.S., *On Liberty and Other Essays*, Oxford University Press, 1991, p.69

both types of pleasures, would nonetheless prefer the lower. In order to address this dilemma, Mill amends his argument with the unlikely claim that a commitment to the lower pleasures cannot truly be deemed a 'voluntary' choice.¹⁶⁶ As Lindley points out, this renders Mill's thesis unfalsifiable; and more worryingly, it commits the same error that the most dangerous proponents of positive freedom make – it debases the actual desires of individuals insofar as they are judged misguided, errant, or false. Of course, Mill's position is a long way from the authoritarian tendencies of, say, Rousseau; nonetheless, his argument as regarding the worth of freedom would be more convincing if it were not attached to his own understanding of the good life. In the end, Mill is in no doubt that the individual must be left alone to pursue his own good in his own way.

From Mill to Raz: An Exploration of Autonomy

Autonomy is a protean concept that has acquired many different meanings in the history of ideas. If we study its etymology, we find that it simply means 'self-rule' – the Greek 'autós' (meaning *self*) combines with 'nómos' (meaning *law* or *rule*). This would seem to imply personal independence from some kind of domination. However, beyond this, the concept has an elasticity and fuzziness that has ensured a various and divergent usage. According to Gerald Dworkin, "autonomy is a term of art introduced by a theorist in an attempt to make sense of a tangled net of intuitions, conceptual and empirical issues, and normative claims."¹⁶⁷ It might be useful, therefore, to sketch the different ways in which the idea of autonomy has been cast. I hope to show that Raz's understanding of autonomy can be firmly placed within the Millian tradition.

Although Mill never used the term 'autonomy', it nonetheless captures his broader view of human excellence: individuality, active choice making, critical awareness, and intellectual development. We might say, then, that for Mill, the autonomous person must have a self-conception that is not bound up with convention or with the

¹⁶⁶ Mill writes: "many who are capable of the higher pleasures, occasionally, under the influence of temptation, postpone them to the lower...but I do not believe that those who undergo this very common change, voluntarily choose the lower description of pleasures in preference to the higher." Mill, J.S. 'Utilitarianism' *On Liberty and Other Essays*, Oxford University Press, 1991, p.141

¹⁶⁷ Dworkin quoted by Blokland, H., *Freedom and Culture in Western Society*, Routledge, 1997, p.47

behaviour of others. By this argument, autonomy requires an ability to justify and uphold one's beliefs and opinions on their own merit, irrespective of whether they are popular or accepted; to be autonomous is therefore to be authentic and reflective. It requires that we cast a critical eye on received wisdom and question the assumptions hidden beneath accepted truths. Lindley calls this process - the subjection of known truths to critical assessment - 'active theoretical rationality.'¹⁶⁸

The Millian school differs from two other key traditions of autonomy. Kant represents the first and most recognisable of these. Here, the notion of autonomy is intimately linked with self-legislation. According to Kant, the autonomous individual assumes independence from the cause and effect of nature. The individual makes free decisions that are not determined by the laws of the phenomenal world, meaning his decisions are informed by the dictates of *reason*. In this regard, there is an intimate relationship between autonomy and the rational will. The autonomous individual is able to rationally determine the rules by which he thinks he ought to live, and assumes full responsibility for these.

The problem with this idea is that self-legislation might generate different rules depending on whether it is the rational will (*Wille*) or the arbitrary will (*Willkür*) that is consulted. Kant thinks autonomous action ought to be directed by the rational will; this alone will deliver moral precepts. This has led some commentators - most notably Isaiah Berlin - to conclude that Kant provides an argument for positive freedom, according to which our subjective preferences and ideals may be quashed by truths of reason. That is to say, if I want to live by my rules, and yet if others consider these rules to be demonstrably irrational (truths of reason are universally understood by all rational beings), then I may be forced to accept their 'rational' rules and hence forego my self-legislative ideal.

Berlin is correct to point out that a vision of rational autonomy is dangerous when employed as a political concept: the rational demands of *Wille* may lead to the restriction of *Willkür*. However, it is not clear that this dark mutation from autonomy to authority can truly be found in Kant's work. He allows more scope for the exercise

¹⁶⁸ Lindley, R., *Autonomy*, Macmillan, 1986, p.46

of *Willkür* than Berlin would have us believe: individuals are under no *political* obligation to act in accordance with *Wille*; they are free within the bounds of the right to pursue whatever ends they wish, so long as they respect the freedom of everyone else.¹⁶⁹ We will return to this distinction in later chapters.

The other tradition of autonomy that should be identified belongs to certain post-romantics and existentialists. This tradition is similar to the Millian view, insofar as individuality is a central component. Indeed, the two traditions were born of the same ethic, namely, the romantic vision of the individual expressing his uniqueness through the free expression of his ideals. Here, the individual is portrayed as an originator, an architect who constructs his ideals irrespective of social mores. Yet, whereas Mill's post-romantic ideal was developed within the confines of a liberal theory, and to this extent remained rather cautious in its moral outlook, the existentialist vision radicalised the idea of originality. Consequently, we find in the writing of Nietzsche and Sartre an autonomous agent who not only has a powerful sense of his individuality, but who is also *self-creating*. The individual personality generates his own ethical and aesthetic standards; he breaks social norms and formulates his own moral ideal. Such an ideal is not contextually derived but is rather a pure expression of will, or freedom.

Yet, it is not clear that this radical notion is supported by human psychology, for the idea of self-creation must be couched in terms of the environmental and biological factors over which we have little or no control. As Gerald Dworkin points out: "We are born in a given environment with a given set of biological endowments. We...are deeply influenced by parents, siblings, peers, culture, class, climate, schools, accident, genes, and the accumulated history of the species. It makes no more sense to suppose we invent the moral law for ourselves than to suppose that we invent the language we speak for ourselves."¹⁷⁰ To this extent, the existentialist ideal of autonomy is unrealistic, inasmuch as it fails to consider human limitations and socialisation.

¹⁶⁹ Williams, H., *Kant's Political Philosophy*, Blackwell, 1983, p.69, 110

¹⁷⁰ Dworkin quoted by Blokland, H., *Freedom and Culture in Western Society*, Routledge, 1997, p.78

Of the three traditions outlined above, Joseph Raz develops an ideal of autonomy that has its roots in the Millian school. He is not sympathetic to the post-romantic ideal articulated by Sartre or Nietzsche. The good, for Raz, is contextual, delimited by habituation, social norms and institutional structures. Our comprehensive plans for life are not implemented from an 'original choice', as Sartre claims; our goals are culturally and historically situated. For Raz, an individual does not invent the good or make radical decisions as the Nietzschean man might; his understanding of autonomy is much less demanding.

§.

Moreover, Raz's understanding of autonomy differs markedly from that of Kant or Spinoza. For Raz, the fact of value-pluralism ensures that we often have to make hard choices. On occasions, the comparative assessment of divergent ends is not viable because of incomplete information; if we cannot fully weigh the implications of a choice, then there may be no means to decide on the best option. Yet, there are times even with perfect information that a comparative judgement is impossible. In such circumstances, the alternatives are simply incommensurable, and as such cannot be ranked in the abstract. If certain values are incommensurable, then there is no objective means by which we can rationally discern their worth. Our decisions are 'under-determined by reason'. This does not mean "equality of merit and demerit. It does not mean indifference. It marks the inability of reason to guide our action, not the insignificance of our choice."¹⁷¹ Far from reason being the defining characteristic of autonomy, Raz contends that reason is potentially under-determining in the formulation of autonomous choice. Consequently, autonomy is not conceived in a rigid Kantian sense, where the object of choice is delimited by truths of reason; rather, autonomous choice may consist of diverse and heterogeneous pursuits. It does not inform us of any substantive plan of life bar the notion that it must be our own:

"The autonomous person is part author of his life... [His] well-being consists in the successful pursuit of self-chosen goals and relationships...Autonomy is opposed to a life of coerced choices. It contrasts with a life of no choices, or of drifting through life without ever exercising one's capacity to choose... The autonomous life calls for a certain degree of self-awareness. To choose one must be aware of one's

¹⁷¹ Raz, J., *The Morality of Freedom*, Clarendon Press, 1986, p.334

options... The autonomous person must be aware of his life as stretching over time. He must be capable of understanding how various choices will have considerable and lasting impacts on his life. He may always avoid long-term commitments. But he must be aware of their availability."¹⁷²

Raz's understanding of autonomy shares certain characteristics with that of Mill. For instance, he insists that the autonomous person should be part author of his own life, involving active-choice making and a general awareness of one's opportunities. The autonomous person must have a degree of foresight, consider the consequences of his actions, and take responsibility for these; he must be loyal to his principles, even if these are unpopular. Raz calls this latter virtue 'integrity'.¹⁷³ At the same time, Raz's understanding of autonomy is importantly different from that of Mill. The notion of individuality (as uniqueness) does not feature heavily in Raz's argument and hence he avoids the charge of fetishism. Raz understands that one may cast a critical eye on convention or tradition and yet ultimately affirm its value; indeed, for Raz, the concept of autonomy must be grounded in a social and cultural context. To this extent, whilst Raz's interpretation of autonomy clearly belongs to the Millian school, he purges Mill's concept of its well-known prejudices. Raz's understanding of autonomy is less demanding than that of Mill. An autonomous life does not always require "a reflective attitude to one's life," or the evaluation of one's plans "in a very reflective, intellectual way."¹⁷⁴ Raz maintains that the autonomous person need not contemplatively endorse every action, even though some activities might require this. In other words, autonomy does not necessarily always require self-reflection, even if the autonomous ideal cannot do wholly without this phenomenon.

Raz on the Facilitation of Autonomy and Human Well-Being

Raz's argument on the social conditions of autonomy can again be related to Mill. As we witnessed earlier, Mill held that individuality could be best realised in an environment characterised by freedom and diversity - whereas freedom allows for individual choice, a diverse environment secures the authenticity of that choice. Thus, we approach an autonomous life insofar as we make free choices among a diverse

¹⁷² Raz, J., *The Morality of Freedom*, Clarendon Press, 1986, p.370-1

¹⁷³ Ibid, p.383

¹⁷⁴ Raz, J., *Ethics in the Public Domain*, Clarendon Press, 1994, p.101

range of opportunities and insofar as we exercise our critical capacities in the examination of our self-chosen ends and principles.

Similarly for Raz, autonomous agency is possible only with the satisfaction of three criteria: appropriate mental abilities, independence from coercion and manipulation, and an adequate range of options.¹⁷⁵ Appropriate mental abilities refer to the minimum degree of self-awareness and rationality that is necessary to form and pursue a vision of the good. Autonomous action entails a sense of self-direction, which requires independence from the psychological compulsions experienced, for instance, by schizophrenics, the autistic, paranoiacs, and kleptomaniacs. If I am autistic and hence compelled to behave in a certain fashion, then I may never be able to establish a vision of the good, and even if I could, it would constantly be at the mercy of my compulsions. The autonomous individual, by contrast, constructs a life from a nested structure of goals, comprising comprehensive, long-term and immediate goals, which combine to form an individual's conception of the good.

Independence refers to freedom from coercion and manipulation by others. We cannot act autonomously if we are subject to the will of another, whether in a corporeal sense, or in a psychological sense. The latter is just as important to autonomy as the former. In Huxley's 'Brave New World', human beings have the physical opportunity to act in accordance with their projects, but these projects are shaped for them by a combination of genetic engineering, indoctrination, and drug use – the individual is therefore manipulated according to a utopian vision. Yet, this is at odds with living autonomously, 'from the inside'. Nozick, among others, points to the value of authentically shaping one's life – we do not simply want to experience, we want to *live*, to *do* and *be*.¹⁷⁶ If we are subject to the benevolent utopia of Huxley, we lose something very dear to human existence – the capacity to make our own genuine decisions, whether for good or bad. In other words, to be autonomous is to live authentically, to be part author of our life, for better or worse. Autonomy in this sense requires a minimum of independence from the manipulative will of others. The

¹⁷⁵ Raz, J., *The Morality of Freedom*. Clarendon Press, 1986, p.372, 389

¹⁷⁶ Nozick makes this point in his famous 'experience machine' example. See Nozick, R., *Anarchy, State, and Utopia*, Blackwell, 1974, p.42

absence of coercion and manipulation is therefore key to the autonomous life since it protects the viability and authenticity of one's projects.

An adequate range of options requires that the individual has an array of worthwhile opportunities from which to choose. For instance, in a recent case, a woman who was paralysed from the neck down and unable to recover was granted the right to die. Her misery seemed to stem from the fact that her condition had all but eliminated her autonomy. Once able to live purposefully, she was reduced to a life of dependence, where even the very breath she took was made possible by a machine. Now this woman was clearly rational and had an extremely lucid mind; moreover, she enjoyed comprehensive legal freedoms, and was not manipulated by another's will. Yet, insofar as she was unable to carry out a plan of life from an array of options, she had almost no autonomy. This would seem to demonstrate the truth of Raz's claim that autonomy requires the capacity to take advantage of worthwhile opportunities.

The allusion to valuable options is where Raz reveals his perfectionism. He writes: "Autonomy requires that many morally-acceptable options be available to a person."¹⁷⁷ In other words, Raz's understanding of the value of autonomy is bound by a specific vision of the good, by options that he considers worthwhile. Consequently, visions of the good must play a role in the political process. Considerations of the good are reflections "of what does and what does not contribute to people's well-being, which options and what aspects of the common culture are valuable and to be encouraged and which are ignoble and to be discouraged."¹⁷⁸ Thus, for Raz, the value of autonomy derives from its contribution to his perfectionist interpretation of human well-being.

Does this mean that there is an onus on the government to engender human well-being? For Raz, this is a difficult question, for well-being is a subjectively generated phenomenon – "no one can make a success of another person's life."¹⁷⁹ Thus, whilst government might have a duty to protect and promote well-being, it cannot actually make human lives flourish. My ambition, say, to become a successful teacher is

¹⁷⁷ Raz, J., *The Morality of Freedom*, Clarendon Press, 1986, p.378

¹⁷⁸ Raz, J., *Ethics in the Public Domain*, Clarendon Press, 1994, p.102

¹⁷⁹ *Ibid.*, p.8

ultimately contingent upon my own efforts, even if the state, friends and family can provide the conditions that would facilitate this plan. The state might provide training and financial support, while my personal relationships might provide me with emotional stability, which would allow me to whole-heartedly pursue my ambition. Hence: "Governments, and other people generally, can help people flourish, but only by creating the conditions for an autonomous life, primarily by guaranteeing that an adequate range of diverse and valuable options be available to all."¹⁸⁰

The conditions required for an autonomous life presuppose both security and empowerment. Without security, we would be unable to execute our decisions and plans. At the most fundamental level, then, governments must protect us against harm by others. Without the rule of law, we would be vulnerable to murder, torture, terror and intimidation by others, which would lead to the erosion of individual well-being. Yet, more than this, governments have a positive obligation towards well-being, to empower individuals and encourage flourishing lives. For Raz, we can "promote people's chance of a good life not only by helping them acquire the skills they need and develop the motivation and strength of will which will stand them in good stead...but also by providing them with the material resources, and with the natural, social, cultural and economic environments, which facilitate a good life."¹⁸¹ This requires that the material preconditions of well-being be met or guaranteed. The absence of our basic needs, which include food, warmth, shelter, health, income, and so on, renders autonomous activity impossible or difficult. This would seem to suggest that some kind of social insurance, designed to protect the most vulnerable in society, must be established by a government concerned with human well-being. For Raz, the material preconditions of autonomy should be financed through redistributive taxation, since: "reasonably affluent people can give up quite a lot with no cost at all to their well-being."¹⁸² Yet, the duty to ameliorate the material conditions of the most vulnerable is not the only consideration of government. For Raz, human well-being consists in the whole-hearted and successful pursuit of valuable activities, meaning the mere redistribution of wealth will fail to increase well-being if it is unsuccessful in generating *valuable* opportunities.

¹⁸⁰ Ibid, p.105

¹⁸¹ Ibid, p.10

¹⁸² Ibid, p.28

The Value of Autonomy

For Raz, the importance of autonomous choice derives from the incompatibility and incommensurability of values and ends. When Raz claims that certain values are incommensurable, he means that they are incapable of being ranked in the abstract; there is no objective means by which their worth can be rationally discerned. By contrast, the notion of incompatibility points to the fact that certain values cannot be fully realised at the same time. These two facets characterise the condition of value pluralism.

Manifest at the level of the individual, value pluralism requires that we often have to make difficult choices. We often have to choose between "many different and incompatible valuable ways of life."¹⁸³ A life devoted to work cannot be combined with a life devoted to family, just as a life of action is at odds with a life of contemplation. If active and contemplative lives are not merely incompatible but also display distinctive virtues then moral perfection is impossible. Different occupations and styles of life require different qualities, yet these can often only be developed at the expense of others – no person can combine every ideal in a single life. I might have the opportunity to assume control of my family business, yet this would involve sacrificing a career in medicine. I cannot realise both of these opportunities; they are necessarily incompatible. Moreover, the value of these respective careers cannot be ascertained in the abstract; it is left to the individual to decide on his concrete priorities.

It is because the moral universe is characterised by value pluralism that autonomy is so valuable. Without autonomy, we would be less capable of deciding between diverse and incompatible valuable options.¹⁸⁴ Furthermore, the necessity of choosing between incompatible goals is increasingly demanded by the social conditions of liberal democracies. According to Raz, autonomy has never been so important: "the autonomous life depends not on the availability of one option of freedom of choice. It depends on the general character of one's environment and culture. For those who live

¹⁸³ Raz, J., *Ethics in the Public Domain*, Clarendon Press, 1994, p. 103

¹⁸⁴ Ibid, p. 104

in an autonomy supporting environment there is no choice but to be autonomous: there is no other way to prosper in such a society."¹⁸⁵ Raz means by this that certain societies, such as our own, often require an autonomous lifestyle. He points to the example of changing attitudes to marriage - once pre-arranged, people now marry out of choice, if at all; co-habitation and other non-contractual relationships are now becoming common. This produces and requires greater autonomy, irrespective of whether it is desirable as such. Similar trends towards the autonomous life are engendered by modern labour markets, which call for more flexibility and choice, for both employers and employees. Of course, that is not to say all relationships in our society engender autonomy; for instance, the child/parent relationship has less room for free choice, even if the options available to parents are now becoming greater - women are having children later in life, some without a male partner; parents can choose to combine work and family; and so on. The point, for Raz, is not that a life without autonomy is worthless; some valuable lives - say the life of a devoted parent - are often less than autonomous. Yet, even if Raz admits that some people might not value autonomy in itself, he is at least convinced of its necessity. An autonomy-enhancing culture requires autonomous citizens.

Some commentators have criticised this argument of Raz. For instance, Bhikhu Parekh notes the success of the Asian tiger economies, which have embraced technological and economic change, and yet the central values of such cultures have not included autonomy. Similarly, Asian immigrants to western societies have often functioned very successfully, yet without embracing an autonomous lifestyle.¹⁸⁶ Yet, Parekh's criticism is only partly justified. He is correct that autonomy has not been embraced in Asian societies such as Japan or Singapore, despite their modern economies. These cultures still emphasise traditional values such as uncritical deference to senior members of staff in the work place or submission to familial and collective responsibilities. At the same time, even within this context, the necessity of autonomous choice is becoming more apparent. Individuals living in these societies increasingly have to forge a life for themselves from an array of competing possibilities - career paths are more frequently determined by choice than by

¹⁸⁵ Raz, J., *The Morality of Freedom*, Clarendon Press, 1986, p.391

¹⁸⁶ Parekh, B., 'Superior People: The Narrowness of Liberalism from Rawls to Mill', *Times Literary Supplement*, 25th Feb, 1994

impersonal factors over which individuals have no control, such as class or familial expectations. And the same can be said of Asian immigrants living in western societies – whilst they have no doubt retained their own cultural identity, many of their traditions have been eroded by the capacity for individual choice. The example of fewer arranged marriages illustrates this point well.

Taken as a whole, Raz's empirical observations demonstrate considerable insight. Many of his critics understate the extent to which life in western democracies requires autonomous decision-making. For instance, John Gray criticises Raz for propagating a misguided view of progress, in which society inexorably edges towards liberal homogeneity.¹⁸⁷ However, Raz makes no such claims – he merely suggests that minority groups will gradually approach the autonomous lifestyle that is increasingly required by modern economies, and hence will naturally assimilate into liberal society. This does not mean that immigrant cultures will inevitably subscribe to liberal values, only that they will be able to integrate into liberal society. Raz does not foresee the production of liberal homogeneity but rather liberal multiculturalism.¹⁸⁸

Nonetheless, Raz must demonstrate more than the necessity of autonomy; he must also establish its value. His sociological treatise cannot arm his broader thesis with prescriptive force; values cannot be derived from facts. Recognising this problem, Raz looks to formulate a normative response to the truth of value pluralism – he looks to make a virtue out of necessity. According to Raz, autonomy becomes inherently valuable in the face of value-pluralism, since the latter requires that we make informed decisions about our values and ends. Insofar as we must choose between incompatible and incommensurable values, the idea of conscious self-direction has intrinsic appeal. However, it does not seem that Raz's normative argument holds. Even if value pluralism does force us into making choices, it remains to be shown why we should value autonomy as such. We may prefer to shirk the responsibility of choice in favour of the safety of conformity, for instance. What value can autonomy have if I prefer a life of dependency or submission to dogma? If the great goods in life cannot be realised together, why should the submissive or deferential plump for autonomy?

¹⁸⁷ Gray, J., *Two Faces of Liberalism*, Polity Press, 2000, p.97

¹⁸⁸ Raz, J., *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, Clarendon Press, 1994

Indeed, it is uncertain that the value of autonomy can be given any special status in Raz's pluralistic world. Consider the three conditions on which Raz's particular brand of value pluralism is constructed. First, an individual calculus as to the worth of different pursuits is not necessarily attainable given the incompatibility and diversity of one's pursuits. Second, no impersonal ranking of values is rationally possible, meaning we cannot settle conflicts by referring to an objective hierarchy of values. Third, incompatible virtues often reflect diverse fundamental concerns and hence are not reducible to a common principle. Now, if all of the above holds, on what basis can we construct an argument in favour of the privileged status of autonomy? If a vision of the good cannot be articulated in relation to a hierarchy of objective values, does autonomy not become just one value among others?¹⁸⁹ Of course, Raz attempts to bolster his argument by pointing to certain sociological truths about the necessity of autonomy in a modern economy. Yet, without the weight of a more recognisable normative argument, this is tantamount to accepting liberal values as ephemeral and groundless.

The Value of Freedom in Relation to Autonomy

"No one would deny that autonomy should be used for the good. The question is, has autonomy any value *qua* autonomy when it is abused?" Raz, J., 'The Morality of Freedom'¹⁹⁰

If we claim that freedom is constitutively valuable, we mean that it is neither a means to something else that is valued nor an end in itself. Rather, it is a constitutive part of something more complex, which itself is intrinsically valuable. Often, proponents of this idea are unhappy at assigning to freedom only an instrumental value (in which case freedom is only as valuable as the end pursued), and yet do not wish to go as far as to say it is intrinsically valuable (which would be difficult to demonstrate). Theorists such as Raz hold that freedom has a constitutive value in relation to autonomy: "Negative freedom, freedom from coercive interferences, is valuable inasmuch as it serves positive freedom... In judging the value of negative freedom one

¹⁸⁹ This criticism of Raz has been levelled by Crowder, G., 'Pluralism and Liberalism', *Political Studies*, 1994, p.304 and by Gray, J., *Two Faces of Liberalism*, Polity Press, 2000, p.99

¹⁹⁰ Raz, J., *The Morality of Freedom*, Clarendon Press, 1986

should never forget that it derives from its contributions to autonomy."¹⁹¹ For Raz, then, individual liberty is a constitutive ingredient of an autonomous life. The essential virtue of liberty lies in its support of autonomy; it is autonomy, not liberty, which is valuable in itself.¹⁹²

This is an appealing argument that has struck a chord with liberals down the ages. If, as Mill and Raz demonstrate, autonomy can be pitched in a way that is consistent with the spirit of freedom and pluralism, then there seems little reason to fear some mutation into the dark monism that Berlin warns against. Raz's argument is overtly pluralistic inasmuch as autonomy comprehends a myriad of incompatible forms of life. To this extent, his understanding of autonomy is not defined in a way that is coloured by the moral right; Raz's perfectionist understanding of the good is pitched in terms of the *value* of autonomy. Consequently, he recognises that one may be autonomous and choose to do wrong, or pursue worthless ends. This is in contrast to Kant, say, for whom it is impossible to autonomously choose to do wrong. Indeed, for Raz, moral condemnation only makes sense if an evil act has been autonomously chosen. If a person drifts into a wasteful, self-degrading way of life because she knows no better, because alternative opportunities were blocked, then we should acknowledge her predicament as regrettable, and mitigate our moral judgement with the fact that she had little choice. Yet, if a person develops such a lifestyle in spite of having the opportunity to pursue a valuable life, then our moral indignation should not be mitigated. Raz is under no illusion, then, that one may be autonomous and choose morally questionable ends - an autonomous life is not necessarily for the better.

Nonetheless, Raz's account of autonomy remains problematic. He suggests that the value of autonomous choice, and hence of freedom, ought to be delimited by an understanding of valuable ends; he is adamant that autonomy contributes to well-being only if a person can choose between worthwhile goals. Autonomous choices therefore have little value when directed at degenerate or depraved activities; they are

¹⁹¹ Raz, J., *The Morality of Freedom*, Clarendon Press, 1986, p.410

¹⁹² Raz is not making an especially original point here. There is a well-represented tradition within liberal circles that would attribute the value of liberty to an individual's capacity to act autonomously towards his or her goals - J.S. Mill made this sort of argument, as did S.I. Benn more recently. See Benn, S.I., *A Theory of Freedom*, Cambridge University Press, 1988

desirable “only if they are choices of what is valuable and worthy of choice.”¹⁹³ In other words, the value of autonomy is intrinsically related to worthwhile pursuits. Even though one can autonomously choose morally questionable ends, this is true only insofar as one could otherwise have chosen a morally valuable end. If I do not have an array of valuable opportunities from which to choose, I cannot exercise autonomy in any meaningful sense.

To this extent, autonomy is a more stringent ideal than freedom, and hence is valuable for a subtly different reason. Autonomy is valuable inasmuch as it allows us to pursue worthwhile ends. By contrast, freedom is valuable inasmuch as it allows us to choose *whether or not* to pursue worthwhile ends. The value of liberty therefore derives in part from the value of choice itself. As Berlin writes: “The essence of liberty has always lain in the ability to choose as you wish to choose, because you wish so to choose, uncoerced, unbullied, not swallowed up in some vast system; and the right to resist, to be unpopular, to stand up for your convictions merely because they are your convictions.”¹⁹⁴ Dworkin also ties the value of negative liberty to the predilections of individual choice, irrespective of whether that choice comprehends worthwhile or worthless ends: negative liberty “applies to the tawdry as well as the heroic.”¹⁹⁵ The ends at which our freedom is directed can be self-destructive, capricious, or foolish; they may even be morally dubious.

Of course, it may be asked, what possible value does liberty have if it is directed at morally dubious ends? Why should we freely allow for the use of pornography, say, if most agree that it is morally odious? What value does freedom have if we make fools of ourselves, if we harm ourselves, or make morally dubious decisions? There are no unproblematic answers to these questions. The best we can do is simply to state that our choices are valuable inasmuch as they are our own. Some, such as Charles Taylor, might be tempted to question this notion by asking if our choices are genuine (for they might derive from a character weakness or an illness, in which case our choice does

¹⁹³ Raz, J., *Ethics in the Public Domain*, Clarendon Press, 1994, p.105; Raz, J., *The Morality of Freedom*, Clarendon Press, 1986, p.380

¹⁹⁴ Berlin, J., *Freedom and Its Betrayal*, 2002, p.103

¹⁹⁵ Dworkin, R., *Freedom's Law: The Moral Reading of the American Constitution*, Oxford University Press, 1996 p.219

not flow from our *true* selves). Yet, this argument (as I have shown in the first chapter) is forcefully dealt with by Berlin's critique of enlightened rationalism.

The important strand of thought that illuminates Berlin's thesis is that choice is valuable because it allows me to express my will, not because it allows for the pursuit of worthwhile ends. For Berlin, liberty is valuable irrespective of whether it constitutes an autonomous life. Raz has mentioned that autonomy requires an understanding of one's life stretching over time, knowledge of options, and the possible impact of one's decisions. In short, the autonomous life calls for a certain degree of self-awareness. For Berlin, the value of liberty should not be attached to such a demanding ideal. Some choices may be good, considered, or reflective, others may be unwise or hasty or foolish; but they are choices all the same. It is from this pluralistic interpretation of choice that, in Berlin's view, liberty attains its value. Berlin believes the moral universe comprises many incompatible and incommensurable values, between which men must choose. Such choices may be agonising, and may incur irretrievable losses; yet, the moral ideal in which all the great goods coalesce is mere fantasy, and to pretend otherwise is to embrace a monistic view that is both incoherent and menacing. So, even if autonomy is deemed a good, it is not the only good, and hence the vision of worthwhile ends, which the concept of autonomy requires, must be placed beside the myriad of other ends that human beings pursue, many of which are worthless, unpopular, and even dangerous. Liberty might be valuable as a constitutive ingredient of autonomous agency, yet it is not only this, for there are other ways in which our freedom acquires value. In other words, the value of liberty is unnecessarily narrowed if we think of it only as contributing to autonomy.

In this sense, Berlin's understanding of the value of liberty is coloured by the same anti-perfectionism and radical pluralism that underpins Rawls' political liberalism. Rawls maintains that his preferred political conception of justice is not informed by what he calls a comprehensive moral ideal, such as autonomy or individuality. According to Rawls, "As comprehensive moral ideals, autonomy and individuality are unsuited for a political conception of justice. As found in Kant and J.S. Mill, these comprehensive moral ideals, despite their very great importance in liberal thought, are extended too far when presented as the only appropriate foundation for a

constitutional regime. So understood, liberalism becomes but another sectarian doctrine."¹⁹⁶ Rawls is not arguing that Mill's vision of the good cannot be legitimately pursued in the context of a modern liberal democracy, for it can.¹⁹⁷ Yet, such a pursuit must be accepted as merely one vision of the good, competing with other goods, some secular, some religious, some philosophical, some not. None of these controversial comprehensive ideas, or conceptions of the good, should contribute to the basic structure of society, precisely because they are not acceptable to all reasonable persons. By contrast, the idea of the right, which *does* inform on the basic structure, is decided by this very criterion. Rawls tries to establish this by way of his overlapping consensus, that is, by the shared ideas that underwrite a just constitutional regime.

Conclusion

This chapter has considered the notion that liberty is valuable as a constitutive ingredient of personal autonomy. Although this idea was traced to Mill, it is Joseph Raz who has most recently articulated this thesis. Raz casts his argument as a form of perfectionism. The purpose of government is to actively promote human well-being, which entails the sponsorship of an array of valuable opportunities, thus enabling autonomous choice. Yet, how, in Raz's pluralistic universe, are these valuable opportunities to be identified? How can we identify morally worthwhile ends from an array of incompatible and incommensurable values? There are no satisfactory responses to such questions. It is not for the state to provide valuable opportunities, for the question of what is good can only be settled at a subjective level. The role of the state is to merely secure basic liberties, after which individuals must be left alone to formulate their ends. The liberal state, within the boundaries of the right, ought to respect the revealed preferences of individuals, irrespective of how undesirable or unattractive these might be. There may be value in freely choosing an end that is eccentric, imprudent, unhelpful or morally ambiguous.

¹⁹⁶ Rawls, J., 'Justice as Fairness: Political not Metaphysical,' *John Rawls: Collected Papers*, Freeman, S. (ed.), Harvard University Press, 2001, p.409

¹⁹⁷ Rawls even admits that societies in which the ideals of autonomy and individuality are commonly held might very well be "the most well-governed and harmonious." *Ibid*, p.410

Chapter 5: The Dialectics of Reason

"If I am rational, I cannot deny that what is right for me must, for the same reasons, be right for others who are rational like me." - Berlin, 'Two Concepts of Liberty'¹⁹⁸

Introduction

In this chapter, I will carefully consider Gewirth's answer to the three questions hinted at in the introduction to Section II. First, why should we privilege liberty over other values? Second, is freedom instrumentally, intrinsically or constitutively valuable? Third, what is the relationship between freedom and other social goods? In answering these questions, I will consider Gewirth's claim that universally binding moral principles can be derived from considerations of prudential agency. This argument evolves into a broader justification of rights to freedom and well-being. Nonetheless, Gewirth's work is hampered by an irreconcilable antinomy, namely, the tension between moral truth and the prudential interests of purposive agents. He is wrong to suggest that moral imperatives can be derived from prudential considerations. Indeed, this tension between the moral and prudential ultimately leads Gewirth to adopt a conception of freedom as rational autonomy, which entails the dangerous belief that truth has priority over liberty.

Gewirth, Kant, and Moral Reasoning

I shall begin by sketching Gewirth's affinity to Kant. The central aim of Kant's ethics is to justify a supreme moral principle, the Categorical Imperative, in order to make morality binding on all agents. The moral law, however, cannot be based upon sentiment, because this would lead to a form of subjectivism and hence to a contingent morality. Certain emotions such as sympathy may be present when an individual is acting morally, but this does not properly characterise moral action. Neither is action that is motivated by self-interest morally commendable, even when this has benevolent results. Rather, moral worth is found in action carried out in the

¹⁹⁸ Berlin, L., *Four Essays on Liberty*, Oxford University Press, 1969, p.145

name of duty, that is, action undertaken out of reverence for the moral law. The moral law can only be determined by reason.

Gewirth subscribes to a similar understanding of morality. Like Kant, he characterises morality as being objective and universally binding:

"A morality is a set of categorically obligatory requirements for action that are addressed at least in part to every actual or prospective agent, and that are concerned with furthering the most important interests of persons or recipients other than or in addition to the agent or the speaker."¹⁹⁹

Gewirth also considers morality to be a truth of reason. However, he is aware that "determining the correct or justified criterion for moral rightness has been a perennial difficulty for moral philosophy."²⁰⁰ He acknowledges the argument that this difficulty may lie in the fundamental incommensurability of values:

"The crucial difficulty...is that...different persons may give conflicting answers to the authoritative question and uphold conflicting criteria of moral rightness, and thus conflicting moral judgements, even if they have made no logical or empirical errors."²⁰¹

In other words, even if a person's argument in favour of a particular moral scheme is logically flawless, this may not be sufficient to justify that morality. Nevertheless, Gewirth is optimistic that this problem can be resolved, that it is possible to arrive at a true morality. The notion that values are incommensurable often ignores the question of whether the predicates of an argument are contingent or necessary. Ultimate moral disagreements can only be rationally resolved *if moral obligations are based on necessary contents*. Once this qualification is admitted, Gewirth is adamant that the cold logic constitutive of rationality is capable of ascertaining an objective moral position: "I hold that the rational analysis of [necessary predicates] is both the necessary and sufficient condition of solving the central problems of moral

¹⁹⁹ Gewirth, A., *Reason and Morality*, The University of Chicago Press, 1978, p.1

²⁰⁰ Ibid., p.2

²⁰¹ Ibid., p.4 Emphasis added.

philosophy.”²⁰² Thus, through the application of our rational faculties we can avoid arbitrariness in moral argument and derive universally valid inferences.

For Gewirth, the necessary predicates on which morality must be based are the *generic features of human action*. This is because all moral judgements are necessarily connected, directly or indirectly, and irrespective of further contents, with *how people ought to act*. Whilst the specific modes of action required by morality are highly variable, the root concept of action is uniformly present. Moreover, Gewirth argues there are two generic characteristics of action that must be present before a person can be judged morally accountable: voluntariness or freedom, and purposiveness or intentionality. Voluntary action is defined as the unforced choice of an action undertaken by an agent, where that agent knows the ‘relevant proximate circumstances’ of his action.²⁰³ Without voluntariness, we cannot be said to be acting in the morally relevant sense. Purposive action occurs where the end or purpose for which the agent acts constitutes the reason for his action. By definition, then, all actions are characterised by purposiveness since purposiveness is equated with intentionality.²⁰⁴ Taken together, voluntariness and purposiveness are the most general features of action. Other candidates for generic features of action, such as adherence to rules or principles, or deliberation or calculation of consequences, must be discounted since they “either do not characterise all actions or else are derivative from and subsumable under [voluntariness and purposiveness].”²⁰⁵

Gewirth’s argument aims to show that the voluntary pursuit of purposes commits an agent to accept certain normative judgements about the generic features of action on pain of self-contradiction. Here Gewirth employs certain of Kant’s justificatory techniques: for instance, he contends that the test of the moral law is that its denial involves a self-contradiction.²⁰⁶ However, his argument is also importantly different from Kant. In Kant’s ethics, there is a tension between the self-interested, sensuous

²⁰² Gewirth, A., *Reason and Morality*, The University of Chicago Press, 1978, p.22

²⁰³ *Ibid.*, p.27

²⁰⁴ This is in contrast to the more specific idea of hedonism. An agent can purposively carry out a given act without necessarily enjoying it.

²⁰⁵ *Ibid.*, p.41

²⁰⁶ For example, Kant suggested that it is self-contradictory to will as a universal law, say, the breaking of a promise, since if this were to become a universal law, “no one would believe he was being promised anything, but would laugh at utterances of this kind as empty shams.” Kant, I., *Groundwork for the Metaphysics of Morals*, trans. Paton, H. J., Hutchinson, 1948, p.85

self and the rational moral self; Kant fails to accurately explain why a self-interested agent would be motivated to act morally. Gewirth looks to escape this problem by employing a dialectical method, where an agent's rational thoughts are conveyed in terms of the agent's linguistic expressions.²⁰⁷ By employing his dialectically necessary method, Gewirth looks to show that the self-interested position from which all people act, necessarily involves certain moral obligations. In this way, he can overcome the problematic dualisms that beset Kant's theory.

Freedom, Well-being, and the Conditions of Action

In *Reason and Morality*, Gewirth aims to establish that every purposive agent is committed to upholding the freedom and well-being of every other purposive agent. This idea involves three main steps:

"First, every agent implicitly makes evaluative judgements about the goodness of his purposes and hence about the necessary goodness of freedom and well-being that are necessary conditions of his acting to achieve his purposes. Second, because of this necessary goodness, every agent implicitly makes a deontic judgement in which he claims that he has rights to freedom and well-being. Third, every agent must claim these rights for the sufficient reason that he is a prospective agent who has purposes he wants to fulfil, so that he logically must accept the generalisation that all prospective purposive agents have rights to freedom and well-being."²⁰⁸

This argument rests upon the normative structure of action. For Gewirth, to act purposively with a given end in mind, is to accept that end as good. However, this conception of 'good' is based upon certain distinctions. First, it implies only that the agent values the end: he regards the goal as being worthy of pursuit. This use is clearly different from the narrower moral sense of 'good'.²⁰⁹ Second, 'good' does not necessarily involve the reflective appraisal or evaluation of the agent's purpose.

²⁰⁷ Therefore, it is dialectical in the Socratic sense, where a method of argument begins from the assumptions, opinions, statements, or claims made by protagonists, before examining their logical implications.

²⁰⁸ Gewirth, A., *Reason and Morality*, The University of Chicago Press, 1978, p.48

²⁰⁹ For instance, an agent may pursue an action that he believes is immoral, but nevertheless may justify or ignore this immorality by recourse to some more pressing principle or desire. In this case, the agent, by Gewirth's definition, must consider that goal good, even though immoral. Thus, the value of the end is not that it is intrinsically good in a moral sense, but simply that it is perceived to be worthy of pursuit by the agent.

Rather, it is sufficient to judge an end 'good' solely on the basis that the perceived worth of the end was the motivating factor before instigating the action, whether or not the desirability of this end is later re-evaluated. Therefore, Gewirth contends that every agent makes an implicit judgement that the purposes for which he acts are good. Crucially, by judging his particular pursued ends as good, the agent must extend this evaluation to the generic features of his actions. All purposive action is valuational, and hence the agent must not only prize the object of his action, but also the voluntariness and purposiveness that characterises his action. Furthermore, if we are to view action generically-dispositionally, we can establish the generic goods required by the agent in the pursuit of his purposes. These goods, according to Gewirth, are *freedom and well-being*.

Freedom is an essential condition of the agent's action since without this the agent would not be able to pursue his self-chosen ends. Freedom allows the agent to control his action by making unforced choices, such that his action is a means of pursuing what he considers good. As a whole, the agent in valuing his self-chosen end must also value the freedom that allows him to pursue that end. Of course, certain conditions are more coercive than others, and for this reason Gewirth differentiates between occurrent and dispositional freedom. Whereas absence of the former debars only particular actions, absence of the latter makes almost all-purposive action impossible.²¹⁰

As well as freedom, the agent must also value the basic, nonsubtractive, and additive goods, which constitute his well-being. Basic goods are the physical and psychological bases of well-being, such as life, food, clothing, shelter, mental health, and confidence in the possibility of attaining one's goals. Not all basic goods are equally necessary for action; there are degrees of indispensability, with life being the most important. Nevertheless, the rational agent must accept the value of all basic goods so long as he upholds the value of his self-chosen ends; basic goods viewed in this way are the "general necessary preconditions of action."²¹¹ Without these goods,

²¹⁰ An example of the former would be traffic lights, which temporarily interrupt a person's purposes. For this reason the good that traffic lights create (i.e. safety for pedestrians and motorists) easily outweigh their evil. An example of the latter would be imprisonment, which more or less makes purposive action impossible. Consequently, imprisonment can only be justified in serious cases.

²¹¹ Ibid., p.54

the agent "would be able to act either not at all or only in certain very limited ways."²¹² As well as basic goods, the rational agent must value nonsubtractive and additive goods. Whilst the absence of these goods do not debar action altogether, nevertheless, they are necessary for generally successful action. For Gewirth, non-subtractive goods "consist in [the agent] retaining and not losing whatever he already has that he regards as good."²¹³ Hence, to lose a non-subtractive good is to have one's level of purpose fulfilment lowered; an example of a non-subtractive good would be protection against theft. Additive goods relate to a person's capacity to increase their levels of purpose-fulfilment, to perpetuate their capacity to pursue self-chosen projects; education, or opportunities for income and wealth, are examples of additive goods. Of course, it is clearly possible to undertake a given act without many of the goods Gewirth elicits. As Gewirth admits, "an agent may perform some successful actions without having well-being in all of its three dimensions; and he may have such well-being and yet not succeed in some particular action."²¹⁴ Gewirth is able to avoid any problematic implications by viewing well-being generically-dispositionally. By doing so, the generic goods he lists can be seen as the general conditions and abilities required for fulfilling more particular purposes. As such, generic goods are viewed as a means to an end; they are valued by the agent in virtue of their instrumental value.

In this regard, Gewirth's understanding of generic goods is comparable to Rawls's conception of primary social goods. In the first instance, the list of generic goods that each author elicits is relatively similar. For Rawls, primary social goods refer to rights, liberties, and opportunities, the social bases of self-respect, and income and wealth. This list is easily translatable into Gewirth's generic goods: what Rawls terms 'liberties' Gewirth understands as 'freedom'; the 'opportunities' and 'income and wealth' referred to by Rawls could be viewed as 'additive goods' in Gewirth; and so on. Beyond this obvious initial similarity, both authors view these goods in the same way, as all-purpose means to agents' ends. For Rawls, primary goods are valued because they increase the agent's capacity to realise his self-chosen ends. It is in the interest of agents to maximise social primary goods; it is rational for an agent to want more of these goods rather than less, irrespective of what plan of life that individual

²¹² Ibid., p.63

²¹³ Ibid., p.54

²¹⁴ Ibid., p.62

adheres to. Accordingly, Rawls states that primary goods are "things that every rational man is presumed to want. These goods normally have a use whatever a person's rational plan of life."²¹⁵ Gewirth too, recognises this position: the agent values his freedom and well-being because these goods increase his capacity to satisfy his purposes. For instance, Gewirth claims that the agent views his freedom "as a means to attaining his ends."²¹⁶ More broadly, all generic goods are instrumental in the achievement of the agent's purposes: "Since the agent regards his purposes as good, he must, insofar as he is rational, regard these conditions as at least instrumentally good, whatever his particular contingent and variable purposes."²¹⁷ To this extent, Gewirth and Rawls argue virtually the same point, namely, that there are certain generic goods that assist the individual in the pursuit of purposes; hence such generic goods are necessarily valued by purposive agents.²¹⁸

However, Gewirth takes his argument further than Rawls in that he suggests the capabilities of action constitute the well-being of the agent. As Gewirth writes, "any rational agent must regard these abilities and conditions as constituting his well-being because of their strategic relation to all his purposive actions."²¹⁹ Whereas Rawls limits himself to the supposition that primary goods are all-purpose means to the individual's ends, Gewirth provides a more demanding account of the role of social goods in our lives: he implies that well-being is not fully attained unless an agent has access to an array of basic, nonsubtractive, and additive goods. Yet, if these criteria for well-being ultimately derive from the purposiveness of the agent, it is hard to see, for example, how a monk who determines to live in poverty has a lower level of purpose-fulfilment than a university educated businessman.

The Right to Freedom and Well-being

The next step in Gewirth's argument is to justify an agent's right claim. According to Gewirth, because the rational agent necessarily values his freedom and well being, the agent must make a claim on these goods. This right claim is extremely strong in

²¹⁵ Rawls, J. *A Theory of Justice*, Revised Edition, Oxford University Press, 1999, p.54

²¹⁶ Gewirth, A., *Reason and Morality*, The University of Chicago Press, 1978, p.52

²¹⁷ Ibid., p.54

²¹⁸ Nevertheless, Rawls can justify limiting his considerations to all-purpose goods, whereas Gewirth cannot. This point will be developed later in the chapter.

²¹⁹ Ibid., p.61

the sense that it is 'required' or 'mandatory' relative to the agent's position. The nature of the claim 'I have a right to freedom and well-being' is such that the agent is making an implicit or explicit demand that all other people ought to respect this right. As Gewirth writes:

"The agent holds that other persons owe him at least non-interference with his freedom and well-being, not because of any specific transaction or agreement they have made with him, but on the basis of his own prudential criteria, because such non-interference is necessary to his being a purposive agent."²²⁰

It should be recalled that for Gewirth, freedom and well-being are the necessary generic conditions for all purpose-fulfilling actions, without which such action would be impossible or futile. Nevertheless, there is a significant difference between my stating that 'my freedom and well-being are valuable' and my stating that 'I am entitled to freedom and well-being'. There is no direct entailment from 'X is good for A' to 'A has a right to X'. In recognition of this point, Gewirth suggests that the right-claim in question is correlative with the agent's perspective that other people ought to respect his freedom and well-being. The agent makes this demand since he recognises that his freedom and well-being are necessary goods for him, and as such they must be kept inviolate:

"In saying that freedom and well-being are necessary goods for him, the agent is not merely saying that if he is to act, he must have freedom and well-being; in addition, because of the goodness he attaches to all his purposive actions, he is opposed to whatever interferes with his having freedom and well-being and he advocates his having these features, so that his statement is prescriptive and not only descriptive."²²¹

In other words, the necessary goodness of the agent's freedom and well-being entails the necessary prudential judgement that other people ought not to interfere with his having them. Gewirth suggests that it is positively contradictory for an agent to say 'my freedom and well-being are necessary goods' and uphold the notion that 'it is not

²²⁰ Ibid., p.66

²²¹ Ibid., p.79

the case that other purposive prospective agents ought not to interfere with my freedom and well-being.' This claim is prudential rather than moral in that it refers to the agent's own freedom and well being; it is only as a means to his purposes that the agent is required to defend his freedom and well being from interference. The 'ought' judgement involved is asserted from the standpoint of the agent, not that of the respondent.

However, according to Gewirth, the agent who claims freedom and well-being as a right must now admit, on pain of contradiction, that this right also belongs to any other person who meets the criterion of justification. That is, the rights the agent claims for himself must also be granted to all other people who share relevantly similar characteristics. This is simply a matter of logic.²²² On pain of contradiction, the agent must accept that his right to freedom and well-being, being based on the sufficient reason that he is a prospective agent who has purposes he wants to fulfil, must be extended to all other prospective agents who have purposes they want to fulfil. This generalisation is a direct application of logical universalisability.

Following universalisation, Gewirth argues that any prospective purposive agent's right-claim to freedom and well-being ought to be respected by other agents, at least to the extent of non-interference. The agent is rationally required to accept this 'ought' judgement, which must be considered as binding on all conduct towards other prospective agents. Thus, the prudential becomes moral as soon as the right-claim is universalised, where the agent acknowledges the rights of others to claim freedom and well-being. Accordingly, the transition from the prudential to the moral is not motivational but logical:

"The agent is logically compelled to make this transition from a prudential to a moral judgement, because if he did not he would be in the position of denying what he had previously had to affirm, namely, that being a prospective purposive agent is a sufficient justifying position for having rights to freedom and well-being."²²³

²²² If the predicate P belongs to the subject S because S has the property Q, then P must also belong to all other subjects S1, S2... So that have Q.

²²³ Ibid., p.147

Thus, every agent logically must admit to having certain generic obligations:

"Negatively, he ought to refrain from coercing and from harming his recipients; positively, he ought to assist them to have freedom and well-being whenever they cannot otherwise have these necessary goods and he can help them at no comparable cost to himself. The general principle of these obligations and rights may be expressed as the following precept addressed to every agent: *Act in accord with the generic rights of your recipients as well as yourself.* I shall call this the *Principle of Generic Consistency (PGC)*."²²⁴

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In this respect, Gewirth's supreme moral principle is Kantian in essence; a morally binding right is realised when the denial of that right to others is self-contradictory. However, as I now hope to show, by basing his theory upon the self-interest of purposive agents, Gewirth's argument leads not to a Kantian universalisation, but to a practical compromise similar to that found in Hobbes.

Moral and Prudential Agency: An Unresolved Tension?

For all of the novelty that Gewirth exhibits in *Reason and Morality*, there is a significant problem with the argument he presents; there is a tension in Gewirth's work that pulls in two directions. As said, the central claims of his argument are Kantian in spirit, but his justificatory method, being based upon the claims of self-interested agents, tends towards a Hobbesian conclusion. In other words, Gewirth, contrary to his suggestions, creates an antinomy between moral and prudential agency.

This becomes clear when we examine the cogency of his reasoning. For the sake of argument, let us assume that all purposive agents value freedom and well-being since they are goods necessary for action. For Gewirth, it follows that each agent thereby demands that his or her freedom and well-being be kept inviolate, which thus engenders a right claim. The nature of this claim is such that the individual agent is making an implicit or explicit demand that *all other people ought to respect this right*, at least to the extent of non-interference. In other words, the value placed upon

²²⁴ Ibid., p.135

freedom and well-being by a purposive agent logically entails the prudential and prescriptive 'ought' judgement that these goods be kept inviolate against interference from others. The agent's own prudential interests are sufficient to justify the demand that his freedom and well-being ought not to be interfered with. In other words, "it is sufficient that the agent has *her* reasons for making the judgement; it is not required that her addressees also have *their own* reasons for complying with it."²²⁵ Hence, the right is grounded solely upon *the agent's perspective* that her interests should be protected against interference from others.

Gewirth looks to consolidate this argument by rebutting the incisive objection of an amoralist. While the amoralist may consider his freedom and well-being to be necessary goods for action, he would argue that other people do not have to respect his claim on these goods.²²⁶ In order to counter this objection, Gewirth asks us to imagine a situation in which an agent's well-being is threatened by Z, which could be avoided by undertaking action X. According to Gewirth, it follows that the agent must make the prudential prescriptive judgement that 'I ought to do X', insofar as the agent values his own well-being. Crucially, Gewirth suggests, the premise 'I ought to do X' entails the judgement 'I ought to be free to do X', where 'to be free' means not being interfered with by others, and where the 'ought' is prudential rather than moral.²²⁷ This follows since the pursuit of action X is contingent upon the agent's freedom.

Now, given that the statement 'I ought to be free to do X' appears to be other-directed and morally situated,²²⁸ it acquires a prescriptive force that is quite different from the first statement, which is self-directed. Yet according to Gewirth, an other-directed 'ought' statement is not illegitimate in this context; the claim 'I ought to be free to do X' remains prudential given that it stems from the self-interest of the purposive agent - even though this statement is other-directed, it is not *other-directing*. By this, Gewirth means that the 'ought' judgement is generated from the agent's prudential demands, and whilst these demands may be directed at another and are to this extent

²²⁵ Gewirth, A., *The Community of Rights*, University of Chicago Press, 1996, p.22

²²⁶ It seems peculiar that Gewirth directs this argument specifically against an objecting amoralist; after all, morality (or amorality) should not affect Gewirth's argument - we are concerned only with *the logical implications of a purposive agent's prudential interests*.

²²⁷ Gewirth, A., *Reason and Morality*, The University of Chicago Press, 1978, p.91

²²⁸ In the second statement, the 'ought' is attached to the idea of freedom, rather than to the purpose set out by the agent. Freedom is a social phenomenon, meaning the agent's freedom is dependent upon the co-operation of *other people* (which implies the statement is other-directed and morally situated).

prescriptive, they do not have the normative weight required to be other-directing, since no moral transaction has taken place.

However, this argument simply will not do: even if we accept that a statement can be other-directed without being other-directing (which in itself is dubious), Gewirth fails to demonstrate that an other-directed 'ought' claim based solely on prudential considerations can generate a right. In order to demonstrate this point, let us probe the criteria Gewirth invokes to justify a prudential 'ought' judgement. First, the agent must outline factual requirements or restrictions pertinent to the conduct of other people. Second, the agent has a prudential reason on which he grounds this requirement. Third, the agent holds that "this requirement and reason justify in some way preventing or dissuading the persons addressed from violating the requirement."²²⁹ Upon examination of these criteria, it is clear that the purposive agent satisfies the first and second conditions: he demands that others do not interfere with his freedom and well-being since these are necessary goods for the pursuit of his purposes. Yet, it is not clear that a prudential claim satisfies the third criterion. As I see it, only a moral 'ought' could satisfy this condition and hence generate a right claim; a moral 'ought' expresses a 'categorically obligatory requirement for action,' which is addressed 'to every actual or prospective agent.' In this sense, only a moral 'ought' has the required persuasive force to prevent or dissuade a recipient from violating this judgement, and hence generate a right claim.

Following this analysis, it seems that Gewirth tacitly smuggles a moral 'ought' into his theory in the guise of a prudential demand. If the agent were to remain solely within a prudential perspective, *he would not be able to persuade the recipients that the 'ought' judgement was owed to him.* In other words, Gewirth's argument falters because he provides no reason for agent B to accept the prudential demands of A; the fact that agent A considers his freedom and well-being to be necessary prudential goods does not mean that agent B ought to respect A's claim on these goods. Thus, an agent's prudential demand that all other agents ought to respect his freedom and well-being cannot lead to a right claim.²³⁰ MacIntyre expresses this point well:

²²⁹ Ibid., p.79

²³⁰ If we remain strictly within a prudential perspective, the agent must abide by self-directed statements: these alone are non-prescriptive relative to the actions of others. Importantly, if this is the case, then a right claim does

"The claim that I have a right to do or have something is quite a different type of claim from the claim that I need or want or will be benefited by something. From the first — if it is the only relevant consideration — it follows that others ought not to interfere with my attempts to do or have whatever it is, whether it is for my good or not. From the second it does not."²³¹

The fact that an agent claims something as a necessary good according to his prudential interests does not thereby give him a right to that good. The right in question requires that the respondents²³² refrain from interfering with the freedom and well-being of the agent, but there are no good reasons for the respondents to accept this 'ought' judgement. In this light, it seems that the logical progression of Gewirth's argument cannot lead to a Kantian universalisation, for this presupposes the legitimacy of the individual agent's right claim.

Indeed, by stressing the prudential interests of the purposive agent, Gewirth has made it impossible to generate moral inferences through a process of universalisation. Gewirth envisages a situation in which the self-interested agent necessarily resists all limitations on his freedom of action; yet following universalisation, Gewirth postulates a moral law that entails the limitation of freedom. In other words, the moral conflicts with the prudential: universalisation ultimately contradicts the agent's demand for freedom. Gewirth deals with this problem in typical Kantian fashion. Even though the moral law places obligations on the agent, this does not constitute a reduction in the agent's freedom "since, being rational, he accepts what is rationally justified."²³² Consequently, in acting morally (i.e. rationally) the agent's freedom is unaffected. However, this response is unsatisfactory. Gewirth's conception of moral freedom is entirely different from that of prudential freedom; and the former cannot be deduced from the latter. Gewirth assumes that an agent would accept limitations on his freedom, but why should this be so if an agent's interests are purely prudential? Why should an agent uphold or accept the moral law if he has no motivation for doing so based on his own self-interest? In this regard Gewirth's

not follow since, as Gewirth admits, a right claim necessarily has a respondent (i.e. it is always claimed against another).

²³¹ MacIntyre, A., *After Virtue*, Duckworth, 1981, p.64; See also Raphael, D.D., 'Rights and Conflicts,' *Gewirth's Ethical Rationalism*, Edward Regis Jr., (ed.) The University of Chicago Press, 1984, p.88

²³² Gewirth, A., *Reason and Morality*, The University of Chicago Press, 1978, p.195

inability to derive moral rights from a prudential basis reveals a deep tension that exists between the self-interest of the agent and the duty to act morally. It seems, then, that Gewirth's argument is ridden by a duality in the agent comparable to that in Kant: there is no connection between the prudential self and the moral self.²³³

However, that is not to say we should thereby discard Gewirth's argument, for it may be possible to generate rights to freedom and well-being from the prudential motivation of the agent. This could occur through something like a Hobbesian covenant. Gewirth is certainly aware that there is a strong individual motivation to secure freedom and well-being as a right: "Self-interested individuals must be concerned with their own having rights. For, as self-interested, they have interests and they want them to be protected for their own sakes, or at least not harmed or infringed."²³⁴ However, Gewirth explicitly denies that a Hobbesian covenant could generate rights; he looks to Kant rather than to Hobbes in order to justify his supreme moral principle:

"The reason why the agent must endorse the generic rights of his recipients is not the Hobbesian prudential or contingent one that if he violates or fails to endorse these rights for others he may probably expect them to violate his own rights, but rather the logically necessary one that if there is a sufficient condition that justifies the agent's having the generic rights, then it must justify that these rights are had by all other persons who satisfy that sufficient condition."²³⁵

However, as we have witnessed, Kantian conclusions cannot be generated out of Hobbesian premises; only by something like a Hobbesian covenant can self-interest generate a moral law. Now, if it were true that every purposive agent necessarily values his or her freedom and well-being, perhaps it would be mutually advantageous to create institutions that uphold individual rights to these goods. If there existed rights to an array of basic freedoms and well-being, then the agent would be guaranteed a level of security; otherwise, the agent's freedom and well-being could be threatened by the self-interest of other agents. At the same time, if a group of self-

²³³ It should also be pointed out that Kant at least acknowledges this duality whereas Gewirth does not.

²³⁴ Gewirth, A., *The Community of Rights*, University of Chicago Press, 1996, p.11

²³⁵ Gewirth, A., *Reason and Morality*, The University of Chicago Press, 1978, p.146

interested agents were to enter into agreement – and have their freedom and well-being enshrined in rights - this would mean sacrificing certain freedoms that the agent could have used to his own advantage prior to the agreement. The question, then, is whether this sacrifice would be offset by the gain in security (in having some freedom and well-being protected).

Perhaps as Gewirth realised, it is unlikely that all purposive agents would be equally motivated to universalise rights to freedom and well-being. In the first instance, there would be little reason (moral considerations aside) for someone who already enjoys freedom and well-being to expend effort in ensuring that others also enjoy such goods; and even if motivation was provided by some sort of natural equality, or through the fear of losing these goods at a future date, justice-as-mutual-advantage would still flounder on the free rider problem: it is maximally advantageous for the self-interested individual to gain the security of rights to well-being without compromising his own freedom. This problem also troubled Hobbes, who recognised that whilst it is in the interest of all to respect the covenant that allows political life to exist, for any single agent the best possible scenario would involve everyone respecting the covenant bar himself (thus retaining the freedom of the state of nature and gaining the security of political life). Hobbes was able to avoid this problem only by invoking the leviathan, an authority bestowed with such power that no-one would risk cheating. Yet, it is unlikely that the leviathan is compatible with a regime that concedes comprehensive rights to freedom and well-being.

As such, we must conclude that justice-as-mutual advantage cannot save Gewirth's theory: prudential interest ultimately frustrates the quest to generate moral relations. The only way in which this argument could work requires a starting point in which no one person is advantaged in any way, where all persons are free and equal; perhaps then we could generate some kind of right to freedom and well-being. Even then, however, the moral grounding is assumed as the premise of the argument: morality is not derived from, but rather constrains self-interest. This, of course, is not the territory of Gewirth but of Rawls; these conditions form the foundation of his original position. We shall reserve judgement on this idea for a later chapter.

The Autonomous Agent and Gewirth's Theory of the Good

Moving from the reasoning and implications of Gewirth's argument, we can now address the foundations of his theory. As I mentioned in my first chapter, the broad purpose of this thesis is to examine the relationship between two central liberal goods, freedom and well-being. Gewirth writes extensively on this topic, and claims that rights should uphold these goods. Yet, most of the authors I consider in this thesis suggest something similar. What makes Gewirth unique among other liberal theorists is that he looks to demonstrate a necessary truth. In this regard, Gewirth hopes to avoid the contingency of other liberal viewpoints. Rawls, for example, admits that his argument demonstrates no necessary truths, and that his theory of justice is only one among several possibilities: "I do not claim for the principles of justice proposed that they are necessary truths or derivable from such truths. A conception of justice cannot be deduced from self-evident premises or conditions on principles."²³⁶ Gewirth, by contrast, claims universal validity for his liberal principles of justice; he claims to present an argument which "culminates in a categorical moral principle." This is because "it proceeds within a context – the necessary conditions of action – that no agent can rationally or consistently reject."²³⁷

In pursuing this argument, Gewirth claims that his supreme principle of morality is derived from an amoral basis: the necessary conditions of purposive action. As such, he hopes to avoid the contingency of other liberal viewpoints: whereas theorists such as Rawls begin from certain moral intuitions, and while the perfectionist liberals base their argument on a specific account of human flourishing, Gewirth's theory rests upon a concept he claims is value-free. Such neutrality is necessary if he wishes to support the impartiality of his moral theory – otherwise the legitimacy of his starting point could be questioned. Consequently, Gewirth contends "the concept of action that is to be used as the basis of the justificatory argument is morally neutral."²³⁸

Yet, this is a dubious claim. Consider the voluntariness that Gewirth suggests characterises action. He claims that a voluntary action occurs where an "unforced and

²³⁶ Rawls, J. *A Theory of Justice*, Revised Edition, Oxford University Press, 1999, p.19

²³⁷ Gewirth, A., *The Community of Rights*, University of Chicago Press, 1996, p.27

²³⁸ Gewirth, A., *Reason and Morality*, The University of Chicago Press, 1978, p.25

informed choice is the necessary and sufficient condition of the behaviour."²³⁹ According to Gewirth, then, voluntary action requires a given amount of freedom; this allows the agent to control his action by making unforced choices, such that his action is a means of pursuing what he considers good. In this regard, voluntary action requires "certain causal conditions" to be fulfilled.²⁴⁰ In Gewirth's view, an agent cannot be said to be acting voluntarily where he is subject to direct physical or psychological compulsion; where behaviour is induced by internal causes beyond the agent's control, such as reflexes, ignorance, or disease; and where a person's choice is indirectly forced by someone else's coercion.

Yet, it is not clear that freedom *is* a necessary condition of voluntariness; it is possible to act voluntarily under coercive conditions. Witness the countless people who have protested against tyrannous governments throughout history, and who have often paid with their lives. It would be peculiar indeed to say that such protestors did not act voluntarily. Yet this Sartrean understanding of voluntariness cannot generate a liberal concept of freedom as the absence of coercion, for we can still act voluntarily even if civil liberties are not afforded to us. A more generous understanding of voluntariness would accept that it is possible for a person to act under coercive circumstances. Therefore, whilst Gewirth is right that voluntariness necessarily characterises action, he is wrong to think that this requires liberty. Gewirth's theory is undermined by a gap between voluntary action and its conditions: voluntary action does not require the absence of coercion.

This, of course, creates a problem for Gewirth in justifying the liberal state, since a person can act voluntarily without legal freedoms. Gewirth skips around this problem by imposing his vision of the good upon the agent: the agent does not simply require generic conditions of action, but conditions of autonomous action.²⁴¹ If a person is to have a meaningful capacity to act according to their own ideals and values, then they will require an extensive measure of freedom and well-being including civil liberties and rights to goods such as housing, education and wealth. Thus, it appears Gewirth's understanding of the concept of action is value-loaded; he bases his theory upon a

²³⁹ Ibid., p.31

²⁴⁰ Ibid.

²⁴¹ This is a point made by Moore, M. *Foundations of Liberalism*, Clarendon press, 1993, p.26

facit notion of the good; his conclusions are more a derivative of his conception of the autonomous person rather than the impartial outcome of his dialectical method. In this regard, the foundation of Gewirth's theory is not morally neutral, as he contends, but relies on a specific concept of the person; Gewirth's purposive agent is motivated by a conception of the good life as autonomy. Hence, he does not derive moral imperatives from a value-free basis.²⁴²

Gewirth's Monistic Rationalism

Gewirth's specific conception of the person becomes even more pronounced following the derivation of the supreme moral law; he ultimately comes to define freedom in the Kantian sense, as *rational* autonomy. For Kant, autonomy is necessary in order to uphold the sanctity of the moral law. Autonomy means being free from the 'object of volition'. Yet, freedom is not lawless: rather, it involves the self-imposition of moral law. Hence, freedom must be a "causality conforming to immutable laws," and consequently a "free will and a will under moral laws are the same."²⁴³ Gewirth also upholds this idea:

"The agent's freedom or voluntariness of action is thus not violated when he is subjected to the duties or requirements imposed by the *PGC*...The *PGC* hence indicates to him that, as rational, he must choose to act in accordance with its requirements rather than in the other ways left open to him. Such choice is not forced because it is based on rational criteria he accepts, and indeed accepts as categorically obligatory for his actions. In choosing to comply with the *PGC* the agent is rationally autonomous in the strict sense."²⁴⁴

However, the implications of this view can be quite illiberal. If we are to uphold the principle of rational autonomy, then choice can become redundant, and freedom can

²⁴² As Moore points out, Gewirth anticipates this criticism towards the end of *Reason and Morality*. Gewirth is aware that by using a deductive method he is open to the criticism that the conclusion he has generated must have been implicit in the premise, meaning the premise itself is value-loaded. To this Gewirth responds that the concept of action he has used is a general, universal concept that does not presuppose any specific moral values; in deriving his moral imperatives Gewirth claims simply to have recognised the logical implications of the normative structure of action through the dialectical method. Yet, as we have just witnessed, he is wrong in this belief.

²⁴³ Kant, I., *Groundwork for the Metaphysics of Morals*, trans. Paton, H. J., Hutchinson, 1948, p.107-8

²⁴⁴ Gewirth, A., *Reason and Morality*, The University of Chicago Press, 1978, p.139

become equivalent to compliance with truth. Gewirth illustrates his acceptance of freedom as rational autonomy when he engages in a hypothetical discussion about a man who will not consent to a life-saving blood transfusion on religious grounds. Gewirth argues that in this situation, the dying man is incapable of giving his rational consent (i.e. he is not acting autonomously, from a correct application of reason), and as such, should be given the transfusion in order to save his life. In other words, the religious man is not in a position to make a reasoned decision about his own welfare since his spiritual convictions cannot be squared with a blood transfusion that serves "to refute or cast doubt upon his beliefs."²⁴⁵ Hence, he should be forced to have the transfusion.

This, of course, is a dangerous interpretation of the concept of freedom, the type of which Berlin has been so critical. According to Berlin, this understanding of freedom makes it "easy for me to conceive of myself as coercing others for their own sake, in their, not my interests. I am then claiming that I know what they truly need better than they know it themselves. What, at most, this entails is that they would not resist me if they were rational and as wise as I and understand their interests as I do."²⁴⁶ This line of thought is clearly evident in Gewirth's theory, and is at odds with a liberal point of view. For Berlin, such excesses typically derive from metaphysical accounts of what it is to be human:

"This demonstrates (if demonstration of so obvious a truth is needed) that conceptions of freedom directly derive from views of what constitutes a self, a person, a man. Enough manipulation with the definition of man, and freedom can be made to mean whatever the manipulator wishes."²⁴⁷

This certainly seems to be the case for Gewirth, who defines the person in terms of rational autonomy. The problem with this, as we have witnessed, is that rational autonomy is associated with moral truth, and hence any act that does not accord with the moral law must thereby be irrational.²⁴⁸ However, it is perfectly plausible that the religious man is aware that a blood transfusion would save his life. He may still

²⁴⁵ Ibid., p.262

²⁴⁶ Berlin, I., 'Two Concepts of Liberty' in *Four Essays on Liberty*, Oxford University Press, 1969, p.133

²⁴⁷ Ibid., p.134

²⁴⁸ Moore, M. *Foundations of Liberalism*, Clarendon press, 1993, p.30

refuse this transfusion on the grounds that it would undermine his deeply held beliefs. This need not be an irrational decision, so long as we uphold Gewirth's definition of rationality as "the canons of deductive and inductive logic."²⁴⁹ In other words, the religious man may be aware of the implications of his choice, that his decision will result in his death, and yet sustain his objection to treatment. This judgement can be rendered in a perfectly rational manner.

Contrary to claims made by Gewirth about the compatibility of negative freedom and rational autonomy, an irresolvable tension exists. On the one hand, Gewirth looks to uphold a certain degree of negative freedom: "Persons must be left free to live their lives as they please and to make and perhaps profit from their own mistakes."²⁵⁰ However, as we have witnessed, this is potentially at odds with the dictates of the moral law he claims to derive. Consequently, an irresolvable conflict emerges. As Moore points out, "if the person's negative freedom or choice is respected, the rational (moral) result may not obtain; and if Gewirth directly applies the PGC to obtain the morally justified result, the actual choices of individuals may not be respected."²⁵¹

This tension also arises in Gewirth's discussion of political obligation. Here, he looks to come to terms with several points of debate: whether there should be a political state; what kind of constitution a state should have; who should govern; and what laws should be enforced. In addressing these issues, Gewirth uses his supreme moral principle as a point of reference. He suggests that the right of every purposive agent to freedom and well-being requires the existence of a minimal state including criminal law, democratic rule, and a constitution that upholds civil liberties. These institutional features are necessary in order to uphold and protect the sanctity of the supreme moral principle, and thus have an instrumental justification. For instance, a person's rights to freedom must be protected by criminal law since without this legal framework such rights could not be effectively held. Moreover, "since the criminal law directly embodies and enforces basic aspects of the [moral law] its obligatoriness can no more be contingent on persons' optional consent than can that of the generic rules

²⁴⁹ Gewirth, A., *Reason and Morality*, The University of Chicago Press, 1978, p.22

²⁵⁰ *Ibid.*, P.265

²⁵¹ Moore, M. *Foundations of Liberalism*, Clarendon press, 1993, p.29

themselves."²⁵² Thus, the existence of these institutional features is non-negotiable given that they derive directly from a rational consideration of the supreme moral law; hence, they "share its inherently rational justification."²⁵³ Beyond these basic constitutional requirements, laws and legislators must, as far as possible, be subject to democratic ratification: the moral law "requires that all persons have equal rights to freedom [which] include equal rights...to participation in the political process."²⁵⁴ The effective capacity to participate in democratic procedure is "required for the dignity and rational autonomy of every prospective purposive agent."²⁵⁵

Yet, this line of argument becomes problematic for Gewirth when he comes to discuss the scope of democracy and its relation to the welfare state. According to Gewirth, the moral right to well-being does not necessarily translate into a political right: the welfare state, which to all intents and purposes supports individual well-being, is subject to democratic ratification. This is because democratic ratification imbues the welfare state with a greater sense of legitimacy, given that its status and scope is a point of great debate. Furthermore, whilst it is morally correct that well-being be upheld as a moral right, the moral law cannot give definitive answers about what kind of welfare support should be given, how the various facets of this support inter-relate, when support should give way to self-help, and how redistribution impacts upon broader economic considerations. In other words, even if the ends are agreed, the means are not: there are different ways in which a state can provide for the needs of the worst-off.

However, as Gewirth realises, it may be problematic to subject welfare measures to democratic ratification, since the outcome of democratic procedure is potentially at odds with the substantive requirements of the moral law. For instance, a majority of people could vote for a laissez-faire economy, and hence place certain members of the community in a situation of disadvantage or poverty, thus endangering their well-being. Thus, there is a potential clash between the will of a majority and the needs of an impoverished minority. The question that arises from this clash is whether the rule of law and democracy can be by-passed by an individual or group in an effort to effect

²⁵² Gewirth, A., *Reason and Morality*, The University of Chicago Press, 1978, p.302

²⁵³ *Ibid.*, p.320

²⁵⁴ *Ibid.*, p.309

²⁵⁵ *Ibid.*, p.310

their moral right to well-being. According to Gewirth, this may be justified: if a minority is on the brink of starvation, and incapable of escaping their plight through democratic procedure, there may be grounds to engage in forms of civil disobedience.²⁵⁶

This, of course, is a standard answer within liberal circles, but it does not make sense within the broader context of Gewirth's argument. He cannot offer a framework for resolution for the simple reason that there exists in his argument an irresolvable tension between the rationally derived moral law and the rule of democracy. According to Gewirth, issues of public policy, including the status and scope of the welfare state, are points of great debate "in which there are many legitimate conflicts of interest and differences of opinion."²⁵⁷ However, this view does not sit easily with a morality that is necessarily true. Surely, if the right to well-being can be rationally demonstrated then much of the debate on the welfare state is superfluous: we are left to discuss frivolous technical details; the normative outcome of the debate is already decided. Hence, it is not clear why the status and scope of the welfare state should be subject to democratic ratification. Ultimately, it seems that Gewirth struggles to harmonise the opposing demands of morality and democracy, of truth and freedom. Indeed, it may be that such antinomies are endemic to Gewirth's theory. At best, this undermines the cogency of his moral theory. At worst, it becomes dangerously illiberal.

In the end, his only escape is to put his faith in reason. He argues that if people are properly educated and informed, the outcome of democratic resolution will probably be in favour of the supportive state:

"The rationality that is dispositionally present in every purposive prospective agent and that leads him to accept the PGC, and with it the democratic constitution of the method of consent, will also tend to lead him to uphold the

²⁵⁶ Gewirth qualifies his thoughts here by stating that civil disobedience is only justified where the dictates of the moral law have been compromised: it is not justified, for instance, for the offended racist to engage in civil disobedience.

²⁵⁷ Ibid., p.305

redistributive justice of the supportive state, if he is given suitable means of public communication and information."²⁵⁸

Yet, the conception of rationality that is contained within this statement goes far beyond the powers of deductive logic that Gewirth originally described. Ultimately, Gewirth emerges as an archetypal monistic rationalist, of the kind against which Berlin writes so vehemently. His view is indicative of a belief in an unrealistic rational consensus; rationality is synonymous with justice, freedom, democracy, and welfare; every truth accords in universal harmony; all true solutions to all genuine problems must be compatible and fit into a single whole. As Berlin writes:

"If the universe is governed by reason, then there will be no need for coercion; a correctly planned life for all will coincide with full freedom – the freedom of rational self-direction – for all. This will be so if, and only if, the plan is the true plan – the one unique pattern which alone fulfils the claims of reason. Its laws will be the rules which reason prescribes: they will only seem irksome to those whose reason is dormant, who do not understand the 'true' needs of their own 'real' selves."²⁵⁹

The implications of this view can be dangerous. Through his portrayal of man as a rational being, Gewirth sees the enforcement of rational truth upon the irrational or ignorant as a paternalistic responsibility, and hence as a justifiable assault on negative freedom. Consequently, the voices of all that do not meet the criterion of reason may be lost. Potentially, all those who prefer religion to science, myth to fact, instinct to logic, may be hushed in the name of truth. Ultimately, Gewirth abides by Fichte's notion that no one has rights against reason.

²⁵⁸ Ibid., p322

²⁵⁹ Berlin, I., "Two Concepts of Liberty" in *Four Essays on Liberty*, Oxford University Press, 1969, p.147

Chapter 6 – Crooked Timber and the Priority of Freedom

“Out of the crooked timber of humanity, no straight thing was ever made”

- Immanuel Kant²⁶⁰

Introduction

In a paper discussing his intellectual heritage, Isaiah Berlin tells of how upon his return to Oxford following the end of World War II he became preoccupied with two philosophical problems. The first was value monism – the belief in a harmonious system of moral truths – and the second was the meaning and application of the notion of freedom. These two issues dominated his thought and writing for much of his subsequent career. It was through the rejection of value monism in favour of pluralism that Berlin became known as a champion of personal freedom. Indeed, this was the cause he supported in his seminal lecture ‘Two Concepts of Liberty’. However, as many critics have pointed out, the sanctity of liberty is uncertain in a truly pluralist world.²⁶¹

This chapter has three main parts. First, I aim to sketch the central tenets of Berlin’s liberalism, beginning with his historical analysis of monism and pluralism. I will concentrate on the most persuasive of Berlin’s arguments for liberalism: the great goods of life collide, and hence an anti-utopian politics of compromise is required to accommodate these conflicting goods; this gives us reason to defend liberal institutions. The second section investigates Berlin’s central argument on liberty and choice. I question whether his appeal to the intrinsic value of liberty is compatible with his understanding of the structure of human values. Finally, the third section examines Berlin’s distinction between ethical relativism and value pluralism; I consider how this relates to the notion of cultural incommensurability. This leads to a broader discussion of value pluralism, which draws upon the arguments of Bernard Williams, John Gray and William Galston.

²⁶⁰ This is Berlin’s favoured rendering of Kant’s quotation. For a more literal translation, see Berlin, I., *The Crooked Timber of Humanity*, Fontana Press, 1991, p.v

²⁶¹ See, for instance, Sandel, M., *Liberalism and Its Critics*, Oxford University Press, 1984, p.8

Monism and Pluralism

For Berlin, monism is an intellectual perspective characterised by harmony: it is the idea that "all true solutions to all genuine problems must be compatible [and]...fit into a single whole."²⁶² Monism is reducible to three broad assumptions. First, to all genuine questions there can only be one correct answer, all other answers being incorrect. Second, a method exists for the discovery of these correct answers. Even if the proper method does not exist in practice - human knowledge may not be sufficiently advanced - it is at least attainable in principle. Third, all correct answers must be compatible with one another. This follows from simple logic - one truth cannot conflict with another. When applied to the moral universe, these assumptions tend towards a harmonious ideal, where all true values accord in "a single, systematic, interconnected whole."²⁶³

According to Berlin, monism has dominated European philosophy since the time of Plato and Aristotle. It has characterised the great theological systems of Judaism and Christianity; it governed the middle ages, the Renaissance and the Enlightenment. Indeed, during the Enlightenment the application of monistic principles proliferated - its domination could be found not only in the natural sciences, but also in sociology and ethics. It was commonly thought that once immutable truths were discovered, the social or spiritual condition of man could be improved. This roughly accorded to the notion of Progress. On this issue much ink was spilled. Witness those such as Helvetius and Holbach, who believed that scientific investigation was the means to discover truth, upon which great societies could be built. Marx argued something similar, though he applied his scientific method to historical development. Others, like Rousseau, put their faith in introspection, but nevertheless believed in immutable principles - society must look to simple truths that can be found in the innocence of man. Others again, such as Kant and his followers, argued that reason could deliver an objective morality - there were certain universal ethical truths that all men could realise, if they would only think about it rationally. All of these thinkers were

²⁶² Berlin, I., 'Two Concepts of Liberty,' *Four Essays on Liberty*, Oxford University Press, 1969, p.147

²⁶³ Berlin, I., 'The Decline of Utopian Ideas in the West,' *The Crooked Timber of Humanity*, Fontana Press, 1990, p.25

convinced that problems of value were temporary aberrations in human development; in the end, a single system of ultimate truths would be revealed.

In contrast to the pervasive doctrine of monism, value pluralism contends that the important moral questions addressed by humanity can be legitimately answered in different ways. These answers may not always be compatible with each another; indeed, the answers might not even be commensurable. Pluralism is therefore characterised by discord: "the perfect universe is not merely unattainable but inconceivable, and everything done to bring it about is founded on an enormous intellectual fallacy."²⁶⁴ The incompatibility and incommensurability of values ensures that friction is a permanent feature of human life. Human ends cannot always be graded according to a common measure, or moulded into a definite hierarchy. Our values will always be in perpetual rivalry with one another. Pluralism therefore generates immensely difficult choices:

"If...the ends of men are many, and not all of them in principle compatible with each other, then the possibility of conflict – and of tragedy – can never wholly be eliminated from human life, either personal or social. The necessity of choosing between absolute claims is then an inescapable characteristic of the human condition."²⁶⁵

According to Berlin, few thinkers in the history of European thought have repudiated monism in favour of pluralism. The first, perhaps, was Machiavelli, who perceived that moral values often conflict: Christian morality, which expressed the values of humility and submission could not always be harmonised with pagan virtues such as pride and fortitude. Machiavelli does not argue that one of these value systems is necessarily correct, only that they are incompatible. Berlin also celebrates the cultural pluralism of Giambattista Vico and J.G. Hamann. These authors insist there is not merely a plurality of values but of entire civilisations, each with its own temporal identity, language, religion and institutions. This idea was repeated and expanded upon by J.G. Herder. Every society has its own centre of gravity, which differs from that of others; different cultures give different answers to their central questions. For

²⁶⁴ Berlin, I., 'My Intellectual Path', *The Power of Ideas*, Chatto & Windus, 2000, p.23

²⁶⁵ Berlin, I., 'Two Concepts of Liberty,' *Four Essays on Liberty*, Oxford University Press, 1969, p.169

Berlin, Herder "maintained that values were not universal; every human society, every people, indeed every age and civilisation, possesses its own unique ideals, standards, way of living and thought and action. There are no immutable, universal, eternal rules or criteria of judgement in terms of which different cultures and nations can be graded."²⁶⁶ In short, Herder's writing sought to contest the very principle on which European thought had been built: "The central assumption [of the Western tradition] was that problems of value were in principle soluble, and soluble with finality... This is the keystone of the classical arch, which, after Herder, began to crumble."²⁶⁷

Berlin's flirtation with these counter-enlightenment figures has been a point of great curiosity for many commentators. Some contend that the ideas of these authors are neither original nor perceptive, but are dogmatic, uninspiring, and dangerous.²⁶⁸ It is surprising, then, that a liberal should look for inspiration in the work of Machiavelli, Vico and Herder, who are all, *prima facie*, enemies not protagonists of liberalism. It is equally surprising that Berlin should tacitly criticise Kant, whose arguments are often cited as foundational in liberal discourse. Berlin defends himself against such criticism by claiming that the authors he has studied disturb the settled liberal vision in which he believes: "I am bored by reading people who are allies, people of roughly the same views, because now these things seem largely to be a collection of platitudes... what interests me is what is wrong with the ideas in which I believe."²⁶⁹ Yet, this response is unsatisfying. Berlin does not present these authors as anti-liberals; rather, he points to the virtues of their pluralism. If Berlin presents his case as that of a pluralist fighting against monism, then what argument does he employ to defend his treasured liberal values?

Berlin's least persuasive defence of liberty pertains to the 'necessity and agony of choice'. It is because our moral predicament requires that we choose between incommensurable ends that freedom is supremely valuable:

²⁶⁶ Berlin, I., 'The Decline of Utopian Ideas in the West,' *The Crooked Timber of Humanity*, Fontana Press, 1990, p.37

²⁶⁷ Berlin quoted in Gray, J., *Berlin*, Fontana Press, 1995, p.39

²⁶⁸ For this reason Mark Lilla notes that the more he studied these writers, the less they resembled Berlin's portraits of them. Lilla, M., 'Wolves and Lambs' *The Legacy of Isaiah Berlin*, Dworkin, R., Kelly, A., and Lilla, M., (eds.), *The New York Review of Books*, 2001, p.32

²⁶⁹ Berlin quoted from Lukes, S., 'In Conversation with Isaiah Berlin,' *Salmagundi*, 120, 1998.

"The world that we encounter in ordinary experience is one in which we are faced with choices between ends equally ultimate, and claims equally absolute, the realisation of some of which must inevitably involve the sacrifice of others. Indeed, it is because this is their situation that men place such immense value upon their freedom to choose; for if they had assurance that in some perfect state, realisable by men on earth, no ends pursued by them would ever be in conflict, the necessity and agony of choice would disappear, and with it the central importance of the freedom to choose."²⁷⁰

This conclusion is thoroughly inadequate as a straightforward normative deduction. As I pointed out in my discussion of Raz, there is no immediate link between the necessity of choice and the valuing of freedom. Simply because a choice must be made between competing ends does not require that such a choice should be made freely.

Still, this simplistic reading is arguably a misrepresentation of Berlin's broader view, which is admittedly vulnerable to obfuscation given the colourful but loose manner in which he expresses his position. An appreciation of Berlin requires a holistic interpretation of his thoughts and ideas. His argument for liberalism is more complex than implied by the extract above – it derives from the anti-utopian implications of value-pluralism and from the intrinsic value that he attributes to liberty. The substance of this argument will be detailed below.

Anti-Utopianism, Liberalism and the Politics of Compromise

According to Berlin, the need to establish a system of social rules is made difficult by the collision between civic goods. Freedom, security, equality, community, culture, tradition, respect, discipline and economic vitality are only some of the values around which different societies organise themselves. Not all of these goods are fully realisable together. A government might have to sacrifice economic vitality for greater equality. National security might clash with basic liberties. Moreover, certain of these civic values cannot be rationally compared. How, then, should we proceed?

²⁷⁰ Berlin, I., 'Two Concepts of Liberty,' *Four Essays on Liberty*, Oxford University Press, 1969, p.168

For Berlin, the truth of pluralism commits us to an anti-perfectionist politics. This follows from the belief that pluralism is incompatible with a final solution: "The very notion of a final solution is not only impracticable but, if I am right, and some values cannot but clash, incoherent also."²⁷¹ For Berlin, if pluralism is true, and human values are incommensurable, no final solution will be able to solve our deepest moral or political problems. No ultimate or absolute ranking of values can eliminate the need for hard political decisions. As human beings, we must acknowledge the truth that we cannot have everything. We must not reach for final solutions predicated upon an eternal, all-embracing value system; the idea of a harmonious system of values is chimerical. We should acknowledge with Burke the constant need to compensate, to reconcile, and to balance; we should celebrate J.S. Mill's observation that human beings are permanently prone to error.²⁷² Therefore, value pluralism requires an anti-utopian political response: "the best that one can do is to try to promote some kind of equilibrium, necessarily unstable, between the different aspirations of differing groups of human beings."²⁷³

Berlin's anti-utopianism draws heavily on the ideas of the Russian critic Alexander Herzen, who rallies against the 'despotism of formulas'. Any doctrine that subsumes the individual to its goals is a menace; individual human beings should never be sacrificed in the name of philosophical abstractions - History or Nation or Class or Progress. Human life is fragile and should not be dismissed as a means to some far-off goal. Despotism has often wrought destruction and violence. The echo of Herzen's voice can be heard in Berlin's campaign against final solutions.

Yet, in what sense, if at all, does this anti-utopianism appeal to the value of liberty? For Berlin, the association between monism and some sort of illiberal utopia is all too clear:

"Since I know the only true path to the ultimate solution of the problems of society, I know which way to drive the human caravan; and since you are ignorant of what I

²⁷¹ Berlin, I., 'The Pursuit of the Ideal', *The Crooked Timber of Humanity*, Fontana Press, 1991, p.15

²⁷² Berlin, I., 'Two Concepts of Liberty', *Four Essays on Liberty*, Oxford University Press, 1969, p.170

²⁷³ Berlin, I., 'The Decline of Utopian Ideas in the West', *The Crooked Timber of Humanity*, Fontana Press, 1991, p.47

know, you cannot be allowed to have liberty of choice even within the narrowest limits, if the goal is to be reached.”²⁷⁴

According to Berlin, pluralism is more humane than the rigid, authoritarian structures of monism because it does not deny to men, in the name of some distant and fantastic ideal, the variety of opportunities that is central to their life as choice-makers.²⁷⁵ In other words, pluralism recognises the diversity of ends that men value; and it is liberalism that best appreciates this diversity, and best understands the role of human agency in creating a meaningful life: ‘the richest development of human potentialities’ can occur only in societies in which there is ‘liberty of thought and expression’, where ‘views and opinions clash’.²⁷⁶ A variety of opportunities will be respected if we commit to a social system that upholds a measure of negative liberty: “there must be some frontiers of freedom which nobody should be permitted to cross.”²⁷⁷ Liberalism protects the deep multiplicity of human ends; it acknowledges that “men can live full lives only in societies with an open texture.”²⁷⁸ It is in this sense that Berlin commits to non-negotiable liberal principles of justice. A genuine belief in the ‘inviolability of a minimum extent of individual liberty entails some such absolute stand’.²⁷⁹

Still, any truthful expression of liberalism will recognise that its central values are antagonistic. The more emphasis that is placed on individual liberty, on leaving the individual alone, the more other values like equality will lose out. Yet no sensible solution will yield unless the great goods are balanced or compromised. If my liberty, say, is dependent upon the misery of other human beings, then the system that sustains this is immoral and unjust. The first public obligation is to avoid extremes of suffering, and freedom for the wolves means death to the lambs. A balance must therefore be struck between liberty and other goods like security or equality or well-being or community. Freedom is not an inviolable good - it might have to be curtailed for the sake of other values. Indeed, one freedom may have to be limited in order to allow space for other freedoms to grow; one freedom may abort another. Reconciling

²⁷⁴ Berlin, I., ‘The Pursuit of the Ideal’, *The Crooked Timber of Humanity*, Fontana Press, 1991, p.15

²⁷⁵ Berlin, I., ‘Two Concepts of Liberty,’ *Four Essays on Liberty*, Oxford University Press, 1969, p.171

²⁷⁶ Berlin, I., ‘The Decline of Utopian Ideas in the West,’ *The Crooked Timber of Humanity*, Fontana Press, 1991, p.46

²⁷⁷ Berlin, I., ‘Two Concepts of Liberty,’ *Four Essays on Liberty*, Oxford University Press, 1969, p.165

²⁷⁸ Berlin, I., ‘The Decline of Utopian Ideas in the West,’ *The Crooked Timber of Humanity*, Fontana Press, 1991, p.46

²⁷⁹ Berlin, I., ‘Two Concepts of Liberty,’ *Four Essays on Liberty*, Oxford University Press, 1969, p.165

such discord can be 'complex' and 'painful'. No political decision is without loss, and to have to compromise on something of intrinsic value must be regretted; yet, it may well be unavoidable. For Berlin, then, and contrary to the likes of Rawls, there exists no scheme of liberal values that is capable of being ranked in the abstract. No lexicographical ordering of goods can be discerned as universally valid. When it comes to deciding on the choice between conflicting values, the outcome will be a stark reflection of priorities, which cannot be accounted for in terms of an overarching rationality:

“It remains true that the freedom of some must at times be curtailed to secure the freedom of others. Upon what principle should this be done? If freedom is a sacred, untouchable value, there can be no such principle. One or other of these conflicting rules or principles must, at any rate in practice, yield: not always for reasons which can be clearly stated, let alone generalised into rules or universal maxims. Still, a practical compromise has to be found.”²⁸⁰

Thus, the liberal society is predicated upon the need to compromise between the great goods, the reasons for which cannot always be systematically expressed. Berlin therefore proceeds by considering the virtue of compromise in specific circumstances. For instance, liberty without education and material well-being is meaningless, just as education and material well-being are meaningless without liberty. Indeed, to the extent that Berlin identifies a symbiotic relationship between liberty and the social goods that support its exercise, he would seem to be arguing that conflicting liberal values can be reconciled by appealing to their point or worth. Without sufficient food, or security, or education, say, political freedoms will be of little use in our broader lives. Liberalism requires that certain social conditions be met in order that freedom can be meaningfully exercised. This involves a commitment to certain safeguards in relation to material well-being; it is a mockery to tell a poor man that he is free to live on his own terms if he can barely afford to buy basic provisions. Poverty erodes the value of freedom. This is also true for education - unless human beings are given the chance of a general education, they will continue to walk in darkness.²⁸¹

²⁸⁰ Berlin, I., 'Two Concepts of Liberty,' *Four Essays on Liberty*, Oxford University Press, 1969, p.126

²⁸¹ Berlin, I., 'General Education', *The Power of Ideas*, Chatto & Windus, 2000, p.214

At the same time, Berlin warns against sacrificing too much liberty for the sake of other social goods. A balance must be attained, which is nevertheless difficult to realise, "for in their zeal to create social and economic conditions in which alone freedom is of genuine value, men tend to forget freedom itself."²⁸² For instance, if, in an effort to make freedom more valuable, we redistribute wealth, or place limitations on the liberty to choose private education or private health care, then an absolute loss of liberty occurs, *ceteris paribus*, even if that loss can be justified in terms of the greater good. Yet, if the scope of such an enterprise is deepened, the more liberty will disappear until, finally, the conditions that were absent beforehand are realised completely, but without freedom, meaning the conditions themselves become worthless. This warning is given repeatedly by Berlin – historically, the provision of social goods designed to empower individuals in living free lives has often been attained only with serious infringement of liberty.²⁸³ Thus, a balance or compromise is required between liberal goods – so much liberty, so much equality, never forgetting the essence of freedom, or just what is lost when people accept limitations on their actions for the sake of some other value or end.

The incommensurability of values does not therefore render moral or political decisions impossible, as difficult as value conflict may sometimes be to resolve. Pluralism does not mean that an appropriately weighted liberalism cannot obtain. Practical solutions are hard found, but in the end, they must be found. The particular balance that obtains will derive in part from the implications of liberal values, from their internal logic. Freedom without some degree of material equality is a sham; equality without freedom is prison sentence. Thus, for Berlin, it is this constant need for balance and compromise that defines liberalism:

"Collisions, even if they cannot be avoided, can be softened. Claims can be balanced, compromises can be reached: in concrete situations not every claim is of equal force – so much liberty and so much equality; so much for sharp moral condemnation, so much for understanding a given human situation; so much for the full force of the law, so much for the prerogative of mercy; for feeding the hungry,

²⁸² Berlin, I., *Four Essays on Liberty*, Oxford University Press, 1969, p.liv

²⁸³ *Ibid*, p.lii, liv, lv, p.125

clothing the naked, healing the sick, sheltering the homeless. Priorities, never final and absolute, must be established."²⁸⁴

Still, it remains to be shown why Berlin's anti-utopianism specifically prescribes a liberal response. After all, liberalism is not alone in its aversion to utopian politics – conservatism, pragmatism, and some variants of socialism and nationalism also concede that the great goods collide. As such, if Berlin is to make a positive case for liberalism, he must claim that coercion is in some sense evil, or else appeal to the intrinsic value of freedom. He must develop the notion that human beings are choice-makers who value the freedom to decide between competing ends. This, indeed, is the path followed by Berlin, as I will explain below.

The Intrinsic Value of Liberty

"To contract the areas of human choice is to do harm to men in an intrinsic...sense."

- Berlin, 'Four Essays on Liberty'²⁸⁵

According to Berlin, there are both universal and contingent components to our nature. The universal is implied by the existence of basic human values. For Berlin, value is constrained by a common human horizon; there are many values that can be pursued, but not an infinite amount. The number of values is restricted by our shared physiological needs and psychological drives: "I believe [the scope of values] to be finite, because I think that in the end there is something called human nature."²⁸⁶ In this regard, a person's values are not ungrounded beliefs that begin and end in subjectivity; rather they derive from, and are bounded by, human nature.²⁸⁷ Human values are therefore delimited by their intelligibility. If a man declares his love of trees on the basis that they are made of wood, we are left flummoxed; we can understand what he is saying, but we cannot understand why. In other words, values are contingent upon mutual understanding: "what makes men human is common to them, and acts as a bridge between them."²⁸⁸ More broadly, there are certain common value-categories invoked by human beings in order to make sense of themselves and

²⁸⁴ Berlin, I., 'The Pursuit of the Ideal,' *The Crooked Timber of Humanity*, Fontana Press, 1991, p.17

²⁸⁵ Berlin, I., 'Two Concepts of Liberty,' *Four Essays on Liberty*, Oxford University Press, 1969, p.iii

²⁸⁶ Berlin quoted from Lukes, S., 'In Conversation with Isaiah Berlin,' *Salmagundi*, 120, 1998

²⁸⁷ Berlin, I., 'My Intellectual Path,' *The Power of Ideas*, Chatto & Windus, 2000, p.12

²⁸⁸ Berlin, I., 'The Pursuit of the Ideal,' *The Crooked Timber of Humanity*, Fontana Press, 1990, p.11

their moral universe. These basic categories pertain to the nature of human ends or duties or interests and provide a framework in terms of which our worldview is constructed. Human beings utilise categories of thought pertaining, say, to duty and freedom, emotion and rationality, suffering and happiness, good and bad, right and wrong, truth and illusion, and so on. Whilst the normative conclusions that flow from these categories vary in accordance with personality, culture, and history, the common framework remains.

Yet, our nature is also characterised by the contingent. For Berlin, the necessity of choosing between absolute ends is "an inescapable characteristic of the human condition."²⁸⁹ Whilst our values might be held in common with others - whilst we arrive at our values through the interaction of cultural norms, family and peer relations, national identity, social class and so on - they are not experienced as a given; ultimately they are a product of choice. In this regard, there is an existentialist slant to Berlin's conception of value.²⁹⁰ Our choices are made by appealing to those values that govern our moral being - honesty, compassion, integrity, thoughtfulness, self-interest, courage, tenacity, duty, prudence, resilience and loyalty, among others. How such choices are made and what values should be prioritised is ultimately a decision for the individual; it is an existential matter. Often, we are required to decide between cherished values, like the wartime student in Sartre's anecdote who had to choose between joining the resistance and caring for his ailing mother. For Berlin, as for Sartre, the answer to such a moral dilemma is incapable of being articulated in the abstract - the individual is condemned to choose what he thinks is right. Such choices can be agonising; an individual may be torn between two conflicting ends.²⁹¹ Yet, a decision must be made: "The concrete situation is almost everything. There is no escape: we must decide as we decide; moral risk cannot, at times, be avoided."²⁹²

²⁸⁹ Berlin, I., 'Two Concepts of Liberty,' *Four Essays on Liberty*, Oxford University Press, 1969, p.171

²⁹⁰ As Berlin comments to Lukes: "In a sense I am an existentialist - that is to say I commit myself, or find that I am in fact committed, to constellations of certain values. This is how I live." Lukes, S., 'In Conversation with Isaiah Berlin,' *Salmagundi*, 120, 1998

²⁹¹ This point is also made by Wollheim, who suggests that in addition to conflict between persons and between civic virtues, "at least as interesting to Isaiah were *intrapersonal* conflicts, which seldom involve the civic virtues... These, I think were enormously important for Isaiah both as a theorist and in his own life." Wollheim, R., *The Legacy of Isaiah Berlin*, Dworkin, R., Kelly, A., and Lilla, M., (eds.), *The New York Review of Books*, 2001, p.136

²⁹² Berlin, I., 'The Pursuit of the Ideal,' *The Crooked Timber of Humanity*, Fontana Press, 1990, p.18

Ascertaining the importance Berlin places on each of these facets of our nature – the universal and the contingent – is a particularly difficult task. Consider the following quote from John Gray:

“There is in Berlin no account of a common human nature that is universal and the same for all, since the propensity to diversity, to difference, is itself implied by the human capacity for choice... Such choice is for Berlin choice among goods that are not only distinct and rivalrous but sometimes incommensurable: it is radical choice, ungoverned by reason... Human nature is something invented, and perpetually reinvented, through choice, and it is inherently plural and diverse, not common or universal.”²⁹³

For Gray, Berlin’s depiction of the human being differs from that of the great social contract theorists, Hobbes, Locke and Rousseau. Whereas the latter depict timeless human passions and motivations, Berlin sees human nature merely as an indeterminate capacity to choose, which suggests a general ability for self-creation. Although Gray arguably overstates the idea of self-creation in Berlin, it is true that the notion of choice plays a fundamental role in his understanding of the human being. Whilst humanity has an essence, it is not purely a given – human beings can and do choose.

Berlin’s position involves the rejection of various doctrines that look to eliminate meaningful choice from human existence – predestination, natural determinism, historical inevitability, and so on. These ideas deny that which Berlin holds to be fundamental, namely, that human beings make real choices in the pursuit of their ends, rather than being swept along by the impersonal force of History, or Nature, or by the will of God. For Berlin, such doctrines wrongly transfer the weight of human choice – and the responsibility this entails – from the shoulders of men to vast impersonal forces: “Freedom notoriously involves responsibility, and it is for many spirits a source of welcome relief to lose the burden of both.”²⁹⁴ Of course, the determinist might ask in response to those who would uphold the power of human agency, how ‘a feeble thinking reed like man’ beset by ‘physical and moral frailty’

²⁹³ Gray, J., *Berlin*, Fontana Press, 1995, p.22

²⁹⁴ Berlin, I., ‘Historical Inevitability’, *Liberty*, Oxford University Press, 2002, p.131

can be responsible for the workings of 'Nature' or the 'Spirit'?²⁹⁵ To this Berlin responds that the boundaries of human choice might not be unlimited, yet neither are they nothing at all. The faculty of choice is not necessarily imagined or impotent. He abides by the words of the Russian critic Alexander Herzen: "Man is freer than he is commonly thought to be. He is greatly dependent on his environment, but not to the degree of being subjugated to it. The greater part of our destiny lies in our own hands."²⁹⁶

In addition, Berlin argues with Strawson and Austin that the elimination of a belief in human choice is unthinkable: the way in which we interact with others, emotionally, morally, and linguistically, suggests that choice is firmly rooted in the basic human condition. Practices such as praise and blame, and emotions such as gratitude and resentment, are so ingrained in the human character that the capacity for choice must be assumed. Our basic virtues - honesty, courage, truth, compassion, and justice - and our vices - brutality, deception, wickedness, ruthlessness, corruption, insensitivity, emptiness - become meaningless unless we think of human beings as capable of pursuing ends for their own sake by deliberate acts of choice. This alone makes "nobility noble and sacrifices sacrifices."²⁹⁷ Human souls are destroyed and moral value annihilated when men are not credited with choice: "men are made human by their capacity for choice - choice of evil and good equally."²⁹⁸ Berlin consequently aligns himself with:

"...all those who protest against despotism wherever they find it, not merely in the oppression of priests or kings or dictators, but in the dehumanising effect of those vast cosmologies which minimise the role of the individual, curb his freedom, repress his desire for self-expression, and order him to humble himself before the great laws and institutions of the universe, immovable, omnipotent and everlasting, in whose sight free human choice is but a pathetic illusion."²⁹⁹

²⁹⁵ Ibid, p.128

²⁹⁶ Herzen, A., 'From the Other Shore', *Selected Philosophical Works*, Foreign Languages Publishing House, 1956, p.445

²⁹⁷ Berlin, I., 'Letter to George Kennan', *Liberty*, Oxford University Press, 2002, p.339

²⁹⁸ Berlin, I., 'John Stuart Mill and the Ends of Life,' *Four Essays on Liberty*, Oxford University Press, 1969, p.192 Berlin is here making the point that human beings are defined by their capacity to choose (for better or worse), not that we should be free to choose evil.

²⁹⁹ Berlin, I., 'A Revolutionary Without Fanaticism,' *The Power of Ideas*, Chatto & Windus, 2000, p.97

Berlin therefore rejects the grand metaphysics of Hegelian Idealism, and its materialist inversion, Marxism, and indeed, all other systems that devalue individual human freedom. He is adamant that human beings can choose meaningfully. The importance of liberty derives from respect for human choice, which is a fundamental feature of our basic humanity. If we qualify slavery as barbaric, say, then we implicitly recognise human beings as ends in themselves, who should not be treated as a commodity, and who are capable of acting as moral agents. In other words, the idea of liberty seems to be a basic human good. This does not mean liberty should trump all other values, but it does mean that without a minimum of liberty human beings are not fully human. When this truth is upheld alongside the notion that our moral universe exists as a constellation of competing and incommensurable goods, then the freedom to choose as we wish becomes intrinsically valuable. Hence, it is better to be free to err than to live correctly but without free choice; otherwise, something dear is lost to human beings.³⁰⁰

Yet, this allusion to the intrinsic value of liberty is controversial since it implies choice is valuable irrespective of the ends it comprehends. Unlike the instrumental value of freedom, which is contingent upon the value of the ends of the individual, the intrinsic value of liberty is detached from all such considerations. Those who believe in the intrinsic worth of liberty maintain that something valuable is lost when it is sacrificed for some other end, irrespective of what that end might be. This notion jars with our moral intuitions. If a law prevents murder, say, then in what sense does its enforcement involve the loss of something valuable? What worth is there in being free to kill? Berlin might complain that this rejoinder is only successful insofar as it attributes an instrumental value to liberty, where our freedom is only as valuable as the end it allows. To say that liberty is *intrinsically* valuable is to say that it is inherently valuable to choose for oneself, unbullied and uncoerced. Hence, whilst there is no instrumental value in being free to kill, the intrinsic value of choice is nonetheless undermined when the liberty to kill is outlawed. Berlin is not against laws that prohibit murder; yet, he believes that however just such laws are, something valuable is lost when they are imposed on human beings and their free choice is eliminated.

³⁰⁰ Berlin, I., 'Letter to George Kennan', *Liberty*, Oxford University Press, 2002, p.337

Presumably, one would accept this argument only if one subscribed to Berlin's view of the human being. He portrays liberty as having intrinsic worth precisely because of our moral predicament – we are condemned to choose between incompatible and incommensurable ends. Liberty therefore exists as an ultimate value because without it we cannot live as normal human beings: "Those who have ever valued liberty for its own sake believed that to be free to choose, and not to be chosen for, is an inalienable ingredient in what makes human beings human."³⁰¹ Yet, as I will argue below, it is uncertain that Berlin's belief in the intrinsic worth of liberty is compatible with his non-realist meta-ethical position.

Liberty, Relativism, and Non-Realist Meta-Ethics

I would argue, somewhat controversially, that Berlin is best characterised as a meta-ethical non-realist – he would claim that values are a derivative of human experience. This judgement does not concur with other commentators' reading of Berlin. John Gray, for example, casts Berlin as a moral realist, as subscribing to the belief that human values are "independent subject-matters, in respect of which our beliefs may be true or false."³⁰² In fairness to Gray, it is true that Berlin often gives us reason to believe he is sympathetic to moral realism. He often invokes quasi-Kantian categories to make sense of human experience, and, more famously, he repeatedly suggests: "there is a world of objective values."³⁰³ Nonetheless, this realist reading of Berlin seems to be mistaken. Berlin is clear that it does not make much sense to think of values as being true or false independently of human experience. He thus distances himself from the moral realism of Kant, say, for whom the moral experience of individuals made no difference to the status of moral truth; such principles were an outcome of rational inquiry, not of subjective (or inter-subjective) beliefs. Berlin, like Hume, appeals to human nature, not to a Kantian view of morality as rationally determinable. He disagrees with the idea that 'moral law is revealed by reason', that

³⁰¹ Berlin, I., 'Two Concepts of Liberty,' *Four Essays on Liberty*, Oxford University Press, 1969, p. ix. At the same time, we should remember that the intrinsic value of liberty does not imply it is an inviolable good. Berlin himself could not be clearer on this point. The idea (often presented by libertarians) that freedom is sacred and inviolable is nonsense; every society restricts certain liberties, even those constructed around libertarian principles.

³⁰² Gray, J., *Berlin*, Fontana Press, 1995, p. 72

³⁰³ Berlin, I., 'The Pursuit of the Ideal', *The Crooked Timber of Humanity*, Fontana Press, 1991, p. 11

its truth can be apprehended 'outside the empirical realm.'³⁰⁴ For Berlin, such moral realism is incomprehensible:

"I don't know what it would be like to recognise certain beliefs as being true independently of what anyone might possibly think. I can see that kind of realism about the external world... but to say that for example, murder is wrong whether I think so or not seems to me to be... puzzling."³⁰⁵

Therefore, Berlin doubts that moral rules can have an *a priori* status. He rejects the notion that "certain values are absolute quite independently of what...[people] may think or want."³⁰⁶ He adopts a mode of moral inquiry that begins from human experience. There is no Platonic or Kantian moral order, which exists *a priori* and which renders moral problems determinate in principle. Indeed, Berlin could not be clearer on this matter: "I am bound, given my general view, to deny the possibility of some over-arching criterion which objectively determines what... all men in all places are required to pursue." He continues: "In that sense I am neither a Platonist nor a seventeenth-century rationalist, nor a *philosophe*, nor a Kantian... nor a believer in any other objectivist doctrine."³⁰⁷

Nonetheless, Berlin believes that it is possible to identify certain moral norms that hold for all human beings. There is a moral minimum without which life becomes intolerable.³⁰⁸ Berlin claims that our common human experiences, which are comprehensible through communication and imaginative insight, reveal certain evaluative principles that collectively form a basic human morality, the adherence to which allows us to function as normal human beings. Berlin therefore commits to the idea of a minimum standard of moral decency. Crucially, Berlin's criterion for decency is contingent upon the beliefs of actual human beings – there is no such thing as 'direct non-empirical knowledge, intuition, inspection of eternal principles'; there is only 'universal human beliefs'.³⁰⁹ The existence of such moral rules cannot be established by the insights of great philosophers, rationalists, theologians, or mystics;

³⁰⁴ Jahanbegloo, R., *Conversations with Isaiah Berlin*, Phoenix Press, 2000, p.109

³⁰⁵ Lukes, S., 'In Conversation with Isaiah Berlin,' *Salmagundi*, 120, 1998

³⁰⁶ Ibid

³⁰⁷ Berlin, I., 'Reply to Ronald H. McKinney' *The Journal of Value Inquiry*, 26, 1992, p.557

³⁰⁸ Jahanbegloo, R., *Conversations with Isaiah Berlin*, Phoenix Press, 2000, p.108 See also Berlin, I., *Four Essays on Liberty*, Oxford University Press, 1969, p.lx-lxi

³⁰⁹ Berlin quoted from Jahanbegloo, R., *Conversations with Isaiah Berlin*, Phoenix Press, 2000, p.114

it is a matter for anthropologists, psychologists, historians, and the like.³¹⁰ In other words, Berlin derives his understanding of a moral minimum from empirical generalisations about our moral existence. He appeals to those values that human beings have held over great stretches of time. Thus, Berlin's meta-ethical position amounts to "an empirical, undemonstrable, *de facto* acceptance of what... human experience provides."³¹¹ This reliance on human experience to ascertain moral rules clearly points to Berlin as a non-realist, which in turn suggests a Humean interpretation of 'objective human values' - a value acquires objective validity insofar as it is normally held by human beings.³¹² As Berlin writes: "Objectivity of moral judgement seems to depend on (almost to consist in) the degree of constancy in human responses."³¹³ This, of course, requires an empirical judgement, independent of belief.

The problem for Berlin comes in reconciling the actual moral sentiments of human beings with the belief that liberty is intrinsically valuable. For instance, Berlin is aware that human beings do not naturally gravitate towards free lives, tacitly accepting Herzen's argument that "the masses... are indifferent to individual freedom, liberty of speech; the masses love authority. They are still blinded by the arrogant glitter of power, they are offended by those who stand alone."³¹⁴ Herzen understood that the urge for freedom and independence is not borne out by history. It is true, he notes, that certain strata of society - primarily the liberal bourgeoisie - have pursued freedom, but this urge has been neither very strong, nor indeed consistent. To claim that man naturally seeks freedom even though most people live in conditions of servitude is the equivalent of saying fish are born to fly even though they primarily live under water.³¹⁵ Moreover, Herzen accepts that the burden of freedom is often too great for man to bear: "We speak so much about freedom; we are so proud of it and, at the same time, are vexed that nobody undertakes to lead us by the hand, that we stumble and pay for the consequence of our acts."³¹⁶ He continues: "Freedom is the

³¹⁰ See Berlin, I., *Four Essays on Liberty*, Oxford University Press, 1969, p.iii-iiii

³¹¹ Berlin, I., 'Reply to Ronald H. McKinney' *The Journal of Value Inquiry*, 26, 1992, p.559

³¹² Crowder, G., 'Pluralism and Liberalism,' *Political Studies*, 1994, p.74

³¹³ Berlin, I., *Four Essays on Liberty*, Oxford University Press, 1969, p.xxxii

³¹⁴ Herzen, A. quoted by Berlin, I., 'Herzen and Bakunin on Individual Liberty', *Russian Thinkers*, Hogarth Press, 1978, p.88

³¹⁵ Herzen, A., 'From the Other Shore', *Selected Philosophical Works*, Foreign Languages Publishing House, 1956, p.422

³¹⁶ Ibid, p.364

very thing [the people] dread: they must have a master to keep them in hand, they must have authority because they do not trust themselves."³¹⁷

This sentiment is also expressed in Dostoevsky's fable about the Grand Inquisitor who condemns a resurrected Christ to death. The Inquisitor's decision rests on the notion that human beings do not primarily value liberty - they want food, water, and security: "Turn [stones] into loaves and mankind will go trotting after you like a flock, grateful and obedient."³¹⁸ For the Inquisitor, the burden of freedom is too great for a feeble creature like man to bear. The Church will reconstruct the sermon preached by Christ in the light of man's true image - weak, depraved, and pathetic. Ultimately, the people will surrender their freedom for the earthly bread that they crave:

"They will bring us their freedom and place it at our feet and say to us: 'Enslave us if you will, but feed us.' At last they will understand that freedom and earthly bread in sufficiency for all are unthinkable together, for never, never will they be able to share between themselves... so terrible will being free appear to them at last."³¹⁹

In return for their freedom, the Church will give the people bread, it will keep them in health, and the people will be eternally grateful. They will be happy to subordinate themselves to the authority of the Church, convinced by the mystery and miracle the Church professes. They will attain the 'quiet, reconciled happiness' of 'pathetic children'. They will be allowed to sin, which can be redeemed under the authority of the Church, and so they will tell every secret of their conscience: "All, all will they bring to us, and we shall resolve it all, and they will attend our decision with joy, because it will deliver them from the great anxiety and fearsome present torments of free and individual decision."³²⁰ The Church will have a monopoly of power and knowledge, and it will make men happy precisely because it denies them freedom but provides the conditions that sustain life.

³¹⁷ Herzen, A., 'From the Other Shore', *Selected Philosophical Works*, Foreign Languages Publishing House, 1956, p.451

³¹⁸ Dostoevsky, F., *The Brothers Karamazov*, Penguin, 1993, p.290

³¹⁹ Ibid., p.290-1

³²⁰ Ibid., p.298

The implication of Dostoevsky's fable is that far from freedom being a universal value, human beings actively resist it; they look to flee from the responsibility that freedom entails. They place more importance on security and material well-being. Yet, this being the case, how can Berlin derive a commitment to liberty from a meta-ethical position that relies upon the actual beliefs of human beings? How many liberals live, and have lived, in our world? Does humanity speak with a voice that supports freedom? Or do human beings consider liberal freedoms a burden? However one answers these questions, it is clear that the value of liberty as Berlin would conceive it cannot rest on the actual beliefs of human beings. The priority of freedom cannot be asserted as a universal feature of human life; at most, limited freedoms may be sanctioned. However, if freedom is relegated to one value among others, then liberalism becomes extremely unlikely. The only way to rescue Berlin's thesis would be to adopt the view that the people often do not recognise the intrinsic value of liberty, in spite of themselves. Yet, by second-guessing the values of individuals in this manner, we enter the terrain of positive liberty, a venture Berlin would be disinclined to take on.

What is more, Berlin's non-realism generates difficulties beyond the identification of liberty as an intrinsic good - it also blurs his distinction between pluralism and ethical relativism. Berlin is adamant that he should not be classified as a value relativist. To suggest that all values are relative is to claim that they are merely an expression of cultural or social norms, which have no force beyond those who accept their validity. In other words, relativism is incompatible with an objective account of good and evil - it happily recommends liberalism for the liberals and cannibalism for the cannibals.³²¹ Relativism is inconsistent with the idea that certain values have universal force.

By contrast, pluralism can accept that though human goods are diverse, incommensurable and incompatible, they are nonetheless objectively identifiable. Equally, pluralism can accept that there are certain universal evils that transcend culture and time. Pluralism is therefore compatible with what might be called a minimum morality. It can accept, as Berlin maintains, that there are "general

³²¹ This axiom of Martin Hollis is quoted by Lukes, S., 'An Unfashionable Fox' *The Legacy of Isaiah Berlin*, Dworkin, R., Lilla, M., Silvers, R., (eds.) New York Review of Books, 2001, p.132

principles of behaviour and human activity without which there cannot be a minimally decent society."³²² In other words, it is pluralism's compatibility with a basic moral code that separates it from ethical relativism.

What fixed ethical principles might constitute this basic moral code? Berlin refers to rules or commandments that "are accepted so widely, and are grounded so deeply in the actual nature of men as they have developed throughout history, as to be, by now, an essential part of what we mean by being a normal human being."³²³ In other words, Berlin thinks he can identify in human nature certain basic moral principles that cannot be interpreted as mere idiosyncrasies, or norms that vary according to time and custom:

"We know of no court, no authority, which could, by means of some recognised process, allow men to bear false witness, or torture freely, or slaughter fellow men for pleasure; we cannot conceive of getting these universal principles or rules repealed or altered; in other words, we treat them... as presuppositions of being human."³²⁴

The problem for Berlin is that his non-realist meta-ethics requires a trans-historical and cross-cultural recognition of such evils, yet this is not supported from an historical or cultural swcep. For instance, I might argue that the following moral principles are necessary for a tolerable existence: respect for human life, respect for the physical and moral integrity of the individual, certain basic freedoms, and a system of justice designed to arbitrate between competing moral claims. How many of these norms have been respected by human beings across time and culture? Not many. Slavery, for example, has been an acceptable human norm for most of our history; torture is still viewed by many human beings as an acceptable means to derive important information; the moral imperative to avert starvation or genocide has not been consistently respected; freedom of religion is scarcely recognised in some cultures. This implies, if we are to employ a non-realist meta-ethic, that many of the basic norms considered above (being culturally and temporally specific) have only a

³²² Berlin quoted from Jahanbegloo, R., *Conversations with Isaiah Berlin*, Phoenix Press, 2000, p.114

³²³ Berlin, I., 'Two Concepts of Liberty,' *Four Essays on Liberty*, Oxford University Press, 1969, p.165

³²⁴ Berlin, I., 'European Unity and its Vicissitudes', *The Crooked Timber of Humanity*, Fontana Press, 1991, p. 204

relative validity. This fatally undermines Berlin's distinction between pluralism and relativism.

Liberalism and Cultural Pluralism (Beyond Berlin)

In order to avoid the relativistic implications of Berlin's argument, we need to adopt a realist meta-ethic. This could potentially re-invigorate Berlin's failing case for liberalism by allowing him to re-state his case for the intrinsic worth of freedom. Yet, even then, authors such as John Gray doubt that this argument will lead to liberalism. The final section of this chapter will test Gray's scepticism.

Let us begin by revisiting Berlin's anti-utopian argument, which appeals to the diversity of value allowed by both pluralism and liberalism. According to Berlin, pluralism is more humane than the 'great, disciplined, authoritarian structures' of monism because it does not deprive men, in the name of some utopian ideal, of the variety of opportunities that are central to their life as 'self-transforming beings.'³²⁵ In other words, pluralism recognises the diversity of ends that men value; and it is liberalism that best appreciates this diversity, and best understands the role of choice-making in creating a meaningful life. This argument is filled-out by Bernard Williams, who portrays liberalism as the most truthful response to the fact of value-pluralism.³²⁶ According to Williams, value pluralism advances a truth claim about the structure of human values. It amounts to the meta-ethical belief that human beings subscribe to a myriad of values that are potentially incompatible and incomparable, which therefore precludes an objectively justified lexicographical ordering of values. Nonetheless, it is exactly because liberalism, as a political doctrine, best accommodates the truth of value pluralism that it is justified. Liberalism allows room for incompatible ways of life to co-exist; it commits to liberty and tolerance; it is extremely generous in the diversity it allows. As Williams writes: "If there are many and competing genuine values, then the greater the extent to which a society tends to be single minded, the more genuine values it neglects or suppresses."³²⁷ Liberalism, in contrast to this single-mindedness, allows for a greater array of genuine values:

³²⁵ Berlin, I., 'Two Concepts of Liberty,' *Four Essays on Liberty*, Oxford University Press, 1969, p.171

³²⁶ Williams, B., 'Introduction' to Berlin, I., *Concepts and Categories*, Oxford University Press, 1980

³²⁷ *Ibid*, p.xix

"More, to this extent, must mean better."³²⁸ It is better because it recognises 'the deep and creative role' that these various values play in human life.³²⁹ Consequently, the virtue of liberalism is not merely that it recognises the greatest array of legitimate values, but that it understands the importance of having these values available for individual self-creation. It is to this extent that liberalism is more truthful than other positions. It understands – within definite boundaries – that there is value in different ways of life.

However, John Gray believes this argument is unsuccessful. First, on what basis can the value of 'self-creation' be placed before other human goods, such as community or tradition? Second, if liberal societies are to be commended on the basis that they harbour more genuine values than illiberal or barbaric societies, does it not follow that the human world would be richer still if it contained both liberal and non-barbaric non-liberal societies?³³⁰ There may be worthwhile forms of life embodying authentic varieties of human flourishing whose survival depends on the denial of negative liberty. Liberal societies often lack certain genuine values like security, or community, which are more strongly felt in other, less liberal social systems. Liberalism, it should be remembered, does not encapsulate all good things; its virtue is not without loss.

Gray portrays liberalism as an archetypal doctrine of the Enlightenment, inasmuch as it privileges an array of ahistorical goods, which are deemed to be in the interests of all human beings. Yet, he argues that the subversive implication of value-pluralism erodes this belief – if human values are incommensurable, there is no good reason to privilege liberal values over others. The priority of freedom cannot be asserted as a 'universal feature of human life' nor deduced from 'the pluralist thesis of value-incommensurability.'³³¹ Consequently, value pluralism provides no reason to promote "distinctive liberal freedoms of the press, religion, or autonomous choice."³³² So long as a moral minimum is protected, there is nothing in value pluralism that recommends a more comprehensive liberal society. It is wrong, therefore, to suppose that liberalism

³²⁸ Ibid, p.xix

³²⁹ Ibid, p.xx

³³⁰ Gray, J., *Berlin*, Fontana Press, 1995, p.152, 157-158

³³¹ Ibid, p.161

³³² Gray, J., 'Where Pluralists and Liberals Part Company' *Pluralism – The Philosophy and Politics of Diversity*, Baghrarian, M. and Attracta, L. (eds.) Routledge, 2000, p.99

embodies a rational solution to the problems created by value pluralism: "liberal institutions can have no universal authority."³³³

Contrary to Berlin's liberal response to value pluralism, Gray believes we must content ourselves with particularist justifications of political obligation; value pluralism "undermines the fundamentalist belief in the universal authority of any single way of life."³³⁴ Gray's argument has sometimes taken the form of conservatism, whereby judgements made between incommensurable values rely on the moral authority of a given cultural tradition.³³⁵ However, his considered opinion seems to be that value pluralism commits us to a pragmatic *modus vivendi*. Here, Gray retains the belief that liberalism is but one acceptable form of life among many. It has no foundations in human nature or natural law; it is a relatively recent phenomenon, culturally specific and upheld by a people who believe unfettered choice is of paramount value. In other words, liberalism cannot be asserted as the most truthful or most rational response to the fact of value-pluralism. Whilst liberalism is compatible with value-pluralism, it is not prescribed by it. To claim that a life of free choice should always be privileged above other forms of life "is precisely the pure philosophy of right that...value-pluralism undercuts."³³⁶

That is not to say Gray believes all cultural practices must be condoned. Only those societies that acknowledge a plurality of goods are acceptable: "*Modus vivendi* is impossible in a regime in which the varieties of the good are seen as symptoms of error or heresy. Without institutions in which different ways of life are accorded respect there cannot be peaceful coexistence between them."³³⁷ Gray therefore rejects all theocratic, fundamentalist and dictatorial regimes that prescribe a single way of life for the general population. Value pluralism requires a political response that respects the diversity of human goods. Gray concedes that often a liberal regime will best protect this diversity, though maintains that it would be wrong to think that liberalism is the sole regime-type that is compatible with value pluralism: "The political implication of strong pluralism is not liberalism. It is *modus vivendi*... Liberal

³³³ Gray, J., *Berlin*, Fontana Press, 1995, p.155

³³⁴ Gray, J., 'Where Pluralists and Liberals Part Company' *Pluralism – The Philosophy and Politics of Diversity*, Baghramian, M. and Akrata, I., (eds.) Routledge, 2000, p.101

³³⁵ See Crowder, G., 'Pluralism and Liberalism,' *Political Studies*, 1994, p.117-8

³³⁶ Gray, J., *Berlin*, Fontana Press, 1995, p.152

³³⁷ Gray, J., *Two Faces of Liberalism*, Polity Press, 2000, p.20

institutions are merely one variety of *modus vivendi*, not always the most legitimate.”³³⁸ In other words, political regimes that are non-liberal but pluralistic and tolerant of minority groups cannot be criticised from the perspective of value pluralism.

However, if Gray concedes that one human group cannot impose a way of life on another (since there is a plurality of valuable ways of life), why should a group be allowed to impose a way of life on an individual? Gray’s explication of cultural incommensurability stresses the right of cultural autonomy but ignores the right of individual autonomy. Consider Amartya Sen’s distinction between two types of cultural practice. The first insists that people should be allowed to decide freely what traditions they wish to follow. The second insists that people should obey the decisions of religious or secular authorities that enforce established traditions.³³⁹ The first presupposes freedom as a universal value, the second stresses cultural autonomy. According to Sen, “the force of the former precept lies in the basic importance of human freedom, and once that is accepted there are strong implications on what can or cannot be done in the name of tradition.”³⁴⁰ Sen therefore maintains that ‘ayatollahs’, ‘guardians of culture’, and ‘political rulers’, have no justification for forcing a way of life upon an individual. Sen is surely right here – without a commitment to individual freedom, cultural autonomy is compatible with abusive political power.

William Galston offers a similar defence of liberal universalism. He argues that Gray ignores the interests of minority groups within cultures. Gray, he claims, is guilty of portraying cultures as monolithic constructs, when in reality they are internally diverse, incorporating disparate groups and factions.³⁴¹ It is therefore important to remember the groups and individuals residing in non-liberal societies that do not identify with the dominant norms. Should their voices be ignored simply for the sake

³³⁸ Gray, J., ‘Where Pluralists and Liberals Part Company’ *Pluralism – The Philosophy and Politics of Diversity*, Baghramian, M. and Attracta, I., (eds.) Routledge, 2000, p.101

³³⁹ This might entail that persons abiding in the UK live under liberal rules of justice, while those in Pakistan live under Sharia Law.

³⁴⁰ Sen, A., *Development as Freedom*, Anchor Books, 2000, p.32

³⁴¹ George Crowder also portrays Gray as an ‘essentialist’ committed to the image of “discrete, self-contained traditional cultures being confronted and overcome by a discrete monolithic liberalism.” Crowder, G., *Liberalism and Value Pluralism*, Continuum, 2002, p.155

of increasing diversity?³⁴² Galston thinks not; diversity must be a derivative of free choice:

“To say that a life is collectively worthwhile is to say (in part) that it is worthwhile *for those who are actually leading it*. It is hard to see how that claim can be sustained unless the people in question identify (for whatever reason) with the way of life in question. But if they do so, the regime need not use coercion to maintain it.”³⁴³

For Galston, then, a given regime cannot enforce compliance or continued membership on those who do not identify with its values; otherwise, that society becomes like a prison, which, for Galston, is intolerable: “This rejection of human imprisonment...is a principle with moral force across political boundaries. It extends to cultural communities within specific regimes as well.”³⁴⁴ In other words, diversity is desirable only insofar as it is the product of ‘expressive liberty’ or free choice. Galston acknowledges that the essential value of negative liberty cannot be derived from the truth of value pluralism. Rather, in asserting the importance of negative liberty, we should follow Berlin in claiming that the preservation of ‘a minimum area of personal freedom’ is necessary if we are not to ‘degrade or deny our nature’.³⁴⁵ Galston therefore believes it is possible to provide “a rational basis for defining a domain of basic moral decency for individual lives and for societies.”³⁴⁶ This entails a commitment to negative liberty, without which human beings are unfairly condemned to live a prison-like existence. Coercion is a basic human evil.

Of course, on its own, the evil of coercion is not enough to justify a fully liberal regime. There remains a gap between the minimum of freedom required by a basic standard of morality and the extensive freedoms that characterise liberalism. Nonetheless, Galston maintains that when a belief in the basic evil of coercion is combined with the anti-utopian implications of value pluralism an argument for liberalism follows. The state should not impose a single solution on its citizens – it should accommodate the various and divergent ways of life that flow from the rational

³⁴² Galston, W.A., ‘Value Pluralism and Liberal Political Theory’, *American Political Science Review*, 1999, p.778

³⁴³ Galston, W.A., *Liberal Pluralism*, Cambridge University Press, 2002, p.55

³⁴⁴ Galston, W.A., *Liberal Pluralism*, Cambridge University Press, 2002, p.56

³⁴⁵ Berlin, I., ‘Two Concepts of Liberty’, *Four Essays on Liberty*, Oxford University Press, 1969, p.126; Galston, W.A., *Liberal Pluralism*, Cambridge University Press, 2002, p.49

³⁴⁶ Galston, W.A., *Liberal Pluralism*, Cambridge University Press, 2002, p.30

indeterminacy of value pluralism; and when this truth is combined with the premise that a way of life is valuable only insofar as it is freely chosen, Galston believes there is a case for liberalism.

Still, the development of liberalism from a theory of value pluralism appeals to uncertain foundations. As Berlin points out, pluralism has its roots in the counter-enlightenment and romanticism,³⁴⁷ and though romantic themes are evident in some articulations of liberalism (most notably in J.S. Mill), the same themes have often led to less desirable conclusions. To avoid this fate, strong moral claims must be made about the dignity and inviolability of the individual. Yet, if one accepts the romantic/pluralist argument and its scepticism about universal moral truths, the scope to invoke such absolute claims is extremely limited. This is because romanticism typically refers to the cult of individual authenticity, which is at root an expression of "the proud, indomitable, untrammelled human will."³⁴⁸ Though Berlin correctly points out that this vision can be a great liberator – it pitches itself against convention, oppression and cynicism – it is also true that the unshackled expression of the human will knows no moral bounds: its exercise may lead to heroic acts of martyrdom, or to the celebration of intensity of feeling, as in Goethe's *Werther*, but it may also cause great suffering, destruction, and conflict, as in Dostoevsky's *Crime and Punishment*. It is therefore rather dangerous for liberalism to refer to romantic/pluralist foundations. The moral license associated with romanticism, which Berlin celebrates for its pluralistic overtones and its anti-perfectionism, is silent on the content of the moral right, so long as moral rules are genuinely created, an authentic expression of individual will. By contrast, Berlin often writes as if the Enlightenment, which declares its faith in reason and a set of moral imperatives for all of humanity, was an enemy of freedom, alleging that it stifles the expression of the will.

This accounts for Berlin's casting of Kant in an ambiguous light: he pays lip service to Kant's liberal heritage while offering a more sustained attack against the (despotic) Kantian vision of rational freedom. It may well be that Berlin misrepresents Kant here, for whatever the weaknesses of Kant's notion of rational freedom, he makes a

³⁴⁷ Berlin, I., 'The Apotheosis of the Romantic Will,' *The Crooked Timber of Humanity*, Fontana Press, 1991, p.236-7

³⁴⁸ Berlin, I., 'The Apotheosis of the Romantic Will,' *The Crooked Timber of Humanity*, Fontana Press, 1991, p.215

clear distinction between the right and the good. That is to say, Kant allows that the individual may pursue whatever path she wishes, so long as she respects the freedom of others.³⁴⁹ Moreover, Kant provides grounds for establishing principles of right, which romanticism with its cult of individual authenticity cannot do: from an assumption that human beings have an inviolability based on their rational autonomy, Kant is able to make certain inferences about the moral right. To this extent, Kant provides the most acceptable foundation for liberalism. As Galston asserts:

"To most theorists, it no longer seems acceptable to base moral theory on divine authority, on cultural tradition, on the *consensus gentium*, on the direct intuitive perception of moral truth, or on any form of naturalism. The remaining possibility is a law of reason in the Kantian sense: a standard immanently derived from the fact and form of moral rationality itself... Kantian moral theory provides a philosophical foundation for the derivation of legitimate authority and rational principles of social organisation from freedom, equality, and autonomous consent – the predominant values of our democratic age."³⁵⁰

Thus, a Kantian justification of liberalism is more persuasive than its rivals. Building upon the 'freedom of every member of society as a human being' and the 'equality of each with all the others as a subject',³⁵¹ Kant is able to generate inviolable rules of justice that define the boundaries of freely chosen, subjectively determined ends. This formula has been given more recent expression by John Rawls, the most famous contemporary Kantian. His argument for liberalism will be considered in the next chapter.

Conclusion

In the opening paragraphs of 'Two Concepts of Liberty', Berlin's principled position vis-à-vis the value of personal freedom is beyond doubt: "If individual liberty is an ultimate end for human beings, none should be deprived of it by others; least of all

³⁴⁹ Kant, I., 'On the Relationship of Theory to Practice in Political Right', *Kant's Political Writings*, Reiss, H., (ed.), Nisbet, H.B., (trans.), Cambridge University Press, 1970, p.74

³⁵⁰ Galston, W.A., 'Moral Personality and Liberal Theory: John Rawls's "Dewey Lectures"' *Political Theory*, 1982, p.492

³⁵¹ Kant, I., 'On the Relationship of Theory to Practice in Political Right', *Kant's Political Writings*, Reiss, H., (ed.), Nisbet, H.B., (trans.), Cambridge University Press, 1970, p.74

that some should enjoy it at the expense of others."³⁵² Equality of liberty, he claimed, forms the foundation of liberal morality. Yet, Berlin's exploration of value pluralism and his aversion to *a priori* principles gradually weakened his faith in this premise and his case for liberalism consequently began to erode. In a revealing essay, Mark Lilla portrays Berlin as a liberal "haunted by the worry that liberalism's attachment to universal principles, discovered through reason, somehow rendered it less liberal and tolerant than it ought to be."³⁵³ This, I think, captures the essence of Berlin's predicament.

This chapter has considered the efficacy of Berlin's argument in relation to the value of liberty. Several interconnected themes were pursued. What is the relationship between liberty and other social goods? On what basis does Berlin justify a commitment to liberty? What is the connection between human nature, choice and liberty? The answers to all of these questions revolve around Berlin's understanding of value pluralism. The central difficulties of Berlin's thesis derive from his ill-considered meta-ethical position. His non-realism precludes an argument in favour of the intrinsic value of freedom, which is integral to his defence of liberalism. Further, a non-realist conception of human value makes it difficult to derive an objective moral floor, which is necessary if we are to distinguish pluralism from ethical relativism. And even if a basic morality could be identified, it would be so weak and contestable that it would be unable to support an appeal to the evil of coercion, upon which the value pluralist's defence of liberalism must rest.

³⁵² Berlin, I., 'Two Concepts of Liberty,' *Four Essays on Liberty*, Oxford University Press, 1969, p.125

³⁵³ Lilla, M., 'Wolves and Lambs' *The Legacy of Isaiah Berlin*, Dworkin, R., Kelly, A., and Lilla, M., (eds.), The New York Review of Books, 2001, p.40

Chapter 7: Liberty and Primary Goods

'By what title does the individual claim his particular share? What is the basis of allotment?'

'His Title,' replied Dr Leete, 'is his humanity. The basis of his claim is the fact that he is a man.'

'The fact that he is a man!' I repeated, incredulously. 'Do you possibly mean that all have the same share?'

'Most assuredly.'...

'Some men do twice the work of others!' I exclaimed. 'Are the clever workmen content with a plan that ranks them with the indifferent?'

- Edward Bellamy, 'Looking Backward'³⁵⁴

Introduction

Although John Rawls is famous for his treatise on justice, he has written much on the meaning and application of liberty. Indeed, as all who have read Rawls know, the value of liberty is fundamental to his principles of justice. In this chapter, I will carefully consider Rawls' answer to three familiar questions. First, why should we privilege liberty over other values? Second, is freedom instrumentally, intrinsically or constitutively valuable? Third, what is the relationship between freedom and other social goods? In answering these questions, I will consider Rawls' general and special conceptions of justice, and pay particular attention to Chapter IV of *A Theory of Justice* and to Lecture VIII of *Political Liberalism*, both of which directly pertain to the argument on liberty.

I will also attempt to engage with Rawls' critics. Initially, my analysis will be limited to Hart's critique of Rawls' first principle of justice, though I will later consider the critical merits of Gray, Daniels, Sen and Dworkin. The response to Rawls' work has been voluminous and hence I have carefully limited my battles to those that directly pertain to a discussion of liberty. Consequently, and in spite of the breadth of the

³⁵⁴ Bellamy, E. 'Looking Backward' in Rosen M., Wolff, J., (eds.), *Political Thought*, Oxford University Press, 1999, p.234

criticism that I aim to consider, I will concentrate my efforts on Rawls' argument for a scheme of basic liberties.

The Original Position and *A Theory of Justice*

Rawls' broader task is to articulate and defend a theory of social justice. Any given society requires rules of justice because the conflicting interests of individuals and groups give rise to competing claims on common resources. A society in which 'all can achieve their complete good,' or in which there are 'no conflicting demands' and the wants of all 'fit together without coercion into a harmonious plan of activity,' is a society 'beyond justice.'³⁵⁵ The aim of justice, then, is to generate an appropriate set of rules that is capable of arbitrating between the competing and incompatible claims that men make on each other. Historically, responses to the problem of justice have been numerous and diverse: Hobbes argued for a benevolent dictatorship, Rousseau for the General Will; Hume invoked the institution of private property, while Bentham appealed to the greatest happiness. Rawls, by contrast, recommends 'justice as fairness'.

Rawls suggests that a settlement of justice requires all affected parties to agree on the principles that govern the basic structure of society. However, it is extremely unlikely that such agreement is attainable, given our conflicting interests and ideals; and even if it did, it would probably derive from inequalities in bargaining power. Consequently, there would be no reason to think of such an agreement as being fair. For Rawls, then, a fair settlement must be resolved from a situation in which the affected parties are unable to dominate one another, which implies that the parties be allowed to freely voice their interests from a position of equality. This is the basic idea behind justice as fairness.

Rawls develops the idea of justice as fairness by constructing an elaborate thought experiment. He imagines a situation in which a group of free and equal promulgators have to decide on the rules that should govern the basic structure of society. The promulgators are free in the sense that they are capable of pursuing a vision of the

³⁵⁵ Rawls, J., *A Theory of Justice*, Oxford University Press, 1971, p.281

good; they are equal in the sense that they are all inviolable moral agents. This philosophical conception of the person ensures that Rawls cannot claim to derive any necessary truths from his theory; his evaluative assumptions are implicit in the initial set-up of his argument. Nonetheless, the virtue of Rawls' project is that he derives a strong conclusion from a weak premise, i.e. a premise that is widely acceptable.

Rawls makes two assumptions about the psychological make-up of the parties involved – that they are reasonable and rational. To be rational is to be able to form, revise and pursue a vision of the good; it is to establish the appropriate means to one's self-chosen ends. Without the assumption of rationality, the promulgators could not pursue their self-interest or vision of the good in a coherent manner. To be reasonable is to be able to accept fair terms of co-operation, to acknowledge conditions of reciprocity and mutuality – all who co-operate in society must benefit and share common burdens. Without the assumption of reasonableness, the promulgators would be unable to form and abide by a sense of justice.

In order to secure the condition of equal freedom that is required by justice as fairness, Rawls places the promulgators under a 'veil of ignorance'. In other words, the imaginary promulgators are prevented from formulating principles of justice based on their own 'thick' theories of the good. Here, the parties operate under considerable limitations – they do not know what skills and talents they have; they are denied knowledge of their conception of the good, of their psychological propensities and of their status and position in society.³⁵⁶ The veil of ignorance thus ensures that the promulgators are unable to assert principles of justice that privilege their own conception of good: "no-one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances."³⁵⁷ These constraints guarantee the equality of bargaining power required by justice as fairness.

Yet, how, in the context of the original position, can the promulgators rationally pursue their purposes if they are denied all knowledge of their subjective good? How,

³⁵⁶ Rawls has been criticised for constructing his theory of justice upon such an ethereal conception of the person. See Sandel, M., *Liberalism and the Limits of Justice*, Cambridge University Press, 1982

³⁵⁷ Rawls, J., *A Theory of Justice*, Oxford University Press, 1971, p.11

if the parties do not know what ends they want to pursue, can they arrive at the principles of justice? According to Rawls, rules of justice can still be formulated, since there are certain 'primary goods' that rational people want more of, whatever else they might want. These social goods normally have a use irrespective of the specific plan of life one pursues. Rawls lists 'rights and liberties, powers and opportunities, income and wealth' among such goods. These all-purpose means are the substantive goods that underpin the rules of justice.

Importantly, Rawls does not ground these basic goods on an account of universal human needs or human psychology; the primary goods are not what all men at all times desire. Rather, they are to be thought of as "what persons need in their status as free and equal citizens, and as normal and fully cooperating members of a society over a complete life."³⁵⁸ This point has been overlooked by certain communitarian critics, who claim that Rawls gives an unduly abstract account of human wants.³⁵⁹ In fact, Rawls avoids this charge by relating the primary goods specifically to his conception of the person. Thus, it is rational, in light of the uncertainties produced by the veil of ignorance, to select principles of justice that secure these goods for all persons; and even if it turns out *ex post facto* that one's plan of life does not involve these goods (perhaps for religious reasons), then one is not obligated to accept them (even though one must accept the rules of justice, which confers the right to have them).³⁶⁰ As such, Rawls believes that the self-interested promulgators in the original positional would arrive at the following conception of justice:

"All social values – liberty and opportunity, income and wealth, and the bases of self-respect – are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage."³⁶¹

The promulgators will adopt this general principle since they do not know what position they will occupy in society. Their choices will be guided by the 'maximin

³⁵⁸ Rawls, J., 'Preface to the French Edition of A Theory of Justice', *Collected Papers*, Harvard University Press, 1999, p.417

³⁵⁹ See Walzer, M., *Spheres of Justice*, Basic Books, 1983

³⁶⁰ Rawls, J., *A Theory of Justice*, Clarendon Press, 1972, p.143 For instance, a monk who desires to live in poverty need not accept the good of private wealth. If he is nonetheless afforded wealth by the principles of justice, he could either use it for charitable purposes or give it to his monastery. Yet even if he can find no use for the money, he has not been subjected to injustice, for he is not compelled to accept it.

³⁶¹ Rawls, J., *A Theory of Justice*, Clarendon Press, 1972, p.62

rule', whereby decisions tend towards the alternative that provides the best worst-case scenario.³⁶² For example, the promulgators will not sanction a society based on a single religious view, since they cannot be sure that they themselves will subscribe to that religious view (meaning they cannot be sure they will not be persecuted for heresy or blasphemy). They have much to lose by sanctioning a theocratic society and very little to gain. In other words, by the maximin ruling, it would be irrational to take a chance with religious freedom.

Yet, why does Rawls insert the condition that certain inequalities are justified so long as they are to everyone's advantage? According to Rawls, the principle of equality must be qualified, or else it might sanction an overall reduction in well-being. This is best demonstrated by considering the efficiency and justice of different forms of economic systems. For example, most commentators acknowledge the effectiveness of capitalism in generating wealth, as opposed say, to the inefficiencies of a centrally planned economy.³⁶³ At the same time, capitalism will inevitably generate unjustified inequalities - it will reward those with marketable talent or industry or power, all of which are arbitrary from a moral point of view. However, if it can be shown that the worst off under capitalism (with its tendency towards material inequality) are better off than the worst off under a planned economy (which looks to secure material equality), then there is a prudential reason to favour capitalism (at least as a starting point). This follows from the maximin principle. In other words, Rawls marries the concerns of economic self-interest with the demands of justice.

How, then, do these broad principles translate into an institutional framework? Anxious to avoid an unlikely ahistorical structure, Rawls articulates a theory of justice that is specifically applicable to a society that has attained a certain degree of wealth. Such a society will be characterised by the 'effective establishment of fundamental rights' and by the capacity of its citizens to fulfil their 'basic wants'.³⁶⁴ In this circumstance, Rawls argues the primary goods that underpin the general conception of justice will be cast in lexicographical order. That is to say, a reasonably affluent society will begin to discriminate between the value of different social primary goods.

³⁶² Ibid, p.152

³⁶³ See, for example, Sen. A., *Development as Freedom*, Anchor Books, 1999

³⁶⁴ Rawls, J., *A Theory of Justice*, Clarendon Press, 1972, p.542-3

For Rawls, after a certain level of material well-being is attained (roughly equivalent to the satisfaction of basic needs), people will begin to place more importance on the liberties that sanction the pursuit of their purposes.³⁶⁵ This is because, beyond a certain minimum, increases in material well-being will have a diminishing value. In this context, the acquisition of liberty becomes a more pressing concern.³⁶⁶ Hence, for a reasonably affluent society, two broad principles of justice will be chosen:

First Principle Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.

Second Principle Social and Economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.³⁶⁷

Thus, Rawls generates his two principles of justice, the first of which has priority over the second. Consequently, the basic liberties "can be restricted only for the sake of liberty,"³⁶⁸ and not for the sake of greater material equality or any other social good. The basic freedoms that will be protected by the rules of justice include political liberty (i.e. the freedom to vote and stand for office); freedom of speech and assembly; freedom of thought and conscience; freedom of the person including the right to hold personal property; and freedom from arbitrary arrest and seizure as detailed by the rule of law.³⁶⁹ Thus, when Rawls claims that each person is to have an equal right to the most extensive total system of equal basic liberties, it is these fundamental freedoms that he has in mind.

³⁶⁵ See Rawls, J., *A Theory of Justice*, Clarendon Press, 1972, p.543

³⁶⁶ Certain of Rawls' assumptions about the relationship between material well-being and liberty have been challenged. Sen points out that political freedoms may be a means to the alleviation of poverty, and so a society might not have to choose between an increase in wealth or the development of political freedom and civil liberties – the latter are often instrumental in securing the former. Sen, A., *Development as Freedom*, Anchor Books, 2000, Chapter 6

³⁶⁷ Rawls, J., *A Theory of Justice*, Clarendon Press, 1972, p.302 The 'least advantaged' are defined as those who have the lowest index of primary goods when their prospects are viewed over a complete life.

³⁶⁸ Ibid, p.302

³⁶⁹ Ibid, p.61

Yet, why are these liberties in particular identified by Rawls as being in the interests of the promulgators? We have already examined the reasoning behind the protection of freedom of conscience. Given that the promulgators are unaware of their religious or moral convictions, or how their views fare in society, it is in everyone's interests to give each person the freedom to subscribe to any religious or moral view compatible with the freedom of others. From the standpoint of the original position, then, no particular interpretation of religious truth can be acknowledged as binding upon citizens generally: "equal liberty of conscience is the only principle that the persons in the original position can acknowledge."³⁷⁰ Whether or not this argument justifies *prioritising* freedom of conscience over material well-being is uncertain – Rawls' argument gives the promulgators reason to prize liberty without necessarily giving them reason to privilege it. This issue will be explored more thoroughly in the next section.

A slightly different reasoning delivers the political liberties. For Rawls, when the constraints of the original position are applied to a reasonably affluent society, a democratic constitution will be derived in which all citizens have an equal right to participate in the legislative process. This is because democracy maintains the equal moral standing of the parties in the original position:

"If the state is to exercise a final and coercive authority over a certain territory, and if it is in this way to affect permanently men's prospects in life, then the constitutional process should preserve the equal representation of the original position to the degree that this is feasible."³⁷¹

In other words, if it is assumed that the promulgators are required to decide upon the best form of government (which is implicit in the broader search for principles of justice), it may well be that there is no rational reason to move from the position of equality conferred by the original position. Thus, when the constraints of the original position are applied to a reasonably affluent society, a democratic constitution will be derived in which all citizens have an equal right to participate in the legislative process since this will best preserve the equal representation of the original position.

³⁷⁰ Rawls, J., *A Theory of Justice*, Clarendon Press, 1972, p.207

³⁷¹ *Ibid*, p.222

This constitutional arrangement requires the protection of certain basic liberties, including the freedom to vote and stand for public office, freedom of speech and assembly, and the freedom to form political associations.³⁷² A just constitution also presupposes the rule of law and hence freedom from arbitrary arrest and seizure. Without these basic freedoms, a just constitution could not function as such.

For Rawls, the constitution must also ensure the fair value of the political liberties. Briefly, this means that those of equal talent and motivation should have the same chances of attaining positions of political authority irrespective of race, sex, or class. Moreover, all citizens should have roughly equal means to influence political power. This might mean compensating steps have to be taken. Property and wealth must be widely dispersed, and government funds should be provided to encourage free public discussion. Political parties should be independent of private economic interests, in case wealthy corporations and individuals acquire unfair political bargaining power.³⁷³ This idea of the fair value of liberty is an important one, to which we shall return.

For now, let us consider two central questions which arise from Rawls' broader argument on the priority of liberty. First, given a certain level of affluence, would rational promulgators necessarily prize the basic liberties more than an increase in wealth? Second, how are we to resolve conflict between these essential freedoms, if our only appeal is to 'the most extensive total system of equal basic liberties'?³⁷⁴ These two issues will be taken up below.

H.L.A. Hart and the Priority of Liberty

As mentioned, Rawls is aware that people may not place much value on personal liberty if they are hungry and poor. Nonetheless, where a minimum standard of living is achieved, people will begin to prize a 'free internal life' and the opportunity to pursue the specific 'ends and excellences to which they are drawn'. In addition, men will 'aspire to some control over the laws and rules that regulate their association,'

³⁷² Ibid, p.223

³⁷³ Rawls, J., *A Theory of Justice*, Oxford University Press, 1971, p.224-227

³⁷⁴ This is the question famously posed by H.L.A. Hart in his essay 'Rawls on Liberty and its Priority'. See Daniels, N. (ed.), *Reading Rawls*, Stanford University Press, 1989, p.230-252

either by directly participating in governmental affairs or else by sanctioning an elected representative to act on their behalf.³⁷⁵ Played out in the context of the original position, the promulgators will therefore understand that 'beyond some point' it becomes 'irrational' to acknowledge 'a lesser liberty for the sake of a greater material means'.³⁷⁶ In other words, when deciding the rules of justice for a relatively affluent society, the priorities of the promulgators will turn towards freedom of conscience and political liberty.

However, some critics have doubted that it is 'rational' to select all the basic liberties before an increase in wealth.³⁷⁷ It is true that if we were reasonably affluent and concerned with furthering our private ends, then we would place great importance on freedom of the person and freedom of conscience. Yet, is it necessarily the case that we would prefer the right to vote as opposed, say, to a significant increase in wealth? After all, the right to vote offers only a limited protection of one's interests – only large blocks of votes count in a democracy. The problem for Rawls, then, is that the basic liberties are unequal in terms of their impact and value in life. Hence, the basic freedoms would seem to be qualitatively distinguishable as more or less fundamental to the promulgators' interests. Not much can be achieved without liberty of the person – if one is a slave, one's options are radically curtailed; yet, one can realise many initiatives without having the right to stand for election, say. The rational requirement of the promulgators to select freedom of the person is therefore more pressing. Critics argue that Rawls overcomes this problem only at the expense of encumbering the promulgators with a highly moralised ideal of the free life. Hart, for example, suggests that the promulgators are cast as 'public-spirited' citizens who are unwilling to exchange the good of political life for 'mere material goods'.³⁷⁸ If this criticism holds, then Rawls' claim that the principles of justice are based purely on the rational self-interest of the promulgators is fatally undermined.

³⁷⁵ Rawls, J., *A Theory of Justice*, Clarendon Press, 1972, p.543

³⁷⁶ *Ibid.*, p.542

³⁷⁷ Lessnoff, M., *Political Philosophers of the Twentieth Century*, Blackwell, 1999, p.240; Macpherson, C.B., *Democratic Theory: Essays in Retrieval*, Clarendon Press, 1973, p.87-94; Hart, H.L.A., 'Rawls on Liberty and its Priority', *Reading Rawls*, Daniels, N. (ed.), Stanford University Press, 1989, p.252

³⁷⁸ Hart, H.L.A., 'Rawls on Liberty and its Priority', *Reading Rawls*, Daniels, N. (ed.), Stanford University Press, 1989, p.252

Rawls addresses this issue in the final pages of *Political Liberalism*. He accepts that a conception of the person 'in some sense liberal' underlies the argument for the priority of the basic liberties.³⁷⁹ However, he claims this is not an illicit ideological insertion, but rather a direct consequence of his conception of citizens as free and equal. It is not a moral ideal passed-off as rationality, but is rather a consequence of the 'reasonable' constraints that define the original position. Moreover, the notion of a 'public-spirited' citizen should not be confused with a more fundamental idea, namely, that persons are able to form and abide by a sense of justice - citizens are regarded as having a "certain natural political virtue without which hopes for a regime of liberty may be unrealistic."³⁸⁰ This defence arguably reflects a stronger conception of the person than Rawls was prepared to acknowledge in *A Theory of Justice*.

Hart also complains that Rawls' list of basic liberties is slightly arbitrary: even though Rawls accepts that his list of basic freedoms is not definitive, he nonetheless fails to adequately explain his selection.³⁸¹ Hart is particularly frustrated by the rather arbitrary way in which Rawls includes the right to personal property among the basic freedoms. Whilst the other liberties are either grounded in freedom of conscience or else flow from the political and legal requirements of a just constitution, the inclusion of personal property as a basic freedom seems to be an unargued assertion.³⁸² Hart is correct to point to Rawls' rather careless approach to this issue, but that is not to say there is no reason for rational promulgators to invoke the institution of personal property. For instance, it might be argued with Hayek that the freedom to hold personal property is itself a basic liberty, since it provides for a private space in which we can act unencumbered by social norms. Indeed, in the later work of Rawls, the promulgators' rational interest in personal property is clarified: "The role of this liberty is to allow a sufficient material basis for a sense of personal independence and self-respect."³⁸³ In other words, personal property is a requisite condition for realising a rational conception of the good.

³⁷⁹ Rawls, J., *Political Liberalism*, Columbia University Press, 1993, p.370

³⁸⁰ Ibid, p.370

³⁸¹ Hart, H.L.A., 'Rawls on Liberty and its Priority', *Reading Rawls*, Daniels, N. (ed.), Stanford University Press, 1989, p.237

³⁸² Ibid

³⁸³ Rawls, J., *Political Liberalism*, Columbia University Press, 1993, p.298

Nonetheless, a seemingly intractable problem remains. According to Rawls, though the basic freedoms detailed are potentially conflictual, this clash can be resolved by appealing to the greatest liberty. Rawls explains how this principle could render a determinate result by alluding to the rules of order in a debate, without which "freedom of speech loses its value."³⁸⁴ Whilst such rules of order might restrict our liberty to speak whenever we please, they are nonetheless required 'to gain the benefits' of free speech - otherwise the debate will deteriorate into to a rabble of unintelligible voices. In other words, the conflict between the freedom to speak uninterrupted by others and the freedom to challenge the speaker is resolved by forming rules of debate, which, whilst limiting the opportunity of speech in some circumstances, nonetheless improves the value of the liberty in question.

Now, this is all well and good, but as Hart points out, it is misleading to describe this resolution as yielding a 'greater liberty,' since this suggests that "no values other than liberty and dimensions of it, like extent, size, or strength, are involved."³⁸⁵ In truth, the rules of debate do not increase the *extent* of free speech (which would be a quantitative judgement), but rather secure the *value* of free speech (which is a qualitative judgement). In other words, the rules in question acknowledge the *point* of debate, i.e. that different protagonists should be allowed to express and consider various points of view. Yet, this being the case, we are making an appeal to evaluative judgements beyond that allowed by Rawls' first principle.

How, then, if we cannot appeal to the 'greatest liberty', can we resolve conflict between basic freedoms? In some cases, such as the imposition of rules of debate, a single solution would seem sensible to all. Other cases, however, yield more disparate responses. In such circumstances, there is no 'rational' solution, only an array of reasonable prescriptions. Hart gives the example of trespass laws, which prevent the public having a right of way through privately owned land. How do we determine, in this circumstance, whether the trespass laws reflect the correct balance between freedom of movement and the right to private property? Whilst Rawls acknowledges

³⁸⁴ Rawls, J., *A Theory of Justice*, Oxford University Press, 1971, p.203

³⁸⁵ Hart, H.L.A., 'Rawls on Liberty and its Priority', *Reading Rawls*, Daniels, N. (ed.), Stanford University Press, 1989, p.239-40

that conflicting freedoms might reasonably be settled in different ways,³⁸⁶ he casts this as a problem to be decided at the level of procedural justice, which can take account of contingent circumstances. Nonetheless, the clash between basic freedoms remains a significant problem for Rawls – there seems to be no determinate principle upon which the decisions of procedural justice could be grounded.

Rawls' Revision of the First Principle of Justice

In the final section of *Political Liberalism*, Rawls reformulates his first principle in order to exorcise its troublesome indeterminacy:

Each person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all.³⁸⁷

Two points should be made about Rawls' revised first principle. In terms of its implications for justice, it does not amount to a major reconstruction. Indeed, the central claim – that none of the basic liberties can be justifiably restricted for the sake of the public good or perfectionist values – remains the same. However, in terms of its derivation, the revised first principle is now more specifically related to a political conception of the citizen, which is latent in the public culture of a constitutional democracy.³⁸⁸

This justification represents a departure from *A Theory of Justice*, in which Rawls places significant emphasis on the deliberative outcome of the original position. He sharply distinguished between the self-interested and rational promulgators motivated to pursue their own good and the reasonable constraints that characterised the original position. These constraints were reflective of a specific moral point of view. In *Political Liberalism*, the balance changes: the outcome of the original position is now said to derive from a conception of citizens as rational and reasonable moral agents. Rather than operating solely from the perspective of their determinate self-interest, the

³⁸⁶ "Different opinions about the value of the liberties will, of course, affect how different persons think the full scheme of freedom should be arranged." Rawls, J., *A Theory of Justice*, Oxford University Press, 1971, p.230

³⁸⁷ Rawls, J., *Political Liberalism*, Columbia University Press, 1993, p.291

³⁸⁸ Ibid, p.34

parties are now additionally said to act in accordance with their moral personality.³⁸⁹ Thus, the parties are rationally autonomous in two ways:

"They are free within the constraints of the original position to agree to whatever principles of justice they think most to the advantage of those they represent; and in estimating this advantage they consider those persons' higher order interests."³⁹⁰

According to Rawls, the higher order interests of citizens are met by securing the conditions that allow for the full development of citizens' two moral powers: the capacity to act upon a sense of justice and the capacity for a conception of the good. These moral powers are presupposed by the idea of citizens advancing their determinate conception of the good within a system of justice.

Returning to the original position, the promulgators are motivated to secure the conditions necessary for citizens to effectively pursue determinate conceptions of the good with widely different contents; and in judging this the promulgators additionally consider the conditions necessary for the development and exercise of citizens' two moral powers.³⁹¹ The reasoning that considers the determinate good of citizens remains much as it did in *A Theory of Justice*. For instance, adumbrating principles of justice that secures freedom of conscience is said to be the most rational choice for promulgators placed under a veil of ignorance. The promulgators will not sanction a society based, say, on a single religious view, since they cannot be sure of the religious views of the citizens they represent; thus, in forwarding citizens' determinate conception of the good, it would be irrational to take a chance with religious freedom.

Yet, how does the motivation to secure the conditions for the development of the two moral powers affect the outcome of the original position? Let us first consider the capacity for a conception of the good. This is defined as the capacity to form, to revise, and to rationally pursue a determinate conception of the good.³⁹² This capacity might be understood as a means to a determinate conception of the good: since there

³⁸⁹ Galston, W., 'Moral Personality and Liberal Theory: John Rawls's 'Dewey Lectures'' *Political Theory*, 1982, p.496-7; See also Paul, J., 'Rawls on Liberty', *John Rawls: Critical Assessments of Leading Political Philosophers, Volume II: Principles of Justice I*, Kukathas, C. (ed.), Routledge, 2003, p.83

³⁹⁰ Rawls, J., *Political Liberalism*, Columbia University Press, 1993, p.74

³⁹¹ Ibid, p.76

³⁹² Ibid, p.312

is no guarantee that our present way of life is the most rational for us, our deliberative reason is instrumental in our assessment of whether we need to revise our ends. This, in turn, gives the promulgators further reason to secure freedom of conscience and its associated liberties,³⁹³ for they are not only interested in securing conditions under which citizens can pursue their self-chosen ends, they are also motivated to secure conditions that allow citizens to revise those ends. Liberty of conscience allows citizens to 'fall into error and to make mistakes', and hence is among the social conditions necessary for the development of citizens' capacity for a conception of the good.³⁹⁴ Rawls' argument is surely well made in this regard. It is not merely our determinate conception of the good that must be considered in the original position, but also our interest in revising this (by means of our deliberative reason). Will Kymlicka appreciates the force of this point in his dissection of religious freedom:

"A liberal society not only allows individuals the freedom to pursue their existing faith, but it also allows them to seek new adherents to their faith (proselytization is allowed), or to question the doctrine of their church (heresy is allowed), or to renounce their faith entirely and convert to another faith or to atheism (apostasy is allowed). It is quite conceivable to have the freedom to pursue one's current faith without having any of these latter freedoms... These aspects of a liberal society only make sense on the assumption that revising one's ends is possible, and sometimes desirable, because one's current ends are not always worthy of allegiance. A liberal society does not compel such questioning and revision, but it does make it a genuine possibility."³⁹⁵

Thus, we find that Rawls strengthens the reasoning behind freedom of conscience and association by appealing to our capacity to form, to revise, and to rationally pursue a determinate conception of the good, which is the first of citizens' two moral powers.

The second of citizens' two moral powers is the capacity for a sense of justice. Rawls is careful to point out that citizens' capacity for a sense of justice should not be confused with a determinate conception of justice. The parties in the original position

³⁹³ Freedom of association is required to give effect to liberty of conscience; for unless we are at liberty to associate with other like-minded citizens, the exercise of liberty of conscience is denied. Rawls, J., *Political Liberalism*, Columbia University Press, 1993, p.313

³⁹⁴ Rawls, J., *Political Liberalism*, Columbia University Press, 1993, p.313

³⁹⁵ Kymlicka, W., *Multicultural Citizenship*, Oxford University Press, 1995, p.82

are rationally autonomous representatives and as such are moved solely by considerations relating to what furthers the determinate conception of the good of the persons they represent: "no antecedent notions or principles of justice are to guide (much less constrain) the parties' reasoning".³⁹⁶ The capacity for a sense of justice refers only to citizens' ability to be moved by terms of social cooperation. Nonetheless, Rawls claims that citizens' capacity for a sense of justice motivates the parties to adopt principles securing the basic liberties and assign them priority. For example, a just and stable scheme of social cooperation, made effective by citizens' capacity for a sense of justice, advances citizens' determinate conceptions of the good. If citizens can rely on each other to abide by the rules of justice, then they are left free to pursue their own good in their own way. In other words, a scheme made stable by an effective public sense of justice is a better means to the good of citizens than a scheme that requires a severe and costly apparatus of penal sanctions. According to Rawls, the most stable scheme of social cooperation is 'justice as fairness', with its requirement for the priority of a scheme of basic liberties:

"The most stable conception of justice is one that is clear and perspicuous to our reason, congruent with and unconditionally concerned with our good, and rooted not in abnegation but in affirmation of our person... The two principles of justice answer better to these conditions than other alternatives precisely because... they are to be public and mutually recognised."³⁹⁷

To summarise on the revised argument from the original position: In promoting the interests of citizens, the promulgators are motivated to secure the conditions in which the two moral powers can be exercised and in which citizens can forward a determinate conception of the good with widely different contents. This is accomplished by adumbrating principles of justice that secure the primary goods (or all-purpose means) normally needed for this purpose.³⁹⁸ The principles of justice are then hierarchically ordered so as to protect the higher order interest of the parties. Thus, the basic liberties are accorded a superior place because they are required to

³⁹⁶ Rawls, J., *Political Liberalism*, Columbia University Press, 1993, p.315

³⁹⁷ Ibid, p.317

³⁹⁸ Rawls, J., *Political Liberalism*, Columbia University Press, 1993, p.76

advance any conception of the good and are fundamental for the exercise of the two moral powers, which any such conception presupposes.³⁹⁹

In modifying his account of the original position, Rawls looks to overcome one of the central problems identified by Hart, namely, that the parties to the original position have no clear grounds for preferring liberty to a given level of economic well-being. Rawls accepts that in *A Theory of Justice* citizens' rational interests were not sufficiently explained and that these failed to demonstrate what was asked of them.⁴⁰⁰ Hence he incorporates the idea of the citizens' higher order interests in securing the conditions required for the exercise of the two moral powers.

However, Rawls must also consider the problem of conflicting basic liberties. In *A Theory of Justice*, he wrongly supposed that the basic liberties could be "specified and adjusted so as to achieve the most extensive scheme of these liberties." He now accepts that this criterion, being purely quantitative, "does not distinguish some cases as more significant than others."⁴⁰¹ He acknowledges, then, that an appeal to the greatest liberty is incoherent, since liberty cannot be summed in a meaningful way - the expression 'greatest liberty' wrongly implies the existence of 'liberty' conceived as a homogenous and measurable whole. The 'best scheme of liberties' is not 'the most extensive.'⁴⁰² Rawls' revised principle requires that the basic liberties be moulded according to their adequacy (a qualitative criterion), not according to their extent (a quantitative criterion).

According to Rawls, a scheme of liberties is adequate if it allows for the exercise of the moral powers in 'two fundamental cases'. The first of these concerns 'the application of the principles of justice to the basic structure of society' and is connected with the capacity for a sense of justice. The second fundamental case concerns 'the application of the principles of deliberative reason in guiding our conduct over a complete life' and is connected with the capacity for a conception of

³⁹⁹ Ibid, p.304-6; Paul, J., 'Rawls on Liberty', *John Rawls: Critical Assessments of Leading Political Philosophers, Volume II: Principles of Justice I*, Kukathas, C. (ed.), Routledge, 2003, p.87

⁴⁰⁰ Rawls, J., *Justice as Fairness: A Restatement*, Harvard University Press, 2001, p.112

⁴⁰¹ Rawls, J., *Political Liberalism*, Columbia University Press, 1993, p.331

⁴⁰² Ibid, p.331

the good.⁴⁰³ The adequacy of each of the basic liberties is to be judged with reference to at least one of the two fundamental cases. The political liberties and freedom of thought "are to secure the free and informed application of the principles of justice, by means of the full and effective exercise of citizens' sense of justice, to the basic structure of society."⁴⁰⁴ By contrast, liberty of conscience and freedom of association "are to secure the full and informed and effective application of citizens' powers of deliberative reason to their forming, revising, and rationally pursuing a conception of the good over a complete life."⁴⁰⁵ The remaining basic liberties – the freedom and integrity of the person and the rights and liberties covered by the rule of law – are the necessary supports of the scheme as a whole.

Rawls accepts that some of the basic liberties may be more important than others, yet believes his revised justification provides a determinate criterion for deciding on the appropriate range of a basic liberty: "A liberty is more or less significant depending on whether it is more or less essentially involved in, or is a more or less necessary institutional means to protect, the full and informed and effective exercise of the moral powers in one (or both) of the two fundamental cases."⁴⁰⁶ In other words, the basic liberties are to be arranged, adjusted, and in some instances limited, depending on their significance for the exercise of the moral powers in the application of justice and deliberative reason.

Consider the basic liberty of free speech. According to Rawls, free political speech is necessary because it allows citizens to exercise their moral powers in applying the principles of justice to the basic structure of society.⁴⁰⁷ With this in mind, the basic liberty of free speech can be contoured to guarantee certain points of principle deemed essential for citizens to be moved by a sense of justice in the first fundamental case. Rawls suggests three points of principle should be respected. First, there can be no crime of seditious libel. If citizens are not free to criticise the government, then they are unable to publicly endorse the principles of justice 'in light of their own

⁴⁰³ Ibid, p.332

⁴⁰⁴ Ibid, p.334

⁴⁰⁵ Ibid, p.334

⁴⁰⁶ Rawls, J., *Political Liberalism*, Columbia University Press, 1993, p.335

⁴⁰⁷ Ibid, p.342

reason'.⁴⁰⁸ Citizens' capacity to be moved by a sense of justice is therefore undermined when criticism and dissent are suppressed. The other two principles are the necessary supports of this first point: the discussion of political, religious and philosophical doctrines can never be censored and as such there can be no prior restraints on freedom of the press; and the advocacy of revolutionary and subversive doctrines is fully protected, meaning there should be no restrictions on the content of political speech. To forego any of these points of principle is to undermine the free and informed use of our public reason in judging the justice of the basic structure of society.

Rawls also believes that his revised criterion suggests the prohibition of certain types of speech that do not affect citizens' capacity to form a sense of justice. For instance, there are no special protections given to freedom of speech when discussing private citizens, since this has "no significance at all for the public use of reason to judge and regulate the basic structure."⁴⁰⁹ Indeed, the defamation of private persons should be prohibited since it is in addition 'a private wrong'.⁴¹⁰ Other types of speech go beyond the requirements of justice. For instance, incitements to the 'imminent and lawless use of force' are too disruptive of the democratic process to be permitted by the rules of order of political debate.⁴¹¹ In other words, violence is not a necessary means for democratic citizens to assess the basic structure of society in light of their own reason. In this specific case, then, freedom of speech is justifiably restricted. To this extent, Rawls believes his revised criterion is able to deliver a scheme of basic liberties suitably adjusted to accommodate the exercise of the moral powers in the two fundamental cases.

Still, it may be that Rawls unnecessarily complicates matters by referring to the moral powers of citizens in the two fundamental cases. Whilst certain alterations were forced on Rawls by Hart's insightful critique, it is doubtful that he needed to make such a direct appeal to the moral personality of citizens in order to contour the scheme of liberties. Indeed, this revision is included at considerable cost to the elegance and lucidity of his argument. In truth, his efforts to provide for an adequate scheme of

⁴⁰⁸ Rawls, J., *Justice as Fairness: A Restatement*, Harvard University Press, 2001, p.91

⁴⁰⁹ Rawls, J., *Political Liberalism*, Columbia University Press, 1993, p.336

⁴¹⁰ Ibid, p.336

⁴¹¹ Ibid.

basic freedoms might not require the complex criterion he suggests; the conflict between basic liberties might be partially resolved by appealing to an independent conception of right understood in relation to the interests of rational promulgators subject to a veil of ignorance. And where conflict is not resolved, it may be that rational reflection cannot provide a satisfactory conclusion: not all questions of justice have an *a priori* answer.

The Conflict of Right and Right

Is it possible to settle conflict between the basic liberties without appealing to the two fundamental cases? I hope to show that we can go some of the way towards shaping a scheme of liberties without making an appeal to criteria beyond the terms of the original position. Consider the argument of Jurgen Habermas, who takes Rawls to task over the 'unresolved competition' between the 'liberties of the ancients' and the 'liberties of the moderns'.⁴¹² In particular, Habermas is critical of the way Rawls limits the scope of the political liberties in order to protect civil liberties. This is problematic, he claims, because Rawls holds that all the basic liberties are co-original in his normative framework. That these liberties have the same root suggests that civil liberties cannot be imposed as external constraints on the democratic process.⁴¹³ Habermas complains that Rawls nonetheless deduces a 'rigid boundary' between the political and private spheres: "this boundary is set by basic liberal rights that constrain democratic self-legislation, and with it the sphere of the political, *from the beginning*, that is, prior to all political will formation."⁴¹⁴ In other words, Habermas is critical of Rawls' suggestion that there should be constitutional principles allowing for the constraint of majoritarian rule, since this quells the 'radical democratic embers' that existed in the original position.

In response, Rawls denies that there is an unresolved competition between the political and civil liberties. Rather, it is a matter of 'weighing the evidence one way or the other'.⁴¹⁵ To this extent, Rawls refers to the central range of the liberties in

⁴¹² This, of course, was Constant's expression, used to distinguish between political and civil liberties.

⁴¹³ Rawls, J., *Political Liberalism*, Columbia University Press, Second Edition, 1996, p.396

⁴¹⁴ Habermas, J., 'Reconciliation Through the Public Use of Reason: Remarks on John Rawls's Political Liberalism', *Journal of Philosophy*, March 1995, p.128

⁴¹⁵ Rawls, J., *Political Liberalism*, Columbia University Press, Second Edition, 1996, p.416

question. The scope of some liberties may have to be lessened if the point of other liberties is to be protected. The point of political freedom is to allow citizens to promote their determinate good through the political process. There are no prior or external bounds on this until we consider the central range of other basic liberties, such as freedom of conscience. In order to attain an appropriate balance between these competing claims, one freedom may have to be restrained in order to secure the central range of the other. Of course, Habermas complains that Rawls consistently gives precedence to the civil liberties. Yet, this is not without good cause. Consider the rational deliberations of promulgators acting to advance the determinate interests of citizens from behind a veil of ignorance. Here, the political liberties are said to be the 'necessary institutional means' for the promotion of other basic liberties, such as freedom of conscience.⁴¹⁶ Moreover, we have a *prima facie* reason for restraining the political liberties, namely, that an unchecked majority rule may result in collective tyranny; such oppression would do serious damage to the determinate interests of those in the minority.⁴¹⁷ Thus, the promulgators have reason to contour the political liberties such that freedom of conscience is appropriately secured. Again, that is not to say the political liberties are not basic – they are the essential institutional means to protect and preserve other basic liberties; we should simply point out that not all the basic liberties are valued for the same reasons and that a suitable process of adjustment will allow us to arrive at a basic scheme of liberties that is equally advantageous to all.⁴¹⁸

Other critics, such as John Gray, argue that conflict between the basic liberties can only be resolved by appealing to a particular account of the good. Consequently, incompatible applications of Rawls' principles can be justified by appealing to different human interests, which destroys the possibility of a strictly 'political' liberalism whose application is independent of any comprehensive religious, moral or philosophical doctrine.⁴¹⁹ This argument betrays Gray's broader suspicion of freestanding principles of right that are capable of arbitrating between competing conceptions of the good. Gray maintains that principles of right cannot be insulated from the force of value incommensurability:

⁴¹⁶ Rawls, J., *Justice as Fairness: A Restatement*, Harvard University Press, 2001, p.143

⁴¹⁷ Rawls, J., *A Theory of Justice*, Clarendon Press, 1972, p.228

⁴¹⁸ Rawls, J., *Justice as Fairness: A Restatement*, Harvard University Press, 2001, p.143

⁴¹⁹ Gray, J., *Two Faces of Liberalism*, Polity Press, 2000, p.71-5

"The central flaw in this common reasoning is in the assumption that principles of liberty or justice can be insulated from the force of value-incommensurability... This is an illusion, since there are conflicting liberties, rival equalities, and incompatible demands of justice... [If] negative liberties do not form a harmonious system but are often incompatible with one another, we will resolve such conflicts only if we attach weights or values to the rival liberties. Sometimes, however, we will have no measure whereby we can give the rival liberties values in a common currency; their values will be incommensurable."⁴²⁰

Gray's argument is not particularly original – it is a fusion of ideas expressed elsewhere by Berlin and Hart. Even then, Rawls' framework can answer Gray's objections. In the first instance, it may be that Gray overstates value conflict and understates the extent to which the basic liberties are mutually supportive. Whilst he acknowledges that some basic freedoms coalesce, he underestimates the extent to which individual liberties are mutually sustaining. For instance, if a free media can scrutinise government policy, it is unlikely that that government will have the scope to undermine the basic liberties of its political opponents (as often happens in states without a free press). Equally, freedom of speech and assembly would not be worth much without freedom from arbitrary arrest and seizure; otherwise, a government could swiftly eradicate any dissenting voices. In other words, the effectiveness of some freedoms requires the institution of other freedoms.

Of course, that is not to say conflict cannot exist between the basic liberties. Again though, this does not mean that Rawls must abandon his revised first principle of justice since he accepts that the regulation of the basic scheme of liberties might require the restriction of certain specific liberties. Note that this does not mean annihilation – to limit freedom of speech in some circumstances does not mean it is therefore incoherent to claim it as a right. Gray's tendency to think in absolutes leads his critique of Rawls off course. He argues that Rawls' ideal regime is unattainable because "a regime in which all basic liberties are *fully* protected is not even conceivable."⁴²¹ Compare this with Rawls' claim that "each person has an equal right to a fully *adequate* scheme of equal basic liberties which is compatible with a similar

⁴²⁰ Gray, J., *Berlin*, Fontana Press, 1995, p.147

⁴²¹ Gray, J., *Two Faces of Liberalism*, Polity Press, 2000, p.80 Emphasis added

scheme of liberties for all."⁴²² Indeed, Rawls explicitly argues against the idea that all basic liberties should be fully protected:

"Since the basic liberties may be limited when they clash with one another, none of these liberties is absolute; nor is it a requirement that, in the finally adjusted scheme, all the basic liberties are to be equally provided for (whatever that might mean). Rather, however these liberties are adjusted to give one coherent scheme, this scheme is secured equally for all citizens."⁴²³

Given this mandate to contour a scheme of liberties, the problems identified by Gray become less troublesome. Consider the conflict between personal property rights and freedom of assembly. The liberty to acquire personal property grants the material basis for a sense of personal independence and self-respect, which all citizens have an interest in securing. By contrast, freedom of assembly is necessary in order to protect citizens' freedom of speech, without which citizens' would be rendered impotent in the political process. Clearly, these liberties cannot both be fully protected: the ownership of personal property (such as land and housing) prevents citizens from assembling wherever they please. In one sense, then, citizens' determinate interests are harmed, for they cannot have everything. Yet, that is not to say an appropriate balance cannot obtain between these competing liberties. If we cast the problem back to the original position, we might ask what balance would promote the determinate good of citizens. The promulgators, subject to a veil of ignorance, must decide whether it is in citizens' interests to constrain freedom of assembly in order to grant personal property rights. It is hard to imagine that the interests of citizens would be protected if everyone were allowed to tramp wherever they pleased (indeed, this is a condition of Hobbes' state of nature, which self-interested persons are motivated to escape); and by granting property rights, citizens are accorded a private space in which they can enact their conception of the good. Thus, there is no reason to think that the institution of personal property would offend against citizens' interest in securing freedom of assembly.

⁴²² Rawls, J., *Political Liberalism*, Columbia University Press, 1993, p.291 Emphasis added

⁴²³ Ibid, p.295

Indeed, an effective right to freedom of assembly does not even entail unimpeded access to *public* places (in order to express our political views). As Rawls points out, these extensions of liberty, when granted to all, are so 'unworkable' and 'socially divisive' that they would greatly reduce the effective scope of freedom of speech. For Rawls, then, there must be "reasonable regulations relating to time and place, and the access to public facilities."⁴²⁴ At the same time, it would be unfair to impose heavy restrictions on the use of public places for political speech, since this might adversely affect poorer communities that lack the necessary funds for other forms of political expression.⁴²⁵ The precise details of regulations pertaining to public assembly would obviously have to consider contingent circumstances. Indeed, this is an important point: it would be wrong to think that the conflict between basic liberties has an *a priori* solution. Rawls is clear that there can be no objective reading of the right at the legislative and constitutional stages. Some legislators may favour more extensive political freedoms, others may shore up the right to privacy; and a given judgement will often be dependent on contingent circumstances. The point, then, is not to give a final judgement on the boundaries between the public and private spheres, only to acknowledge the need to contour the liberties in accordance with some process of adjustment and balancing at the level of procedural justice.

Crucially, however, the point of the basic liberties can only be respected if their worth is maintained: "The worth of liberty is not the same for everyone. Some have greater authority and wealth, and therefore greater means to achieve their aims."⁴²⁶ As such, Rawls emphasises the relationship between the basic liberties and the material conditions that are necessary to guarantee their *value*. He claims the political liberties should have their fair value maintained, while the value of the non-political liberties should be regulated in accordance with the difference principle. The cogency of this argument will be assessed below.

⁴²⁴ Rawls, J., *Political Liberalism*, Columbia University Press, 1993, p.340

⁴²⁵ *Ibid*, p.358

⁴²⁶ Rawls, J., *A Theory of Justice*, Oxford University Press, 1971, p.204

The Worth of the Basic Liberties

As mentioned, Rawls distinguishes between liberty and the worth of liberty. Whereas liberty is 'represented by the complete system of the liberties of equal citizenship', the worth of liberty to persons and groups is 'proportional to their capacity to advance their ends within the framework the system defines.'⁴²⁷ According to Rawls, a just constitution will not only provide for a scheme of basic liberties, it will also ensure the fair value of the political liberties, such that all citizens have a roughly equal political influence. The first principle of justice can therefore be fully articulated as follows:

Each person has an equal claim to a fully adequate scheme of equal basic rights and liberties...compatible with a similar scheme of liberties for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value.⁴²⁸

Notably, this guaranteed fair value, which is roughly equal for each citizen, does not extend to all the basic liberties. For Rawls, the value of the non-political liberties (those which pertain to our private ends) should be determined by the difference principle.

Yet, Norman Daniels argues there is no reason, from the perspective of the promulgators in the original position, to regulate the worth of freedom through the difference principle. For Daniels, equal liberty is a 'hollow abstraction' if it is not also accompanied by 'equality in the ability to exercise liberty'. As such, the promulgators have a rational interest in securing the equal worth of liberty, given that they do not know their position in society and given that they are primarily concerned with the advancement of their ends.⁴²⁹ In other words, they would not sanction the inequalities of wealth and income potentially allowed by difference principle since this would reduce the relative worth of liberty for the worst off members of society and deliver a substantial competitive advantage to the affluent. Daniels would therefore prefer to

⁴²⁷ *Ibid.*, p.204

⁴²⁸ Rawls, J., *Political Liberalism*, Columbia University Press, 1993, p.5

⁴²⁹ Daniels, N., 'Equal Liberty and Unequal Worth of liberty', *Reading Rawls*, Daniels, N. (ed.), Stanford University Press, 1989, p.278

see the first principle of justice recast with a stronger 'egalitarian punch', such that it secured the fair value of all the basic liberties.

However, contrary to Daniels, it is unlikely that a first principle of justice committed to the equal value of freedom would produce desirable results. A revised first principle (that guaranteed the equal value of freedom) might entail that wealth and income should be distributed equally. This would make the basic liberties equally valuable for all citizens by giving them equal access to primary social goods. Yet, as Rawls points out, if a society distributes social and economic resources equally in order to equalise the worth of freedom for all, it would be ignoring other pressing concerns such as economic efficiency, wealth generation and so on. The result of extreme egalitarian distributive principles might ensure equal worth of the basic freedoms, but at the cost of degrading the absolute value of the (non-political) freedoms – it would diminish the capacity of individuals to advance their ends. If a command economy suffers from inefficiency and limited wealth production, then the equal freedoms it provides for will be worth less than might have been the case if economic justice was governed by the difference principle. In other words, social policy designed to ensure the equal value of freedom is self-defeating if it is acquired at the expense of widespread poverty. This type of dogmatic egalitarianism is, for Rawls, simply irrational.⁴³⁰ By contrast, if social and economic resources were regulated by the difference principle, it would protect the value of freedom for the worst-off in society in absolute terms. For Rawls, this solution is more amenable to the interests of rational and mutually disinterested promulgators looking to advance their ends.⁴³¹

Rawls provides a further reason as to why the first principle of justice should not provide for the equal value of the basic liberties, namely, that an extreme egalitarianism might be socially divisive. If the state were to protect the equal value of freedom for all, it may be required to support very particular or specific goals. For example, Daniels makes the point that the equal value of religious freedom might require the public funding of expensive pilgrimages, which are required by certain

⁴³⁰ Rawls, J., *Political Liberalism*, Columbia University Press, 1993, p.329

⁴³¹ Ibid, p.329

religions.⁴³² Rawls thinks this is absurd – from the perspective of political justice, this means that pilgrims are entitled to a greater proportion of public funds than atheists, say, on the grounds that it takes more to satisfy the value of their religious freedom. Such inequity is bound to be socially divisive, and lead to civil unrest. At any rate, the point of justice is to ensure an appropriate distribution of primary goods (irrespective of the ends individuals choose to pursue). Thus, the case for upholding the equal value of all the basic liberties is quite unconvincing.

Still, there is problem for Rawls in that the difference principle does not take account of citizens' different capacities to convert wealth into agency outcomes. This is especially important in relation to disabilities or other disadvantageous circumstances. As Amartya Sen points out: "Since the conversion of these primary goods and resources into freedom of choice...may vary from person to person, equality of holdings of primary goods or of resources can go hand in hand with serious inequalities in actual freedoms enjoyed by different persons."⁴³³ Thus, if the difference principle is to regulate the worth of the non-political liberties, the result will be that people with disabilities will be placed in a position of disadvantage relative to the able bodied because the former have to spend more of their resources to achieve similar agency outcomes.

Rawls responds to this charge by making a counter-factual assumption that citizens have the moral, intellectual and physical capacities that enable them to be fully cooperating members of society over a complete life. In other words, the principles of justice are derived from a conception of the person stripped of the psychological and physical differences that characterise actual human beings. The principles of justice 'specify the fair terms of cooperation' among free and equal persons.⁴³⁴ Still, this raises the question: how will the mentally and physically disabled fare in Rawlsian society given that their additional needs are not recognised at the level of the basic structure of society? Rawls responds by casting this problem as an issue to be settled at the level of legislative justice. At this stage, "the prevalence and kinds of misfortunes are known and the costs of treating them can be ascertained and balanced

⁴³² Daniels, N., 'Equal Liberty and Unequal Worth of liberty', *Reading Rawls*, Daniels, N. (ed.), Stanford University Press, 1989, p.267

⁴³³ Sen, A., *Inequality Reexamined*, Oxford University Press, 1992, p.81

⁴³⁴ Rawls, J., *Political Liberalism*, Columbia University Press, 1993, p.183

along with total government expenditure."⁴³⁵ In principle, however, he agrees with Sen that basic capabilities 'are of first importance' and that the use of primary goods is always to be assessed 'in the light of assumptions about those capabilities'.⁴³⁶

Let us now consider why Rawls believes that the political liberties in particular should have their fair value guaranteed. Rawls is adamant that this guarantee cannot be grounded on any perfectionist account of the human being as a political animal. Democratic self-government cannot be held as a pre-eminent good; it is but one conception of the good among many. Rather, the political liberties must have their equal value maintained since this is a necessary feature of just legislation and a fair political process. For Rawls, this means that the worth of the political liberties to all citizens, whatever their social or economic position, "must be approximately equal, or at least sufficiently equal, in the sense that everyone has a fair opportunity to hold public office and to influence the outcome of political decisions."⁴³⁷

According to Rawls, the competitive nature of democratic politics means that disparities in wealth and income can dramatically affect the worth of the political liberties, more so than for other liberties. Our private ends are to a lesser extent in competition with each other, especially when governed by the difference principle. Citizens can often advance their specific ends fairly and without conflict. In other words, the 'social space' in which individuals can pursue their vision of the good is extensive. By contrast, the public sphere is characterised by a more limited social space, which generates greater conflict and competition. Here, the effects of inequalities in wealth and income are amplified in relation to the capacity of individuals to advance their ends. Even allowing for the governance of the difference principle, disparity in wealth can generate considerable harm to the fairness of the political process. This is because it engenders an effective competitive advantage for those with the financial means or requisite bargaining power. Justice as fairness cannot allow such inequality in the value of political liberty.

⁴³⁵ Ibid, p.184

⁴³⁶ Ibid, p.183

⁴³⁷ Ibid, p.327

How, then, are we to ensure the fair value of the political liberties? Rawls admits that the issue is 'complex and difficult' and that the requisite historical experience and theoretical understanding may be lacking. Nonetheless, "one guideline for guaranteeing fair value seems to be to keep political parties independent of large concentrations of private economic and social power."⁴³⁸ Rawls' argument seems to be informed by the subversive effects of unregulated private finance on the US political process. Although legal argument is ongoing, the US constitution does not forbid extensive individual freedom in relation to the financing of political parties, which potentially gives wealthy citizens a disproportionate degree of political power. If I am a billionaire I can make significant financial contributions to *both* major parties; in return, my patronage can buy me significant political influence (irrespective of which party gains power). The result of this financial freedom is that citizens with more money have greater political power, which is an assault to the idea that each citizen is entitled to "fair and equal access to the political process as a public facility."⁴³⁹ Consequently, "public financing of political campaigns and election expenditures, various limits on contributions and other regulations are essential to maintain the fair value of the political liberties."⁴⁴⁰

However, do limitations on the private financing of political parties not unjustly limit one's political freedom? Rawls believes not - it is entirely acceptable to prevent large contributions from corporations or wealthy individuals going to political parties or candidates for election if it results in the fairer value of the political liberties:

"Such a prohibition may be necessary so that citizens similarly gifted and motivated have roughly an equal chance of influencing the government's policy and of attaining positions of authority irrespective of their economic and social class. It is precisely this equality which defines the fair value of the political liberties."⁴⁴¹

Indeed, Rawls demonstrates at length the injustice of the US Supreme Court in not allowing for such regulation and restriction. In *Buckley vs. Valeo* the Court ruled that such provisions place direct and substantial restrictions on political speech and that

⁴³⁸ Rawls, J., *Political Liberalism*, Columbia University Press, 1993, p.328

⁴³⁹ Ibid, p.328

⁴⁴⁰ Ibid, p.357

⁴⁴¹ Ibid, p.358

the government had no business in restricting the speech of some in order to enhance the voice of others.⁴⁴² Yet, for Rawls, this judgement not only contradicts judgement rendered elsewhere by the Court, but it actively endorses the view that fair representation in the political process accords to the amount of financial influence effectively asserted. For Rawls this is an assault on what we understand by justice. Justice requires a political procedure that secures for all citizens a full and equally effective voice in a fair scheme of representation.⁴⁴³

The Instrumental Value of Liberty and Rawls' Anti-perfectionism

Let us finally explore the way in which Rawls' instrumental view of liberty supports his anti-perfectionism more broadly. In pure conceptual terms, Rawls agrees with MacCallum: the skeletal structure of an expression of freedom is best captured by the XYZ formula – X is free from Y in order to do Z. I have already cast doubt over the adequacy of this position,⁴⁴⁴ partly because it fails to appreciate the value that we place on being free to choose. Whilst we must distinguish between freedom and choice, and whilst choice is not sufficient for the existence of freedom (for I may be forced to choose), the *value* of freedom derives from our desire to choose uncoerced and unthreatened. Therefore, freedom is valued inasmuch as it permits choice *in a general sense*, a point that is obscured by MacCallum's argument. All the same, Rawls has a specific reason for abiding by MacCallum's XYZ formula, namely, that he wants to portray freedom as a means to the pursuit of our purposes. The component Z necessarily speaks of the instrumental value of freedom - it represents the positing of an end at which our freedom is being directed. Consequently, our freedom is valuable only insofar as Z is valuable.

Rawls' focus on the instrumental value of freedom is necessary for two reasons: first, for the coherence of the original position; and second, for his articulation of a strictly political liberalism. Let us deal with the first point. In the initial set-up of the original position, the promulgators look to secure social primary goods, defined as all-purpose means for the pursuit of purposes. According to Rawls, all rational persons whose

⁴⁴² Rawls, J., *Political Liberalism*, Columbia University Press, 1993, p.360

⁴⁴³ Ibid, p.361 This view is also supported by Ronald Dworkin, who wishes to see 'reasonable expenditure limits on political campaigns'. Dworkin, R., *Sovereign Virtue*, Harvard University Press, 2000, Chapter 10

⁴⁴⁴ See Introduction, p.3,4

primary interest is the satisfaction of their ends desire social primary goods. Although such ends are multifarious and divergent, there are certain goods that are relevant to any plan of life. One such primary good is liberty. Hence, whatever one's system of ends might be, liberty is an all-purpose means. Consequently, it is valuable in a purely instrumental sense. A more specific value cannot be attributed to liberty since the promulgators are unaware of their thick theory of the good and hence are unable to know whether they view liberty as being valuable in itself – as those who believe in the intrinsic value of making a free choice would claim – or valuable as a constitutive ingredient of another good, such as autonomy. In this sense, Rawls affirms the instrumental value of liberty as a consequence of the limitations incumbent upon the promulgators under the veil of ignorance.

Nonetheless, this is an incomplete appraisal of Rawls' reasons for casting freedom as instrumentally valuable. In order to understand this more fully, it is necessary to elaborate upon the concept of the rational good. According to Rawls, a man is happy when he is more or less successful in the pursuit of his rational plan of life. In other words, "the good is the satisfaction of rational desire."⁴⁴⁵ Rationality is itself instrumentally conceived and hence is in no way associated with one true end; it is compatible with a plurality of disparate ends. As such, it is reasonable to assume that the individual's rational plan of life may alter according to changing circumstances or feeling. It is this tendency to revise one's conception of the good that supports the central value of freedom:

"As free persons, citizens recognise one another as having the moral power to have a conception of the good. This means that they do not view themselves as inevitably tied to the pursuit of the particular conception of the good and its final ends which they espouse at any given time. Instead, as citizens, they are regarded as, in general, capable of revising and changing this conception on reasonable and rational grounds. Thus it is held to be permissible for citizens to stand apart from conceptions of the good and to survey and assess their various final ends."⁴⁴⁶

⁴⁴⁵ Rawls, J., *A Theory of Justice*, Oxford University Press, 1971, p.93 The oxymoronic 'rational desire' is more fully explained as the rational pursuit of desired ends. To be rational is to be able to relate means and ends in a way that will advance one's ambitions.

⁴⁴⁶ Rawls, J., 'Kantian Constructivism in Moral Theory', *Collected Papers*, Harvard University Press, 1999, p.331 See also Rawls, J., 'Social Unity and Primary Goods', *Collected Papers*, Harvard University Press, 1999, p.366

For Rawls, then, freedom is valuable not only because it allows for the rational pursuit of the good, but also because it allows for a revision of that good. To pursue one's ends rationally is merely to establish appropriate means; it says nothing of the inalterability of those ends. Indeed, reasonable people can expect to alter their notion of the good across time, depending on contingent circumstance, shifting priorities, internal reflection and so on. I may dedicate all my energies and time to writing a great novel only to discover that it is human relationships that holds true value; and, in time, I may also reject this ideal, preferring to pursue a life of travel and adventure. The point is, our ends shift with time, place, and temper, and so our freedom is valuable inasmuch as it allows us to reassess the value of our projects.

This portrayal of a pluralistic rational good, defined in part by its revisability, speaks not only of the instrumental value of freedom, but also of an anti-perfectionist view of life more broadly. Perfectionists might argue that human fallibility is one reason to support a determinate vision of a common or objective good. In fact, the contrary is true. That I do not comprehend an unchanging rational good does not thereby justify imposing an unalterable ideal on me. In the first instance, how would we determine which vision of the good should be followed? As Rawls points out, it is a 'given' that there is a 'plurality' of 'non-negotiable' and 'firmly-rooted' comprehensive theories of the good.⁴⁴⁷ Reasonable people may disagree about the ultimate ends of life because our mutual powers of reason and judgement often diverge over questions of source, evidence, meaning and weight. Such disagreement is also entailed by the fragmentation and incommensurability of values. In making these claims, Rawls follows Nagel and Berlin.⁴⁴⁸

The fact of reasonable pluralism underlies much of Rawls' thinking in *Political Liberalism*, which is centrally concerned with the following question: "How is it possible for there to exist over time a just and stable society of free and equal citizens who still remain profoundly divided by reasonable religious, philosophical, and moral doctrines?"⁴⁴⁹ Rawls' answer to this lies in his articulation of a freestanding political conception of justice that derives from an 'overlapping consensus', or ideas latent in a

⁴⁴⁷ Rawls, J., *Political Liberalism*, Columbia University Press, 1993, p.314

⁴⁴⁸ See Nagel, T., *Mortal Questions*, Cambridge University Press, 1979 and Berlin, I., *Four Essays on Liberty*, Oxford University Press, 1969

⁴⁴⁹ Rawls, J., *Political Liberalism*, Columbia University Press, 1993, p.47

public culture. For Rawls, a political conception of justice is acceptable to people who nonetheless affirm very different philosophical and religious doctrine; even though such comprehensive views might be inconsistent with each other, they are compatible with political liberalism. This is partly because political liberalism does not derive from a comprehensive philosophical view, as found in Kant or Mill, but is grounded on values that are specifically applied to the basic structure of society. Political liberalism is confined to the political sphere – it is concerned with the right, not the good.

26.

We therefore find another reason for focussing on the instrumental value of liberty: it is invoked as a strictly political value that is not tied to a comprehensive philosophical view. This would not be the case if freedom were portrayed as being valuable in itself (as in Berlin), or valuable as a constituent component of some more basic good like autonomy (as in Raz) or individuality (as in Mill). This would render liberty a sectarian value and hence would become less acceptable to those whose comprehensive moral view is inconsistent with the intrinsic or constitutive value of freedom, such as those with strong religious views. Rawls' argument for liberty therefore diverges from traditional defences at the point where liberty becomes attached to a comprehensive viewpoint – freedom can only be presented as a *means* to a comprehensive perspective, if political liberalism is to obtain.

In order to demonstrate this, let us return to the idea of reasonable pluralism and its relation to the value of liberty. Consider the traditional argument, invoked since the Wars of Religion, that freedom of conscience and toleration sensibly accommodates divergent beliefs in contrast to the imposition of an overarching conception of the good. The argument runs as follows: even if there are compelling reasons to force a determinate vision of the good on individuals, its worth would be lost on those who disagreed with it. If I commit to a vision of the good not because I understand its value, but because I fear the repercussions of not submitting to it, then the point of the good is beyond me. As such, the good – if it is to have any worth at all – must be lived from the inside. Even though I may be wrong about my chosen ends – they may be foolish or misguided – I am more likely than anyone else is to be able to ascertain my good; and anyway, I would rather be free to determine my own life (even if it goes badly), than allow another to determine it for me (even if it goes well).

Notably, whilst this traditional argument for liberty and tolerance begins from the fact of divergent beliefs, it ultimately appeals to the intrinsic worth of autonomous choice, which is inconsistent with Rawls' quest for a strictly political liberalism. In particular, the idea that a life characterised by mistake and regret is valuable simply because freely chosen does not sit well with anti-perfectionist principles. Neither would the value of autonomy always be compatible with certain religious views. If Rawls is to derive a political liberalism, then, he must use a concept of liberty that is amenable to all reasonable comprehensive doctrines.

For Rawls, the state should not impose a certain religious or philosophical ideal upon its citizens, including a specific view of the worth of a free or autonomous life. Yet, this does not mean, as Nozick argued, that the state should leave individuals alone, for better or worse. Rather, public funds should be distributed such that individuals are empowered in their pursuit of the good. Rawls favours measures that assures for all citizens "adequate all-purpose means to make effective use of their liberties and opportunities."⁴⁵⁰ This strong egalitarian perspective is manifest at the institutional level through equality of opportunity and through the difference principle. Again, it is important to point out that this is not an attempt to 'pattern' society. Rawls is clear that the use of public funds should not be distributed according to any perfectionist principle:

"The principles of justice do not permit subsidising universities and institutes, or opera and the theatre, on the grounds that these institutions are intrinsically valuable. Taxation for these purposes can be justified only as promoting directly or indirectly the social conditions that secure the equal liberties and...the long term interests of the least advantaged."⁴⁵¹

For Rawls, individuals should be provided with the basic goods that will enable them to pursue their subjectively derived conceptions of the good. This means a society must provide for the basic needs of its citizens: a 'social minimum' must be observed, which entails family allowances and benefits for the sick or unemployed, or some

⁴⁵⁰ Rawls, J., *Political Liberalism*, Columbia University Press, 1993, p.6

⁴⁵¹ Rawls, J., *A Theory of Justice*, Oxford University Press, 1971, p.332

kind of negative income tax.⁴⁵² It also means that fair equality of opportunity should be upheld, meaning those of equal talent and motivation should have the same educational or cultural opportunities irrespective of their class, sex or race. In addition, there should be an attempt to secure the fair value of the political liberties through regulations that prevent 'concentrations of power' and encourage the 'wide dispersal of property.'⁴⁵³ Finally, there should be a general facilitation of private ends through the governance of the difference principle. This means there should be an equal distribution of wealth unless inequalities are to the benefit of the least well off. Rawls' substantive prescriptions for social policy can be summarised as follows:

- a. Public financing of elections and ways of assuring the availability of public information on matters of public policy.
- b. Fair equality of opportunity, especially in education and training.
- c. A decent distribution of income and wealth: all citizens must be assured the all-purpose means necessary for them to take intelligent and effective advantage of their basic freedoms. This does not merely entail provision for food, clothing, housing or other basic needs, but rather a system that ensures all the basic liberties are meaningfully held.
- d. Social and economic policies that provide all citizens with an opportunity to work. Lacking a sense of long-term security and the opportunity to work is destructive of self-respect and generates social exclusion, which can lead to self-hatred, bitterness and resentment.
- e. Basic health care assured to all citizens⁴⁵⁴

For Rawls, the types of institutions that derive from the two principles of justice promote a 'property owning democracy'. This, he tells us, is distinct from the idea of a welfare state, which only seeks to assist those who lose out through accident or misfortune by providing benefits such as unemployment compensation or medical care. Importantly, the welfare state is compatible with large and inheritable inequalities of wealth, yet such disparity undermines the fair value of the political liberties and offends against the difference principle. By contrast, a property owning democracy not only protects against misfortune and accident but it additionally

⁴⁵² Ibid, p.275

⁴⁵³ Ibid, p.277

⁴⁵⁴ Rawls, J., *Political Liberalism*, Columbia University Press, Second Edition, 1996, p.lviii-lix

empowers all citizens to manage their own affairs and to cooperate on a footing of mutual respect under 'appropriately equal conditions'. This is achieved through a system of competitive markets and through the dispersal of ownership of wealth and capital.⁴⁵⁵

In a property owning democracy, Rawls believes individuals will be empowered in their pursuit of the good. Individuals are not told how to live, but are provided with the support that facilitates meaningful choice. Again, there is a great difference between the philosophy of a property owning democracy and the principles of the welfare state. While the latter provides a safety net against misfortune, it also encourages dependency and apathy; it provides a maternal comfort for those who are incapable of providing for their needs and accordingly diminishes the value of freedom and personal responsibility. The welfare state therefore fosters social and economic relations in which some are "servilely dependent on others."⁴⁵⁶ Rawlsian institutions go *beyond* the welfare state: they must provide for basic needs (via some sort of social safety-net), but they also ensure fair opportunities in education and public life, and guarantee the fair value of political liberties. Individuals are encouraged to forge a life for themselves through cooperative interactions and competitive markets; they are made aware of the opportunities that are available to them, and yet the state is agnostic as to the value of those opportunities.

Rawls may or may not be right to point the inadequacies of the traditional welfare state, yet he is too short on detail to make a persuasive case for his alternative. It may be that his conception of the property owning democracy is a response to pervasive criticisms of the difference principle. Much to the delight of reactionary forces, Rawls has difficulty in dealing with those who remain apathetic and idle in the face of empowering institutions. He maintains that considerations of moral desert should be eliminated from his theory of justice – no one deserves his greater natural capacity (which is an accident of birth), or the character that cultivates his abilities (since this is largely dependent on family and social circumstances). The problem is that Rawls implies that citizens can rightly expect their basic needs to be met without

⁴⁵⁵ Rawls, J., 'Preface to the French Edition of *A Theory of Justice*', *Collected Papers*, Harvard University Press, 1999, p.419-20; Rawls, J., *Justice as Fairness: A Restatement*, Harvard University Press, 2001, p.139-40

⁴⁵⁶ Rawls, J., *A Theory of Justice*, Oxford University Press, 1971, p.529

contributing to their own welfare. Someone who chooses idleness can claim that it has been forced upon him by a combination of undeserved natural and social contingencies, in which case other citizens must work to support him. Yet, this conclusion would seem to go against our basic intuitions about justice – the idle should not be allowed to gain from the efforts of the industrious because normal human beings have a *choice* about whether they wish to work or not (or at least whether or not to apply effort). As Dworkin points out:

“Individuals should be relieved of consequential responsibility for those unfortunate features of their situation that are brute bad luck, but not from those that should be seen as flowing from their own choices. If someone has been born blind or without talents others have, that is his bad luck, and, so far as this can be managed, a just society would compensate him for that bad luck. But if he has fewer resources than other people now because he spent more on luxuries earlier, or because he chose not to work, or to work at less remunerative jobs than others chose, then his situation is the result of choice not luck, and he is not entitled to any compensation that would make up his present shortfall.”⁴⁵⁷

In response to this criticism, Rawls accepts that those with a predilection for ‘expensive wines and exotic dishes’ should not be subsidised by those who are satisfied with a diet of ‘milk, bread, and beans’. This is because as moral persons, citizens have some part in forming and cultivating their objectives and preferences. Hence, we must view citizens as being ‘responsible for their ends’ – in any particular situation, “those with less expensive tastes have presumably adjusted their likes and dislikes over the course of their lives to the income and wealth they could reasonably expect; and it is regarded as unfair that they should now have less in order to spare others from the consequences of their lack of foresight or self-discipline.”⁴⁵⁸ He builds upon this view in *Political Liberalism* – if one chooses idleness over work then one is not entitled to support by public funds; individual citizens must be held partly responsible for their decisions and choices.⁴⁵⁹ For Rawls, then, justice demands that those inequalities that unfairly affect citizens’ life chances should be ameliorated, while inequalities that arise from life choices should be allowed. Unfortunately, it is

⁴⁵⁷ Dworkin, R., *Sovereign Virtue*, Harvard University Press, 2000, p.287

⁴⁵⁸ Rawls, J., ‘Social Unity and Primary Goods’, *Collected Papers*, Harvard University Press, 1999, p.369

⁴⁵⁹ Rawls, J., *Political Liberalism*, Columbia University Press, 1993, p.182, footnote 9

difficult to sustain this notion without fundamentally changing the difference principle. As Will Kymlicka points out, the difference principle does not distinguish between chosen and unchosen inequalities – whilst it mitigates the unjust effects of natural and social disadvantage, it also mitigates “the legitimate effects of personal choice and effort.”¹⁶⁰ In other words, justice demands that we acknowledge the difference between chance and choice. This distinction will be pursued in the next chapter.

Conclusion

This chapter has surveyed Rawls’ conception of justice, with specific attention being paid to the argument for the priority of liberty. H.L.A. Hart pointed out the inadequacy of Rawls’ position on this matter, complaining that conflict between basic freedoms could not be settled if our only appeal was to the greatest liberty. Nonetheless, Rawls’ revised argument for the priority of liberty maintains that a scheme of basic liberties can be prioritised by appealing to a conception of the person as rational and reasonable.

The virtue of Rawls’ endeavour derives from his formulation of a systematic understanding of justice from a jumble of egalitarian and libertarian intuitions. The central message that should be taken from his writing on liberty is that individuals ought to be reasonably supported in their pursuit of the good – hence his (admittedly imprecise) notion of the property owning democracy, which largely empowers individuals in effecting choices about their preferred ends. The Rawlsian society is not paternalistic in that it is agnostic about the good life; neither is it a conventional welfare state with its protective, sheltering instincts. Rather, it affords individuals the rights and liberties to live meaningful lives while providing against misfortune; it commits to social institutions that are designed to maintain the fair value of political liberty. All of these social prescriptions are admirable. Yet, Rawls’ argument for the difference principle is weaker – its aim to regulate the distribution of wealth such that any disparities are to the benefit of the least well off is *prima facie* appealing, but it does not adequately accommodate the idea of personal responsibility.

¹⁶⁰ Kymlicka, W., *Contemporary Political Philosophy*, Oxford University Press, 1990, p.75

Section III – The Ideal of Liberty

Social institutions greatly affect the capacity of citizens to take advantage of their basic freedoms. If institutions allow significant want, squalor, idleness, ignorance, or disease to go unchecked, the essential value of freedom will be undermined. The presence of such evils precludes individuals from making meaningful choices in the pursuit of their purposes. The liberal state should, as far as possible, look to eliminate these burdens on individuals. Ignorance can be alleviated by education, disease by universal healthcare. Want and squalor can be ameliorated by cultivating employment opportunities and by introducing some form of income support for the unemployed and disabled. Idleness can be overcome through public schemes designed to give people opportunities, whether educational, community based, or work related. To this extent, liberal institutions will roughly accord with Rawls' recommendations for:

- a. Fair equality of opportunity, especially in education and training.
- b. A decent distribution of income and wealth: all citizens must be assured the all-purpose means necessary for them to take intelligent and effective advantage of their basic freedoms.
- c. Social and economic policies that provide all citizens with an opportunity to work.
- d. Basic health care assured to all citizens.⁴⁶¹

Although these recommendations are broad, they are the type we need if citizens are to have the capacity to act on their conception of the good. The hope is that we can give a determinate account of what these social policies might entail. Three ideas will be advocated: A voucher-governed education system that ensures equal opportunity (policy a); asset-based welfare in conjunction with market capitalism (policy b); proactive employment policy that rests upon the notion of reciprocity (policy c); and basic health care funded by general taxation (policy d). As a whole, I argue that social institutions should be designed to empower individuals in their pursuit of a conception of the good.

⁴⁶¹ Rawls, J., *Political Liberalism*, Columbia University Press, Second Edition, 1996, p.lvi-lx. Rawls adds to this list the 'Public financing of elections and ways of assuring the availability of public information on matters of public policy'. However, I consider Rawls' work on the value of the political liberties to be sufficiently detailed (discussed in the previous chapter) and have nothing to add to his commentary.

Chapter 8 – Freedom, Welfare and Responsibility

“A person’s well-being depends not only on himself. It also requires that the conditions which make his pursuits possible, and give them their meaning, obtain.”

– Raz, ‘Duties of Well-Being’⁴⁶²

Introduction: A Prescription for Freedom

This chapter deals with the economic and social institutions that ought to support egalitarian liberalism. It builds upon the argument that a system of basic freedoms ought to be made valuable by securing access to an array of social primary goods. It holds that social institutions ought to empower individuals in pursuit of their conception of the good. Three specific areas of social policy will be considered: economic institutions and the distribution of wealth, employment opportunities, and healthcare. More broadly, this chapter provides a liberal-egalitarian response to the realities of our current politics; it provides a manifesto for radical change; and it supports a commitment to individual freedom, fairness, reciprocity, and personal responsibility.

Markets, Wealth, and Freedom

Let us begin by considering the epigraph found at the beginning of this thesis: “No-one can compel me to be happy in accordance with his conception of the welfare of others, for each may seek happiness in whatever way he thinks fit, so long as he does not infringe upon the freedom of others to pursue a similar end which can be reconciled with the freedom of everyone else.”⁴⁶³ Here Kant implies that the morality of political freedom is characterised solely by negative obligations: so long as people live within the boundaries of the moral law, they should be left alone to do as they wish. My argument is different: formal freedoms are not sufficient for individuals to do as they wish – social institutions must exist to enable individuals to take advantage of their freedoms. Hegel criticised Kant along these lines, as did Marx. Yet, in lodging

⁴⁶² Raz, J., *Ethics in the Public Domain*, Clarendon Press, 1994

⁴⁶³ Kant, I., ‘On the Relationship of Theory to Practice in Political Right’, *Kant’s Political Writings*, Reiss, H., (ed.), Nisbet, H.B., (trans.), Cambridge University Press, 1970, p.74

this complaint, both Hegel and Marx obscured the nature of freedom, and it became amenable to authoritarian designs. For this reason, my argument stays within the boundaries of negative liberty, which is properly defined as the opportunity to act without interference from others.

Still, if we are to commit to a system of basic negative liberties (specified by the right), we must also commit to a system of distribution that suitably supports these liberties (through an adequate allocation of all-purpose means). Of all the modern theorists, John Rawls understands this best of all: he prescribes social institutions that allow people to take advantage of their freedoms; he understands that the value of our liberty is to a large extent contingent upon personal resources like income or wealth; he acknowledges that unless efforts are made towards a more equitable distribution of material resources, a minority will be able to dominate the majority, particularly in the political arena. At the same time, parts of Rawls' argument are problematic. In particular, his view of reciprocity as the basis of social cooperation is inconsistent with his second principle of justice (viz., inequalities in social and economic goods are only justified if they are to the benefit of the least advantaged). Rawls understands the idea of reciprocity in terms of the mutual obligations that arise from justice as fairness. In other words, all who are engaged in cooperation and who fulfil their obligations as the rules and procedures require are to benefit in an appropriate way.⁴⁶⁴ By implication, then, those who do not fulfil their obligations should not be entitled to the benefits generated by cooperation. Yet, the difference principle conflicts with this reasoning – it supports the conditions of freedom at the expense of personal responsibility for choice and effort; it allows the idle to gain from the efforts of the industrious. This has the effect of eroding the reciprocity upon which Rawls places so much importance.

There are further problems associated with the difference principle. First, it provides no criterion according to which we can determine which citizens belong to the worst off group: should it be the poorest third or the poorest tenth, for example?⁴⁶⁵ Both of these cut-off points are arbitrary, and yet are likely to have huge impact upon the way wealth is distributed in society (arbitrarily favouring one section of society over

⁴⁶⁴ Rawls, J., *Political Liberalism*, Columbia University Press, 1993, p.16

⁴⁶⁵ Dworkin, R., *Sovereign Virtue*, Harvard University Press, 2000, p.330

another). Moreover, the difference principle attends only to the position of those with fewest primary goods, irrespective of how this impacts on those who have more. Yet, as Dworkin points out, it seems unfair "wholly to ignore the impact of a welfare scheme on people who are not in the worst off group."⁴⁶⁶ Thus, if we are to establish a system of distribution that assures to all citizens the all-purpose means necessary for them to take intelligent and effective advantage of their basic freedoms, then the difference principle is not the answer. We should not be bound by such a demanding code. We need a more flexible approach, which acknowledges the right to gain from personal industry and toil.

How should we proceed? I have argued that an egalitarian distribution of wealth and income underpins a commitment to the worth of freedom. Yet, we must bear in mind that equality and liberty can conflict, and that a fairer distribution of wealth and income may require certain restrictions on economic freedom (to buy, sell and exchange as we please). In other words, there is a tension between leaving people alone (and paying respect to their liberty) and investing in social practices that aim to ensure the worth of liberty for all (which may involve restraining certain freedoms). A fair balance is difficult to strike, as Berlin recognised: "In their zeal to create social and economic conditions in which alone freedom is of genuine value, men tend to forget freedom itself."⁴⁶⁷ With this in mind, I suggest the following strategy. Let us begin by affirming a system of distribution that upholds individual freedom and then ask how far this must be restrained in order to promote the fair value of liberty. More specifically, we should commence by affirming the freedoms and efficiency of the market, and then ask what social policies appropriately ensure that each person has the all-purpose means necessary for them to take intelligent and effective advantage of their basic freedoms within that context.

There are both normative and pragmatic reasons for favouring the market as the most desirable system of allocation. In the first instance, most commentators now accept the legitimacy of the market as the most effective means to generate wealth and economic growth.⁴⁶⁸ Indeed, it is a widely respected truth in the discipline of

⁴⁶⁶ *Ibid.*, p.331

⁴⁶⁷ Berlin, I., 'Introduction,' *Four Essays on Liberty*, Oxford University Press, 1969, p.liv

⁴⁶⁸ Sen, A., *Development as Freedom*, Anchor Books, 2000, p.7

economics that a competitive market mechanism can achieve a type of efficiency that a centralised system cannot. This is because of the economy of information (each person acting in the market does not have to know very much) and because of the compatibility of incentives (each person's prudent actions can merge nicely with those of others).⁴⁶⁹ Thus, the efficiency of the market is predicated upon the interaction of self-interested individuals acting in a way that best satisfies their requirements. That is to say, "It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest."⁴⁷⁰

Irrespective of the powerful economic reasons for supporting market mechanisms, it is a basic liberty to be able to exchange goods and services. Indeed, the primary reasons for which classical economists such as Adam Smith or David Ricardo (and later economists such as Hayek) favoured the free market was not simply that it was more efficient than other modes of production, but that it was an extension of freedom itself. This rationale for affirming the market mechanism is taken up by Sen. In a neat thought experiment, he imagines an omniscient dictator attempting to match the efficiency of the market through a centrally planned economy. Sen points out that even if the dictator achieved a reasonable degree of economic efficiency, something extremely valuable would be lost on the way, namely, "the freedom of people to act as they like in deciding on where to work, what to produce, what to consume, and so on."⁴⁷¹ Thus, there are both moral and prudential economic reasons for favouring the market.

The freedoms associated with market society are not only a powerful antidote to the centrally organised labour of socialist dictatorships; they also act as beacons of hope for those who are enslaved or bonded by feudal ties. There are still many developing countries in which people are tied to the land. This propagates, among other evils, child labour and female subjugation.⁴⁷² Capitalism might generate injustice, but even Marx recognised that it also liberates, in the sense that it allows one to voluntarily sell one's labour (as opposed to slavery, which *forces* one to labour). The question, then,

⁴⁶⁹ Ibid, p.27

⁴⁷⁰ Smith, A., *Wealth of Nations*, 1976, p.26

⁴⁷¹ Sen, A., *Development as Freedom*, Anchor Books, 2000, p.27

⁴⁷² Sen, A., *Development as Freedom*, Anchor Books, 2000, p.114-5

is not *whether* the free market should be supported, but *to what extent* it should be supported. As Sen surmises:

"The market mechanism...is a basic arrangement through which people can interact with each other and undertake mutually advantageous activities. In this light, it is very hard indeed to see how any reasonable critic could be against the market mechanism, as such. The problems that arise spring typically from other sources...[such as] unconstrained concealment of information or unregulated use of activities that allow the powerful to capitalise on their asymmetrical advantage. These have to be dealt with not by suppressing the markets, but by allowing them to function better and with greater fairness, and with adequate supplementation. The overall achievements of the market are deeply contingent on political and social arrangements."⁴⁷³

Thus, if we are looking for the institutional conditions in which people can take advantage of their freedoms, then we must establish how far free market principles should be compromised in order to provide people with the appropriate all-purpose means to their self-chosen ends. What is not in question is the fact that the market offers a system of distribution that both respects individual freedom and fosters economic growth.

Still, it is an open question as to what mix should obtain between free market forces and benign social engineering. According to Sen, the appropriate role and reach of markets cannot be predetermined on the basis of some grand, general formula either in favour of placing everything under the market, or of denying everything to the market. Rather, we need to apply critical scrutiny to the efficiency of markets, to establish when they work in our interests and when interventionist approaches are required. The wholehearted liberalisation of markets will inevitably produce many casualties, unless it is supported by comprehensive state education, social security guarantees, social opportunity, considerations of equity, and so on. On the other hand, overly fussy state intervention will stifle growth, efficiency and the generation of wealth. As with many aspects of life, a balance is desirable. What institutions are conducive to this balance? Pure capitalism establishes what should be produced, how

⁴⁷³ Ibid, p.142

it should be produced, and for whom it should be produced. Yet, the market mechanism is silent on the question of social justice; it does not consider the need to distribute wealth so as to improve the worth of freedom for the worst off. Thus, we need to consider how an equitable distribution of wealth within a capitalist context might be achieved. One answer lies in the diffusion of capital assets.

Asset-based Welfare and the Property Owning Democracy

Rather late in the day, Rawls began to talk about the concept of a property owning democracy. Although his exploration of this idea was limited, he clearly suggests that a stable and well-ordered society should promote the diffusion of capital assets, such that material wealth and hence power does not accumulate in the hands of the few: "the aim is to encourage a wide and far more equal dispersion of real property and productive assets."⁴⁷⁴ This is to be achieved through the regulation of bequest and restriction of inheritance. Not only would this ensure the fair value of the political liberties, it would also provide citizens with the general means to take advantage of their civil liberties (and hence allow them to act upon a determinate conception of the good).⁴⁷⁵ A more equitable distribution of wealth is therefore a key component of the property-owning democracy: "Institutions must, from the outset, put in the hands of citizens generally, and not only of a few, sufficient productive means for them to be fully cooperating members of society on a footing of equality."⁴⁷⁶

In a recent article, Samuel Brittan gives this idea greater credence.⁴⁷⁷ He points out that differences in personal wealth are far greater than differences in income. This should give us reason for disquiet: extreme inequalities in the ownership of capital are undesirable quite apart from any inequalities of income which they might imply. In normal circumstances, a person with capital investments has a sense of security and independence; she can rely on her investment when other sources of income disappear. By contrast, in times of hardship, the propertyless person has only the state or the benevolence of her peers to fall back on.⁴⁷⁸ It therefore makes little sense to

⁴⁷⁴ Rawls, J., *Justice as Fairness: A Restatement*, Harvard University Press, 2001, p.161

⁴⁷⁵ The additional welfare needs of the disabled are not considered here. See Chapter 9

⁴⁷⁶ Rawls, J., *Justice as Fairness: A Restatement*, Harvard University Press, 2001, p.140

⁴⁷⁷ Brittan, S., 'Assets for All', *Prospect*, August 2003

⁴⁷⁸ Ackerman, B., Alstott, A., *The Stakeholder Society*, Yale University Press, 1999, p.25

impose punishing tax regimes on high-income earners since the amount earned in salaries is trivial compared to the wealth passed on at death and through the movement of capital.

The radical solution to economic inequalities is to redistribute wealth, not income. An appropriate dispersal of wealth can potentially be achieved through asset-based welfare: the distribution of a significant one-off sum of money to all members of society at the beginning of their adult lives, to be used for their broader purposes, however conceived. The thinking behind asset-based welfare embraces capitalism as a means to generate wealth for all, in contrast to the exploitative beast that Marx believed he had exposed. Indeed, Marx's diagnosis that capitalism is inherently unfair because the bourgeoisie are able to extract surplus value from their capital assets is confused: "The trouble with capital assets and investment income is not that they exist but that too few of us have them."⁴⁷⁹ With this in mind, Brittan suggests that western countries are now affluent enough to spread some of the benefits of property ownership to all their inhabitants rather than relying on "inheritance or the luck of the draw alone."⁴⁸⁰

The idea of creating a more diffuse spread of assets was originally propagated in the UK by the political right. One strategy was to privatise state-owned assets; citizens were given the opportunity to buy shares at below market prices. Although this initially created a large increase in the number of shareowners in the UK, the new capitalists were mostly quick to sell their shares. Alternative schemes were more successful. Under Thatcher, council houses were sold off at heavily discounted prices, introducing tenants to capital investments. This was the UK's first step towards a property owning democracy. Still, the significance of this transformation can be overstated. For one, the poorest members of society could not afford to buy their council houses and hence were unable to make the leap to the property market. Moreover, home ownership does not readily produce an investment income, unless one 'trades down' and reaps the profit of a house sale. Although houses are certainly capital investments, they are essentially built to live in.⁴⁸¹ More recognisable asset-

⁴⁷⁹ Brittan, S., 'Assets for All', *Prospect*, August 2003, p.24

⁴⁸⁰ *Ibid.*, p.25

⁴⁸¹ Brittan, S., 'Assets for All', *Prospect*, August 2003, p.25

based schemes have recently been implemented in the UK. In his last budget, Gordon Brown committed the government to funding a child trust fund. Each new born infant should be provided with a small capital sum - £500 for the poorest third of families, £250 for the rest - to be invested in the financial markets and from which bearers shall be free to draw at the age of eighteen. The treasury has suggested that, with modest contributions from the exchequer at a later stage, the capital investment will be worth around £1,600 when it matures.

Thinking on the distribution of capital assets currently transcends the political reality. In a recent publication, the Fabian Society recommends a scheme that entitles everyone to a one-off grant of £10,000 upon reaching the age of eighteen.⁴⁸² The cost of £6.5bn per year, which would be required to fund the scheme, would be found by transforming the way in which wealth is passed on through inheritance. Even more radical is the scheme promoted by Ackerman and Alstott, who recommend a payment of \$80,000 to each US citizen at the beginning of their adult life. This sum is sufficient to provide citizens with a cushion against market shocks and provides a means of investing in their future. Recipients can use this money 'for any purpose they choose', although stakeholders have a responsibility to repay the money upon death, at least where this is financially possible. The scheme as a whole would be funded by an annual 2 percent tax on the nation's wealth.⁴⁸³

Four main benefits might be identified in relation to asset-based welfare. First, a more equal overall distribution of wealth is generated, and in particular among young adults. Capitalism is excellent at generating wealth, but this wealth primarily rests with those who are already affluent; the effects of wealth 'trickling down' might help some, but others are left without any kind of material gain. By contrast, the distribution of a significant one-off sum of money to all members of society at the beginning of their adult lives would go some of the way towards Rawls' demand for a fairer distribution of income and wealth. Second, asset-based welfare generates progressive incentives to accumulate capital; it familiarises citizens with financial markets and provides them with a means to purchase private property. It therefore gives recipients a measure of economic independence, which allows for a sense of

⁴⁸² Nissan, D., Le Grand, J., *Capital Idea: Start-up Grants for Young People*, The Fabian Society, Feb 2000

⁴⁸³ Ackerman, B., Alstott, A., *The Stakeholder Society*, Yale University Press, 1999

personal autonomy and self-respect.⁴⁸⁴ It thus takes us closer to Rawls' ideal of the property-owning democracy. Third, asset-based welfare means people are equitably supported in their pursuit of a determinate conception of the good. Importantly, investments will mature when recipients are still young enough to use the wealth in a way that promotes their conception of the good (unlike retirement pensions, say). Some recipients might choose to fund a university education; some might choose to travel. Others might invest the money in a house or in the stock exchange; others again might launch a business venture. The important point is that young adults are empowered in making life-shaping decisions at a time in their lives when they might otherwise have been economically impoverished and hence forced into short-term compromises (e.g. taking a job that pays tolerably in the short-term instead of studying for a degree that promises long-term benefits).⁴⁸⁵ Fourth, asset-based welfare encourages individuals to become responsible for their choices. Gifted with a large sum of money, it is up to recipients to decide whether to spend or invest their asset. However the sum is used, recipients must take responsibility for their choices: "their triumphs and blunders are their own."⁴⁸⁶ Asset-based welfare therefore succeeds where Rawls' difference principle fails: it rewards the canny and penalizes the self-indulgent. Asset-based welfare asserts the right of each person to make the most of his or her opportunities, without having to make concessions to those who have acted differently in their choices.

Of course, the flip side of this is that asset-based welfare does not protect citizens against their own imprudence. The idea of an equitable distribution of assets works on the assumption that people will invest wisely, making some kind of lasting contribution to their future well-being. However, we know that people do not always make sensible decisions, especially, perhaps, in young adulthood. Indeed, while Ackerman and Alstott argue that recipients can use their asset 'for any purpose they choose' (to start a business or pay for more education, to buy a house or raise a family or save for the future) they fear that some people will fritter their money away on 'drugs and decadence'.⁴⁸⁷

⁴⁸⁴ Rawls, J., *Political Liberalism*, Columbia University Press, 1993, p.298

⁴⁸⁵ Ackerman, B., Alstott, A., *The Stakeholder Society*, Yale University Press, 1999, p.35

⁴⁸⁶ *Ibid.*, p.5

⁴⁸⁷ Other people – the profoundly mentally disabled – will be unable to manage their assets on their own

Given this opportunity for ruin, the temptation might be to place the administration of the scheme under some form of external bureaucratic control. Ackerman and Alstott recommend paternalistic safeguards: full control of their proposed \$80,000 stakeholding should be conditional upon high school graduation, a test by which recipients can demonstrate their 'self-discipline'.⁴⁸⁸ For those who fail to graduate, a sum of \$4,000 would be released each year over the course of twenty years, unless the recipients wished to make a large capital investment, such as buying a house. Moreover, high school classes on 'How to Manage Your Stake' would be mandatory.⁴⁸⁹ Even for those who succeed at high school, the scheme would be administered through four graduated payments of \$20,000 every two years from the age of twenty-one.

From the anti-perfectionist perspective that I have defended, the administration of the Ackerman Alstott scheme is overly paternalistic. We should certainly encourage citizens to think about their assets and promote wise investment, yet wresting control of assets out of the hands of citizens is entirely counter-productive. Moreover, high school dropouts will be radically disempowered: they will be unfairly stigmatised; they will lose their financial autonomy; they will effectively be forbidden the opportunity to use their assets to accumulate wealth; and they will be constantly reminded of their incompetence as citizens. This offends against the equal moral worth of all persons and against the notion of reciprocity. Yet, most importantly, it denies that which should be encouraged: individual responsibility for one's choices.

In contrast to this recommendation for limited bureaucratic control, Samuel Brittan takes an anti-paternalistic line: if some people wish to use their assets in order to 'opt out of the rat race for while' or to 'enjoy an extra bit of leisure or riotous living', then so be it; only, they must live with their decision.⁴⁹⁰ By this argument, we should be wary of attaching overly paternalistic conditions to asset-based welfare, since this could potentially undermine the very reasons for implementing the scheme in the first place – to empower individuals in the pursuit of their purposes. This notion is more in keeping with the anti-perfectionist, empowering society envisaged by Rawls.

⁴⁸⁸ Ackerman, B., Alstott, A., *The Stakeholder Society*, Yale University Press, 1999, p.9

⁴⁸⁹ *Ibid*, p.37

⁴⁹⁰ Brittan, S., 'Assets for All', *Prospect*, August 2003, p.24

However we decide on the specifics of administration, a more diffuse spread of capital assets is undoubtedly required if we are to facilitate citizens' pursuit of the good on a fairer basis. The aforementioned schemes represent a radical solution to the concentration of wealth and should therefore be commended in principle. Nonetheless, even if we look to spread capital assets more fairly, some members of society will continue to struggle, perhaps having lost their assets through addiction, fraud, folly, or brute bad luck. To this extent, asset-based welfare is not sufficient for all citizens to be assured the all-purpose means necessary for them to take intelligent and effective advantage of their basic freedoms. This also requires some form of social security.

Unconditional Income Guarantee (Why Should I Subsidise You?)

An unconditional income guarantee ensures that every citizen receives regular monetary instalments from the state, irrespective of their occupational or marital status, and irrespective of their ability or eagerness to work. Such a scheme, advocates claim, would minimally allow each person to pursue a vision of the good, it would provide financial support during unemployment, it would redistribute income from men to women, and it would give extra support to those in poorly paid jobs.⁴⁹¹ However, such a proposal is immediately placed on a defensive footing by two powerful criticisms.

First, if a basic income were afforded to all, irrespective of income or earnings from other sources, then payment would be delivered to those who do not need it, at the expense of those who do. Means testing, by contrast, dispenses benefits according to financial need, reduces overall spending and ensures that the limited resources in public coffers are directed to citizens in the direst circumstances.⁴⁹² In other words, there is a strong case to be made for selective welfare payments rather than universal provision.

⁴⁹¹ Van Parijs, P., 'Why Surfers should be Fed: The Liberal Case for an Unconditional Basic Income', *Philosophy and Public Affairs*, 1991, p.102

⁴⁹² Gilberl, N., *Transformation of the Welfare State*, Oxford University Press, 2002, p.136

Second, the idea that all people should be adequately empowered in their pursuit of the good irrespective of whether they contribute to the production of personal wealth is an impracticable social ethic. We tend to think it is unfair that the indolent should be allowed to gain from the industrious, *ceteris paribus*. This partly derives, it would seem, from our evolutionary development. In his excellent study of human nature and genetics, Steven Pinker suggests that social altruism (in contrast to nepotistic altruism) in human beings has evolved on the back of reciprocal exchange of favours, where organisms confer large benefits on others at small costs to themselves and where others are impelled to reciprocate accordingly: "social generosity comes from a complex suite of thoughts and emotions rooted in the logic of *reciprocity*."⁴⁹³ In other words, human beings are unlikely to concede goods to strangers unless there is a commitment on the part of the recipients to reciprocate. Taxpayers are consequently unlikely to support a practice in which some receive a non-contributory income from the state (at taxpayers' expense).

In spite of these objections, Philippe van Parijs provides sustained argument in favour of the unconditional income guarantee, claiming - among much else - that it is superior to asset-based welfare. He argues that all citizens should have a grant paid to them, irrespective of their occupational or marital status, and irrespective of their ability or eagerness to work. What is more, he argues not only for a minimal income - enough, say, to satisfy basic needs - but 'a very substantial basic income'.⁴⁹⁴ This is because any defensible conception of liberal justice ought to be concerned with maximising the 'real freedom' of those with the least all-purpose means. An unconditional income guarantee would maximise the capacity of the worst-off citizens to realise their conception of the good.

In order to give his idea credence, Parijs imagines two people, Crazy and Lazy, who have identical natural talents but who are differently disposed towards work. Crazy is keen to earn a high income and will work tirelessly for that reason. Lazy, by contrast, is content with a low income and prefers not to exert himself. According to Parijs, a minimum income guarantee would satisfy both of their conceptions of the good:

⁴⁹³ Pinker, S., *The Blank Slate*, Penguin Books, 2002, p.255

⁴⁹⁴ Van Parijs, P., 'Why Surfers should be Fed: The Liberal Case for an Unconditional Basic Income', *Philosophy and Public Affairs*, 1991, p.102

Crazy could work any amount to supplement his basic income, while Lazy would gain a modest income without having to tire himself. Of course, this arrangement might be held to be unjust: since both parties have equal talent it is unfair that Crazy should be forced to redistribute the fruits of his labour to support the basic income of Lazy. Parijs looks to overcome this powerful objection by drawing upon Dworkin's idea of equal resources. He imagines that Crazy and Lazy are given an equally sized patch of land, to do with as they please. Now, given their respective conceptions of the good, Crazy is dissatisfied that his labour is restricted to his share of the land, while Lazy has been granted land that he does not wish to use. Hence, neither maximises their real freedom. A better arrangement, Parijs thinks, would be for Lazy to concede his land to Crazy in exchange for an income: "If Lazy gives up the whole of his plot of land, he is entitled to an unconditional grant at a level that corresponds to the value of that plot."⁴⁹⁵ This type of argument, Parijs suggests, can ground an argument for an unconditional basic income.

However, this argument fails to demonstrate that an income guarantee ought to be delivered at a 'very substantial' level in the real world. Parijs tackles this issue by suggesting that jobs should be thought of as assets, the value of which ought to be distributed equally among all citizens. To this end, 'employment rents' will be used to swell the basic income.⁴⁹⁶ This is justified because some people are involuntarily unemployed. Yet, Parijs' argument is wholly unpersuasive in this regard. He acknowledges but does not fully account for the problems his theory of distributive justice would have in relation to economics; it is likely that a 'very substantial' unconditional income guarantee would implode having destroyed the economic incentive to work. What is more, his scheme is altogether alien to our intuitions about desert. For instance, he claims that the voluntarily unemployed ought to be entitled to the same generous income guarantee than the involuntarily unemployed receive (even though the former evidently do not think of jobs as 'assets'). This is because the liberal state cannot be seen to privilege one vision of the good life (work-based or leisure-based) over another.⁴⁹⁷ This, of course, is liberal neutrality gone mad.

⁴⁹⁵ Ibid, p.112

⁴⁹⁶ Van Parijs, P., *Real Freedom For All*, Clarendon Press, 1995, p.108-9

⁴⁹⁷ Van Parijs, P., *Real Freedom For All*, Clarendon Press, 1995, p.109

The idea of asset-based welfare is far superior to Parijs' scheme. Although the idea of equal resources supports both, only the former requires citizens to take responsibility for their choices. Consider my earlier recommendation that each citizen be given a significant one-off grant upon reaching adulthood. Now, it is conceivable that a recipient predisposed to surfing might decide to live off this grant for a number of years without attempting to invest or work. This might give the surfer ten years of life by the beach (perhaps slightly more if part of the money is invested). To my mind, this would not be unjust. From a position of initial equality, the money is spent in accordance with the surfer's conception of the good. Yet, what if we were to guarantee the surfer a lifetime of easy living through regular income payments? Parijs reckons this scheme is superior to asset-based welfare given that the latter allows citizens to squander their stakeholding: "A mildly paternalistic concern for people's real freedom throughout their lives, not just 'at the start', makes it sensible to hand out the basic income in the form of a regular stream."⁴⁹⁸ Yet, paternalistic concerns about citizens' welfare, however noble or well intentioned, can only lead to the reduction of freedom. Moreover, an unconditional guarantee provides an income irrespective of the choices individuals make in their lives and hence undermines personal responsibility. In doing so, the policy offends against the idea of reciprocity (some people will be content to live off the industry of others) and creates a disincentive to work (since recipients know they will receive an income, come what may). The unconditional income guarantee can foster dependency in a way that is unlikely with the asset-based scheme.

Asset-based welfare upholds personal responsibility for choices in a way that the unconditional income guarantee does not. The asset-based scheme offers a one-off sum to be spent or invested as the recipient thinks appropriate; thereafter, recipients are responsible for the choices they make, for better or worse. In order to maintain the value of the original asset, the recipient has an incentive to remain productive and prudent: if a recipient invests wisely, she will reap the rewards of a good life. Of course, we are not all productive and prudent, and some will lose their assets through a series of foolish or self-indulgent decisions. Others will be happy to allow their funds to diminish in accordance with their vision of the good. Either way, the

⁴⁹⁸ Van Parijs, P., *Real Freedom For All*, Clarendon Press, 1995, p.47

recipient must live with the outcomes of their choices. If after a ten-year stint at the beach a surfer finds that his funds have disappeared, then he will be required to work for a living. It would be unfair to ask those who have acted prudently to continuously support the lifestyle of free spirits.

Nevertheless, critics might argue that the asset-based scheme is equally disloyal to the notion of reciprocity – it looks to empower people in their pursuits, irrespective of the contributions they have made to their personal wealth. Here we must contest the charge. In the first instance, recipients ought to repay the initial sum at death (where this is financially feasible), at which point their wealth is no longer of use to them (by contrast, the unconditional income guarantee asks for nothing in return). Moreover, since recipients acquire their asset at the beginning of their adult life, they cannot be criticised for having not contributed to the benefit received: beneficiaries have had no real opportunity to work (by contrast, we can reasonably chastise recipients of an unconditional income guarantee who are content to live off the productivity of others).

Consequently the asset-based scheme, unlike the unconditional income guarantee, is compatible with Rawls' idea of citizens co-operating over a complete life, taking responsibility for their ends. Rawls' later work is suffused with terms that bespeak shared obligation: reciprocity, responsibility, mutuality, commitment, and cooperation. These key concepts are either missing or stunted in Parijs' argument, which ultimately undermines his ability to make certain key distinctions. He fails to distinguish between the voluntary and involuntary unemployed. He sees no moral difference between someone who is out of work and seeking employment and someone who has made a conscious decision to live off the benefits provided by others. We ordinarily distinguish between the voluntary and involuntary unemployed because without it we would offend against the principle of reciprocity – that society should administer a fair distribution of *benefits and burdens*. One certainly should have the option to opt out of the reciprocal agreement, but only if one also accepts the consequences.

Yet a central problem remains unresolved. Some citizens will squander their stakeholding and, notwithstanding another income source, face destitution. We have already discounted an unconditional income guarantee as a means to protect those

who have lost their stakeholding. Should we therefore leave the imprudent, reckless, self-indulgent and idle to fend for themselves? This notion is discussed below.

Fighting the New Right: A Defence of Unemployment Compensation

Those who identify with the New Right, argue against intervention in the labour markets. They tell us that it is best to leave each citizen alone to find a job on his or her own terms. The labour market ought to clear like any other; we cannot be sentimental about those who are paid poorly or work in dangerous jobs. This way, they claim, we can avoid the problem of dependency. If a person wishes to dedicate his life to surfing, at the very least he will have to work part-time to support himself. This strategy embraces the value of self-help, industry, prudence, and personal responsibility.

The New Right agenda objects to unemployment compensation at both a normative and practical level. At the normative level, the objection goes, a welfare state supported by general taxation imposes a condition of forced labour upon those who fund the welfare system. When a government takes from me in taxation, it is effectively forcing me to work for the good of another person. Yet, this argument is unpersuasive: a laissez-faire approach places undue burdens on the involuntary unemployed and allows those with wealth and income to dominate those with less.⁴⁹⁹ More importantly, it erodes the essential value of the political and civil liberties. If unemployment is not compensated for by the state, then a certain section of society will be condemned to poverty; and, more often than not, these evils render one incapable of advancing one's determinate conception of the good, and erodes one's influence in the political sphere, thus offending against the very reasons that we have for valuing liberty in the first instance.

Still, at a practical level, proponents of laissez-faire point to the huge fiscal burden of welfare costs and to the undesirable economic and social consequences this can generate – there is, they claim, a pragmatic reason to limit the tax and spend strategy. They point to generous levels of unemployment compensation provided in European

⁴⁹⁹ Rawls, J., *Political Liberalism*, Paperback Edition, Columbia University Press, 1996, p.lix

countries like Germany and France and to their high levels of unemployment. They point to figures that suggest almost a third of the unemployed in these countries have been out of work for over a year.⁵⁰⁰ There is, then, an undoubted economic reason to pursue policy that delivers lower unemployment rates, even if it means reducing the levels of benefits and applying conditions to them. This thinking has driven a social policy agenda that aims to deliver economic conditions in which people can earn an income through employment. Indeed, this policy is increasingly being pursued in western democracies. As Gilbert points out: "Stretching across the political spectrum from Sweden to the United States, policies to activate the unemployed have created new incentives and strong pressures for welfare beneficiaries to find work."⁵⁰¹

Prominent thinkers on the left have sensibly assimilated this argument into their broader economic policies. Consider Sen's argument that loss of work leads to 'capability poverty'. If we examine income levels in Europe and the US, it seems that the former does significantly better at restraining material inequalities – the difference in income between the unemployed and the employed is far smaller in Europe. Nonetheless, unemployment of around five percent in the US compares favourably with the ten percent or more in Europe.⁵⁰² This level of unemployment has a greater impact on capability poverty in Europe because, as Sen points out:

"Unemployment is not merely a deficiency of income that can be made up through transfers by the state (at heavy fiscal cost that can itself be a very serious burden); it is also a source of far reaching debilitating effects on individual freedom, initiative and skills. Among its manifold effects, unemployment contributes to the 'social exclusion' of some groups, and it leads to losses of self-reliance, self-confidence and psychological and physical health."⁵⁰³

The scourge of unemployment, then, is not simply that it lowers income but that it can affect capability in more damaging ways. Unemployment must be considered broadly in terms of the various ends that it prevents us from achieving. Policy directives

⁵⁰⁰ Figures taken from Gary Becker's 1996 study of unemployment rates in France and America, quoted in Schmidtz, D., and Goodin, R., *Social Welfare and Individual Responsibility*, Cambridge University Press, 1998, p.15

⁵⁰¹ Gilbert, N., *Transformation of the Welfare State*, Oxford University Press, 2002, p.62

⁵⁰² Sen, A., *Development as Freedom*, Anchor Books, 2000, p.95

⁵⁰³ *Ibid*, p.21

designed to tackle unemployment will then promote the empowerment of the individual rather than encourage dependency. For Sen, "the creation of social opportunity makes a direct contribution to the expansion of human capabilities and quality of life."⁵⁰⁴

A good employment policy will therefore look to get people off benefits and into work. This strategy empowers people in their pursuit of the good – it focuses on personal responsibility, inclusion, and self-direction. Yet equally, in order to make use of the precious freedoms that people are morally entitled to, employment policy should also be predicated upon social support and a systematic attempt to tackle the causes of unemployment. This suggests a policy of conditional unemployment compensation.

Conditional Unemployment Compensation

The idea of reciprocity is crucial to social justice. We cannot be content with a system that concedes all to the vulnerable and asks for nothing in return; yet, neither can we support a system that leaves everything to the individual. If an unemployed man is not prepared to take charge of his situation and actively seek employment, then he evades his responsibility to those who provide him with benefits. Equally, if we are not prepared to support the unemployed man in seeking employment, then we are evading our responsibility to him. Consequently, we might recommend the following unemployment policy:

1. The beneficiary who is out of work must be willing to accept a suitable job or undergo suitable training if offered. Failure to cooperate shall result in the reduction of benefits.
2. Benefits should be contingent upon the absence of other mechanisms of support and hence the beneficiary must pass a means test.
3. Benefits should be assessed relative to the circumstance of beneficiaries - whether they live in an expensive part of the country, whether they have dependents, whether they have a disability, and so on.

⁵⁰⁴ Sen, A., *Development as Freedom*, Anchor Books, 2000, p.144

4. Suitable provisions must be made available to the beneficiary in order to make the transition to work tenable: childcare, education, vocational training, counselling services, financial support, rehabilitation services, and so on.

These prescriptions are made on the assumption that people are better off in work than out of work - the latter is a central feature of social exclusion and has debilitating effects on the individual: low self-esteem, apathy, dependency, and depression.⁵⁰⁵ There is now virtually a consensus in western democracies that employment rather than welfare should be the focus of policy initiatives. The successful implementation of such policy is contingent upon securing economic conditions conducive to full employment and through a flexible employment agency designed to get the unemployed off benefits and into work. The latter must be responsive to the heterogeneous difficulties faced by the unemployed. Following recent thinking in the UK, different strategies might be discerned for: young unemployed people; long-term unemployed people; single parents; people with disabilities or long-term illnesses; and partners of the unemployed. The idea is that employment initiatives must adopt a flexible strategy based on the different needs of welfare recipients. The reasons that a blind man cannot find suitable work will typically differ from the problems faced by a single mother; a heroin addict will face employment difficulties radically different from those of a graduate.

Unemployed persons should be encouraged to apply for work that is consistent with their general abilities and qualifications, or be allowed to enter vocational or academic study in order to improve their marketable talents. A man with no qualifications (and who is not willing to undergo training) ought not to be supported if he laments that he cannot secure his preference for work on the international space station; if the beneficiary proves unwilling to set out realistic employment goals and hence demonstrates disregard for the principles of reciprocity and mutuality, then there is a case to reduce his benefits accordingly. To this extent, unemployment benefit might be delivered via some kind of contract that identifies the rights and obligations of each party. The state would be required to provide employment opportunities, education

⁵⁰⁵ As Giddens points out, the effects of unemployment are not limited to financial loss, devastating as these might be. Rather, unemployment can erode confidence, generate apathy, reduce social interaction, adversely affect personal identity and self-esteem, and eliminate diversity of opportunity. Giddens, *Sociology*, Second Edition, Polity Press, 1993, p.513

and financial and social support. The beneficiary would be required to accept a suitable job or undergo training. Failure to respect these obligations should result in the reduction of benefits.

Still, it might be asked how practical measures that sanction mild coercion in order to get those on benefit into work can increase the value of freedom. Surely, by threatening the reduction of state support, the individual is made less free. In one sense, this is correct. An opportunity that would otherwise exist (to stay on benefit without trying for employment) is ruled out. Moreover, if we are to appeal to an anti-perfectionist conception of justice, we cannot say that a vision of the good that is grounded on the value of employment is inherently better than one that is lazy, without structure and directionless. Yet, attaching conditions to the receipt of benefit does not render a conception of justice perfectionist. As Rawls points out, society should administer a fair distribution of *benefits and burdens*: all who are engaged in cooperation and who fulfil their obligations as the rules and procedures require are to benefit in an appropriate way; those who do not fulfil their obligations should not be entitled to the benefits generated by cooperation.

At the same time, it is clear that not everyone is capable of work. We do not expect children to work, or adults with certain physical and mental disabilities, or adults who are required to care for dependents. Such people have no obligation to find employment and should be given income support. Other people in receipt of state support *can* be reasonably expected to work and yet choose not to. This might be because of motivational problems; it might be a result of a pathological disregard for the efforts of others. Whatever reason is given, the efforts of the state to facilitate employment may well be in vain. What should be done in this circumstance? If our sole concern is with personal responsibility, we ought to let the slothful fend for themselves. Yet, as sentimental beings, we ought to have a minimum regard for the welfare of others, which is divorced from blame and expectation. As Sen argues:

"As reflective creatures, we have the ability to contemplate the lives of others. Our sense of responsibility need not relate only to the afflictions that our own behaviour may have caused (though that can be very important as well), but can also relate more

generally to the miseries that we see around us and that lie within our power to help remedy.”⁵⁰⁶

By this view, we should always provide for the basic needs of citizens (such as food, shelter and clothing). We have no obligation to support anything beyond this, but this minimum should at least be respected. That is to say: if, in spite of our efforts, a small minority are unable to function in line with the principles of reciprocity and mutuality, it would be unconscionable to allow this minority to sink into destitution and misery. No decent society should completely withdraw support from its citizens. This may or may not create dependency in a small minority of cases but alternative strategies elude us. As Rawls concedes, a residual underclass may very well be a result of “social conditions that we do not know how to change, or perhaps cannot even identify or understand.” When society faces this impasse, and when it has done everything else possible to empower individuals in their pursuit of the good, “it has at least taken seriously the idea of itself as a fair system of cooperation between its citizens as free and equal.”⁵⁰⁷

As a whole, then, several points of policy might be identified as flowing from our assumptions about the value of freedom and its relationship with employment policy and capitalist institutions. Briefly, employment policy must secure meaningful opportunities in the labour market. Where the market fails to clear, unemployment compensation should be conditional upon reciprocal contracts between state and beneficiary. The individual should be empowered in seeking and gaining employment (so long as the individual is capable of working) through an appropriate mix of financial support, support services and coercive obligations. This in turn will approach the goal of social inclusion, where each individual has a meaningful opportunity to work or study, and where, ultimately, each individual will be able to direct their lives in accordance with their conception of the good.

⁵⁰⁶ Sen, A., *Development as Freedom*, Anchor Books, 2000, p.283

⁵⁰⁷ Rawls, J., *Justice as Fairness: A Restatement*, Harvard University Press, 2001, p.140

Health Care

If employment policy crucially affects the ability of citizens to pursue their conception of the good, then healthcare is equally important. We cannot take advantage of our freedoms if we are plagued with illness and disease. Health is something without which the good becomes illusory. The point of healthcare policy, then, is to provide the support needed in order that individuals can live as fulfilling a life as possible. In what follows, I will argue for universal access to basic health care.

As Sen points out, there are certain goods that ought not to be left to market provision, one of which is healthcare (along with other goods, like epidemiology, policing, and environmental preservation).⁵⁰⁸ This is because the market produces casualties and hence is not amenable to the perfect provision of goods and services. That is not to say the market *per se* is morally odious – imperfect provision does not matter so much in relation to consumption goods like apples or shirts. In the market place, we buy what we can afford, and if we find silk shirts too expensive, then we settle for cotton. Health care is different; it is less about preference and more about need. Here, we cannot simply match our preferences to our means, as we do with consumer goods. If we need heart surgery, we cannot trade down or opt for a less expensive option. This provides us with an initial reason to identify the provision of healthcare as a special case.

Yet, Robert Nozick contests this assumption. He doubts that the provision of healthcare ought to be considered as a case apart from other goods. If a man decides to use his wealth in order to contract the services of a particularly skilled heart surgeon, he ought to be allowed to do so, for this not only acknowledges the economic freedom of the purchaser, it also respects the liberty of the provider to broker a maximally beneficial contract. Nozick recognises, of course, that medical care is of fundamental importance to human well-being and that everyone has an interest in securing it, but he goes on to point out that people need food as well, although we do

⁵⁰⁸ Sen, A., *Development as Freedom*, Anchor Books, 2000, p.127-8

not insist that the allocation of food be distributed on terms other than those of the market.⁵⁰⁹

Crucially, however, the reason that we are content that food be allocated by market forces is that, by and large, most people have the ability to buy enough food to satisfy their nutritional needs. When people are unable to acquire food (whether through famine or poverty), we recognise that accepted rules of exchange should no longer apply – we provide food (or the means to buy it) without asking for a return. Equally, if some people are unable to acquire basic healthcare when it is needed, then we deem the situation unfair or unjust. In other words, there is a moral obligation to ensure that basic healthcare is distributed fairly. For some to receive more, or better, or quicker medical attention on the grounds of an arbitrary qualification – wealth, ethnicity, class, location, age – is morally dubious. Our social and economic position should not determine our access to a good as important as healthcare. This is because we recognise that our health is a precondition of our pursuit of the good and so we all have an equal interest in receiving medical attention when ill.

What type of justification might we appeal to in order to generate the type of healthcare that suitably supports people in their pursuit of the good? One strategy might be to alter Rawls' argument from the original position such that healthcare is included among the social primary goods. Yet, this approach presents immediate difficulties. As Kenneth Arrow points out, if healthcare was to be identified as a primary good, Rawls' second principle of justice, which requires inequalities to work to the advantage of the worst-off, would potentially drain public resources in order to meet the needs of those with extreme health care needs. It would also complicate the second principle by forcing a trade-off between healthcare and income and wealth, thus generating the type of utility comparison that Rawls set out to avoid.⁵¹⁰

Moving away from a Rawlsian framework, we might proceed in a formal manner. Bernard Williams looks to justify equal access to healthcare on the basis of medical need:

⁵⁰⁹ Nozick, R., *Anarchy, State, and Utopia*, Blackwell, 1974, p.233-4

⁵¹⁰ Arrow, K., 'Some ordinalist-utilitarian notes on Rawls's theory of justice' *Journal of Philosophy*, 1973

"Leaving aside preventive medicine, the proper ground of distribution of medical care is ill-health: this is a necessary truth. Now in very many societies, while ill health may work as a necessary condition of receiving treatment, it does not work as a sufficient condition, since such treatment costs money, and not all who are ill have the money; hence the possession of sufficient money becomes in fact an additional necessary condition of actually receiving treatment. [This situation raises a further example of inequality]...not now in connexion with the inequality between the well and the ill, but in connexion with the inequality between the rich ill and the poor ill, since we have straightforwardly the situation of those whose needs are the same not receiving the same treatment, though the needs are the ground of the treatment. This is an irrational state of affairs."⁵¹¹

In spite of Williams' honourable aspiration to eliminate personal wealth from the provision of healthcare, his argument contains several errors. First, there is the problem of moving from an 'is' to an 'ought'. Williams implies that need alone should be the basis for the provision of healthcare. Yet he manages this by moving from the necessary truth that healthcare is the treatment of ill-health to the normative conclusion that ill-health ought to be a sufficient condition for the provision of healthcare, thereby smuggling a value judgement into an argument that purports to be purely formal. Moreover, Williams' argument fails to distinguish between essential and non-essential healthcare. A society should look to provide for the former, but to provide for all of the latter is economically inconceivable. If a nation devoted every possible resource to the medical needs of its citizens, it would have nothing left to spend on other important areas of social policy, such as education or income support. In other words, Williams' prescription for healthcare provision does not recognise the fact of scarce resources.

Ronald Dworkin constructs a better argument. He begins by conceding the impracticability of the rescue principle: not *all* the health tests and treatments that citizens might want are affordable for a nation. Medical technology is now so expensive that a community which channelled every possible resource into healthcare would have nothing left to spend on other social goods (because of scarce resources).

⁵¹¹ Williams, B., 'The Idea of Equality', *Equality: Selected Readings*, Pojman, J., and Westmoreland, R., (eds.), Oxford University Press, 1997, p.97

No sane society would try to meet this standard.⁵¹² Yet, neither should we allow healthcare to be allocated on the free-market; it ought not to be left to the individual (or employers) to purchase health insurance. This would lead to something like the current US healthcare system, which Dworkin finds morally odious: "Forty million Americans have grossly inadequate medical coverage or none at all, and many who now have adequate insurance will lose it, because they will lose their jobs or develop a disease or condition that makes them uninsurable."⁵¹³ He concludes: "It is disgraceful that so prosperous a nation cannot guarantee even a decent minimum of health care to all those over whom it exercises dominion."⁵¹⁴

Why does Dworkin think we should not merely leave the individual alone to purchase an appropriate level of healthcare insurance? In the first instance, we do not have equal resources; some people could afford a comprehensive insurance package while others could not even afford basic coverage. And while economic inequality is partly due to the choices individuals make in their lives (some people work and save hard, others live free and easy), it is also due to unchosen circumstances beyond our control (money bequeathed at birth, parental income, natural talent and so on). As such, people with less money are unjustly penalised in a system that requires us to fund our own healthcare insurance. However, even if equality of resources obtained, there would still be reason to provide healthcare collectively: in reality, we face unequal risks in relation to our health; we are not all equally likely to succumb to disease or injury. It is consequently unfair that a person blessed with good health can use his resources for leisure while another person that is hampered by poor health has to spend his resources on medical care. Thus, even if people had equal funds to purchase healthcare insurance, some would be unfairly penalised by their undeserved natural disadvantage.

How, then, should we proceed? Dworkin suggests we can work out what kind of medical coverage is appropriate by engaging in a thought experiment. He imagines a counter-factual world in which each person has equal resources and is of appropriate age and ability to make a judgement about a desirable level of health insurance. These

⁵¹² Dworkin, R., *Sovereign Virtue*, Harvard University Press, 2000, p.309

⁵¹³ Ibid, p.307

⁵¹⁴ Ibid, p.318

decision-makers have appropriate information about the costs and side effects of various medical procedures, although they are otherwise subject to a veil of ignorance about their prospective health. They only know that a certain proportion of them will develop disease or illness and must assume that each person is equally susceptible to this. They must therefore decide on an appropriate level of insurance, to be generated through compulsory taxation, which will protect them against misfortune. According to Dworkin, from this initial position of fairness, whatever amount a community agrees to spend on health care will be just, since it will be grounded on the well-informed choices of individuals.

Dworkin argues that these counterfactuals help us to decide what level of healthcare we should aim to provide in our own imperfect and unjust community. For instance, it would be irrational, he argues, for a young man to insure himself for life-sustaining treatment if he falls into a permanent vegetative state – the money spent on the insurance premium would be better spent on enhancing his actual conscious life. This claim might be enlarged to include Alzheimer's disease and other forms of dementia. Whereas most people would like to ensure that they receive appropriate palliative care, they would not wish to insure themselves, say, for organ transplants or renal dialysis once dementia has set in. By contrast, most people would like to insure themselves for ordinary medical care, hospitalisation when necessary, prenatal and paediatric care, and regular checkups and other preventative medicine.⁵¹⁵ It is therefore reasonable to assume that anything less than this coverage is a consequence of the unfairness inherent in a society.

Dworkin's ingenuity lies in the fact that he aims to derive universal health care principles from considerations of prudential insurance coverage. He is also correct to marry our concern for equality of access in medical care with the reality of scarce resources. And while his recommendations are, on his own admission, debatable, his framework provides a platform from which we can consult public opinion and medical expertise as to what level of health coverage is desirable.

⁵¹⁵ Dworkin, R., *Sovereign Virtue*, Harvard University Press, 2000, p.315

Barring this broader consultation, let us work with Dworkin's proposals for mandatory health insurance: ordinary medical care, hospitalisation when necessary, emergency medicine, prenatal and paediatric care, and regular checkups and other preventative medicine. This scheme ought to be provided to all equally. It would ensure that key healthcare provisions are distributed on the basis of need and not according to arbitrary factors such as wealth, class, ethnicity, age, or location. The scheme would be paid for through mandatory taxation. Were specific individuals to judge the coverage insufficient, justice would allow individuals to purchase from their own funds any additional insurance, as required. For instance, particularly cautious individuals might wish to purchase an additional insurance package, which included physiotherapy or fertility treatment. In this circumstance, the provision of healthcare would derive from an agreement between private persons, private insurers and private providers. Indeed, with regard to non-essential medicine, moral objections to market allocation become less forceful.

Still, the implications of Dworkin's conception of social justice do not always match his proposals for healthcare. His idea of justice is predicated upon discrimination between chance and choice. He correctly argues that one's life chances *should not* be affected by unchosen circumstances but *should* be sensitive to one's choices. Put another way, this means we should not be held accountable for our bad 'brute luck', but that we should be responsible for our bad 'option luck', i.e. events which we could reasonably be expected to foresee and protect ourselves against. Relating this to healthcare, we might say that some medical conditions – say, being diagnosed with a brain tumour, or being injured in an accident – are instances of brute bad luck. At other times, our ill health is partially contingent upon our choices: our decision to smoke in spite of the risk of lung cancer, or our decision to eat fried food despite the chances of acquiring heart disease. In a rather brutal sense, then, people get what they deserve from their option luck. Yet, how, if at all, should option luck impact upon the provision of medical care? It might be argued – if we are to uphold the notion of personal responsibility – that the lifestyle choices of a patient *should* be considered in determining whether treatment is given. Thus, the treatment of lung cancer for smokers should be conditional on their abstinence from smoking; the treatment of heart disease should be conditional upon beneficiaries eating more healthily; and so on. Yet, not only does this jar with Dworkin's proposed collective insurance scheme

(which requires that certain tests and procedures be unconditionally available), it also strikes us as a rather vindictive way to run healthcare. Indeed, where would our moralising end? Would we withhold treatment from those who acquired HIV after not taking adequate precautions? Would we refrain from treating a drug user who has taken an overdose? Our intuitions, it would seem, would have us divorce the provision of medical attention from moral judgements about a person's responsibility for their medical condition, at least where devastating consequences follow from non-intervention. Yet Dworkin's theory of justice is blind to this notion.

Conclusion

This chapter focused on the practical implications of the relationship between freedom, material goods and social institutions. The point of market society is to produce opportunities for wealth production and to allow individuals to act on their economic freedom. However, a laissez faire society produces significant casualties, and hence the capacity of many people to pursue a vision of the good is undermined. The task, then, is to generate conditions in which people have a good chance to pursue their own ends without undermining personal responsibility or transgressing against basic freedoms. I argued this could be achieved through a mixed economy that fostered economic independence, and through social institutions that promoted personal responsibility and reciprocity. Specific policies that might facilitate this included asset-based welfare, unemployment benefit and universal basic health care.

Chapter 9 – Freedom and the Welfare of Others

“A government might be established on the principle of benevolence towards the people, like that of a father towards his children. Under such a paternal government...the subjects, as immature children who cannot distinguish between what is truly useful or harmful to themselves, would be obliged to behave purely passively and to rely upon the judgement of the head of state as to how they *ought* to be happy, and upon his kindness in willing their happiness at all. Such a government is the greatest conceivable *despotism*.”

- Kant, ‘On the Relationship of Theory to Practice in Political Right’⁵¹⁶

Introduction

Isaiah Berlin was convinced that paternalism, no matter how benevolent or cautious or rational, is infinitely patronising and degrading; it implies that men are too foolish or irresponsible to live by their own light. Indeed, Berlin goes as far as to describe paternalism as despotic, “not because it is more oppressive than naked, brutal, unenlightened tyranny, nor merely because it ignores the transcendental reason embodied in me, but because it is an insult to my conception of myself as a human being, determined to make my own life in accordance with my own (not necessarily rational or benevolent) purposes, and, above all, entitled to be recognised as such by others.”⁵¹⁷ For all that, Berlin recognised there is a need for paternalism in certain circumstances.

This chapter is centrally concerned with the value of freedom in relation to three areas of social life in which there is a genuine case to be made for paternalism: the education of children, the care of the mentally ill, and the prevention of suicide. As far as possible, I wish to uphold the value of freedom in each area. Briefly, I will look to support a pluralistic schooling system that is consistent with Rawls’ notion of political liberalism. I will defend the right of the mentally ill to determine the course of their own life. Finally, I will affirm the right to die, whether through suicide or assisted suicide: the opportunity to shape the course of one’s life includes, I argue, the right to control one’s death.

⁵¹⁶ Kant, I., ‘On the Relationship of Theory to Practice in Political Right’, *Kant’s Political Writings*, Reiss, H., (ed.), Nisbet, H.B., (trans.), Cambridge University Press, 1970, p.74

⁵¹⁷ Berlin, I., ‘Two Concepts of Liberty,’ *Four Essays on Liberty*, Oxford University Press, 1969, p.157

Part I - Education

The idea of education as a social good is problematic in two senses. First, how can we educate children and engender the skills required for a good life without recourse to a comprehensive philosophical or religious doctrine? Second, how do we ensure, given the importance of education, that children have fair access to schools and colleges, irrespective of wealth or social status? These are the two central issues that need to be addressed when we consider the necessary steps for children to be able to take intelligent and effective advantage of their basic freedoms upon reaching adulthood.

Education, Political Liberalism and the Good

Education, it would seem, is a means to enlightenment; it is the light by which individuals can navigate their pursuit of the good. Yet, this being so, must education itself be coloured by a vision of the good? Should it aspire to truth and certainty, albeit of a sectarian nature? Or should it be agnostic on the larger questions of life? Depending on one's view, sectarian education either respects the right of parents to have their children educated in accordance with their vision of the good, or else it is a frightful imposition of dogma and doctrine on immature minds. The problem is that the liberal state would seem to be sympathetic to both positions: it acknowledges a plurality of comprehensive doctrines and the right of citizens to advocate these doctrines; and yet it is duty-bound to foster the independent judgement and normal development of its citizens.

Ever since state-sponsored education was first promoted as a progressive social policy, liberals have tended to favour some form of compromise between sectarian education and children's rights. J.S. Mill attempts to deal with this tension by sanctioning a pluralist education system that nonetheless protects the determinate interests of children. Mill begins by asserting the inalienable right of children to be treated as distinct beings: "A person should be free to do as he likes in his own concerns; but he ought not to be free to do as he likes in acting for another."⁵¹⁸ The implication here is that parents ought not to be able to raise children without

⁵¹⁸ Mill, J.S., *On Liberty*, Oxford University Press, 1998, p.116

consideration for their well-being; practices that are essentially to the child's disadvantage must be prohibited. For instance, if a father looks only for the labour of his child, without consideration for the child's imagination or intellect, then we might say that the child's development has been harmed. "To bring a child into existence without a fair prospect of...instruction and training for its mind, is a moral crime, both against the unfortunate offspring and against society."⁵¹⁹ To this extent, Mill insists that the state is justified in compelling parents to educate their children: "the state should require and compel the education, up to a certain standard, of every human being who is born its citizen."⁵²⁰

However, that is not to say Mill favours the state as an appropriate authority to decide upon the instruction children should receive. If the state were to assume responsibility for education, Mill fears the views of powerful elites would be imposed upon children, leading to 'despotism of the mind'.⁵²¹ As such, the state should leave it to parents to decide where and how their children are educated; the state should merely compel parents to school their children and, in cases of impoverishment, offer financial support. This, Mill believes, is the most effective way of ensuring the full development of each person: "All that has been said of the importance of individuality of character, and diversity in opinions and modes of conduct, involves, as of the same unspeakable importance, diversity of education. A general state education is a mere contrivance for moulding people to be exactly like one another."⁵²² Mill's prescriptions are therefore radically pluralistic, sanctioning both religious and secular curricula: "There would be nothing to hinder them being taught religion, if their parents chose."⁵²³ His only proviso is that children should be made to sit public examinations in literacy and the sciences in order that there are reliable standards of educational attainment.

Yet, there are certain problems with Mill's thesis. Although his general policies are sound enough, his reasoning cannot legitimate an education system in a modern liberal democracy characterised by a plurality of comprehensive viewpoints. This is

⁵¹⁹ Ibid, p.117

⁵²⁰ Ibid, p.116

⁵²¹ Ibid, p.117

⁵²² Ibid.

⁵²³ Ibid, p.119

because Mill's argument is inspired by a sectarian ideal – the reason that he favours a pluralist system derives from his interest in securing 'individuality of character' and 'diversity in opinions and modes of conduct'. In other words, his educational policies flow from a comprehensive view of the good rather than from considerations of the right. More shall be said on this later.

It also seems that Mill's fear of a uniform education system is unwarranted; he underplays the positive contribution such a system could make to the general welfare of children and overstates its homogenising effects. Moreover, his argument that a pluralist education system will avoid 'despotism of the mind' is not altogether convincing. If parents are free to educate their child in accordance with a fundamentalist view of religion, say, then certain scholarly virtues may be relegated or rejected by those in control of the curriculum. Obedience, conformity and faith might be promoted at the expense of autonomy, inquisitiveness and critical thought. In extreme cases, then, religious education might lead to the 'despotism of the mind' that Mill feared only from a state education. Thus, Mill does not fully consider the tension that exists between the liberty of parents to educate their child in accordance with their beliefs and the interests of children in receiving an education that fosters normal development, including the growth of their capacity for independent judgement. The question, then, is what balance should obtain between these factors.

William Galston concedes significant ground to the right of parents. The reason for this pertains in part to the intimacy of the relationship that normally obtains between parent and child. As Galston points out: "On average, parents understand their children's individual traits better than public authorities do, their concern for their children's welfare is deeper, and they are not subject to the homogenizing imperatives of even the best bureaucracies in the modern state."⁵²⁴ Thus, any education policy that ignores the views of parents offends against those who are normally best placed to defend a child's welfare. Moreover, Galston suggests that the value of freedom of conscience extends to our desire to raise children in accordance with our deepest held beliefs: "we cannot detach our aspirations for our children from our understanding of

⁵²⁴ Galston, W.A., *Liberal Pluralism*, Cambridge University Press, 2002, p.100

what is good and virtuous.”⁵²⁵ At the very least, then, parents ought to be entitled to introduce their children to what they regard as vital sources of meaning and value, and to hope that their children will come to share this orientation.

Yet, that is not to say Galston is polemical in his view of education. He maintains (as any liberal ought to) that parents cannot educate their children in a way that prevents them from pursuing a foreign or unwelcome conception of the good. Parents have no right to mould their children’s character in a way that precludes the children from making a decision to break with the traditions in which they were raised. As such, parents should not have complete control over their children’s education, for the determinate interests of children are not necessarily concomitant with the interests of parents. Indeed, parents may adversely affect a child’s development through neglect, abuse, or indoctrination. It is not unreasonable, then, to concede some power to the state in order to prevent these wrongs.

Still, critics argue that Galston grants too much influence to parents and, in particular, to the right of parents to educate their children in accordance with the practices of a traditional culture. For instance, Macedo criticises Galston for his view that a liberal education system should maximally accommodate diversity of beliefs and practices, including those that challenge the central values of liberalism. To cite a well-rehearsed example, Galston advocates that parents living in the Amish community in the US ought to be allowed to pull their children out of school aged only fourteen (in order to satisfy the religious traditions of the community), so long as this accords with the wish of the child. Yet, according to Macedo, this practice could “thwart children’s ability to make adequately informed decisions about how to live their lives.”⁵²⁶ Indeed, it is a common liberal complaint that Amish practices restrict children from making independent judgements, such that they are unable to pursue a vision of the good from an array of viable alternatives. Whether or not this is true, the logic of exempting the Amish community from national standards may sanction more extreme educational practices. For instance, we might imagine a particular religious view which holds that girls should be educated to serve the needs of the home, that they

⁵²⁵ Ibid, p.102

⁵²⁶ Macedo, S., ‘Liberal Civic Education and Religious Fundamentalism: The case of God vs. John Rawls?’ *John Rawls: Critical Assessments of Leading Political Philosophers*, Volume IV: Political Liberalism and The Law of Peoples, Kukathas, C., (ed.), Routledge, 2003, p.161

should be instructed in needlework and cookery, and that they should not be taught mathematics or language beyond that required for their role. If a parent holds this patriarchal view and attributes it to a religious belief, ought we to accommodate the parent's desire to withdraw the child from state education?

Faced with the prospect of unregulated diversity (to the detriment of the child's well-being), many liberals prefer a child-centred approach to education, with an emphasis on critical thinking and autonomy. It is claimed that unless children are equipped with the intellectual tools with which to hypothesise, criticise, and review, their adult lives will be hampered and stunted, devoid of intellectual understanding. By this view, autonomy is valuable because it allows one to determine the extent to which reasons justify certain beliefs, claims, or decisions. Its inculcation requires the teaching of certain intellectual virtues: an aspiration for truth, intellectual honesty, clarity, respect for evidence, and a willingness to enter rational discussion.⁵²⁷ Moreover, autonomy is valuable as a means to revising one's conception of the good. Without an education that includes autonomy as a central aim, children will be unable to make rational judgements about the value of different ways of life. If we are to equip children with adequate skills to steer a course through life, then we must nurture their autonomous capabilities when young by promoting open-mindedness, experiments in living, and tolerance.

The problem with this argument is that it relies on a comprehensive philosophical position. If we are to privilege the value of autonomy then the state provision of education loses its impartiality and becomes sectarian. The reason that liberals take so easily to this comprehensive perspective is that it is amenable to their conception of the good, broadly defined. Yet, we can understand the disquiet of religious fundamentalists and conservatives by considering how liberals would react to their children being taught values and ideas that are alien to the liberal worldview. If parents look to instil in their child the virtues of autonomous choice, critical reflection and scepticism of unsupported claims to truth, then they will contest a schooling system that promotes religious faith, deference and obedience to tradition. It seems,

⁵²⁷ Steutel, J., and Spiecker, B., 'Liberalism and Critical Thinking', *The Aims of Education*, Marples, R., (ed.), Routledge, 1999, p.62

then, that liberal sensibilities must be watered down if they are to be agreeable to all, or most, citizens.

This indeed is the central point that Rawls makes in *Political Liberalism*. A legitimate liberal society ought to be founded upon civic values that are consistent with a wide array of competing comprehensive perspectives. The state has no business promoting one sectarian view over another, including those which claim to be liberal. Liberalism must be restricted to the political sphere:

“The liberalism of Kant and Mill may lead to requirements designed to foster the values of autonomy and individuality as ideals to govern much if not all of life. But political liberalism has a different aim and requires far less. It will ask that children’s education include such things as knowledge of their constitutional and civic rights so that, for example, they know that liberty of conscience exists in their society and that apostasy is not a legal crime, all this to ensure that their continued membership when they come of age is not based simply ignorance of their basic rights or fear of punishment for offences that do not exist. Moreover, their education should also prepare them to be fully cooperating members of society and enable them to be self-supporting; it should also encourage the political virtues so that they want to honour the fair terms of social cooperation in their relations with the rest of society.”⁵²⁸

According to Rawls, although education ought to advance an array of civic ideals, it should stop short of promoting a comprehensive liberal view of the good: ‘the question of children’s education’ ought to be answered from ‘entirely within the political conception.’⁵²⁹ Nonetheless, the educational requirements of political liberalism remain controversial. Let us first consider the proviso that children are to be made aware of their civic rights and obligations. This policy will not be agreeable to all citizens. For instance, we can imagine a religious fundamentalist objecting to an education system that makes a point of giving information on citizens’ right to break with their cultural and religious traditions. By this view, instruction on civic rights will encourage a child to forsake their heritage and family values. Rawls himself concedes that his prescription for education may inadvertently lead to a stronger liberal position than is strictly required by political liberalism, although he maintains

⁵²⁸ Rawls, J., *Political Liberalism*, Columbia University Press, 1993, p.199

⁵²⁹ *Ibid.*, p.200

that we should not shy away from this: "the unavoidable consequences of reasonable requirements for children's education may have to be accepted, often with regret."⁵³⁰ Political liberalism holds that just as one has the right to follow a traditional lifestyle, one equally has the right to break with that tradition. Thus, education has a negative obligation not to foreclose either option, and a positive obligation to make children aware of their legal opportunities.

Rawls' commitment to stop short of a comprehensive liberal perspective is further strained by his broader strategy to secure the conditions under which citizens can form, revise and rationally pursue a determinate conception of the good. According to Rawls, this requires the full, deliberate and reasoned exercise of our intellectual and moral powers:

"This rationally affirmed relation between our deliberative reason and our way of life itself becomes part of our determinate conception of the good... Thus, in addition to our beliefs being true, our actions right, and our ends good, we may also strive to appreciate *why* our beliefs are true, our actions right, and our ends good and suitable for us. As Mill would say, we may seek to make our conception of the good 'our own'; we are not content to accept it ready-made from our society or social peers."⁵³¹

Rawls is very careful with his language here, noting only our opportunity (rather than our obligation) to critically examine our ends. Indeed, he goes on to say that "many persons may not examine their acquired beliefs and ends but take them on faith, or be satisfied that they are matters of custom and tradition. They are not to be criticised for this."⁵³² Nonetheless, Rawls faces severe difficulties in reconciling these outcomes. Our critical capacities are not ready made; they are nurtured and developed by education. In other words, the agnosticism of political liberalism and its obligation to foster the development of citizens' moral powers pulls its educational policy in different directions: the more room we leave in education for faith, acceptance and tradition, the more our critical capacity to revise and rationally pursue a determinate conception of the good will suffer.

⁵³⁰ Ibid, p.200

⁵³¹ Rawls, J., *Political Liberalism*, Columbia University Press, 1993, p.313

⁵³² Ibid, p.314

Even if autonomy is not an essential component of a good life, it may still be necessary if citizens are to acquire the 'political' virtues of reciprocity, tolerance, and reasonableness. Citizens must recognise that the 'burdens of judgement' render their own 'comprehensive' position inappropriate for argument in a political sphere characterised by reasonable pluralism. As Eamonn Callan points out, this potentially imposes educational requirements on children that are tantamount to the promotion of autonomy: the capacity to accept the reasonableness of comprehensive philosophical or religious positions opposed to one's own; the capacity to set aside our 'thick' ethical beliefs in political debate; the ability to reflect critically upon other comprehensive perspectives.⁵³³ Yet, it may be that this criticism of Rawls is overcooked slightly: it is grounded on the premise that people who hold comprehensive viewpoints are intolerant of competing views and hence need to be instructed on the requirements of political liberalism. In truth, however, many people loyal to a comprehensive religious or philosophical perspective are perfectly willing to live and let live, and so the obligation to foster autonomy and critical thought as an educational goal is radically diminished.

As such, we should not merely discard the distinction between political and comprehensive liberalism vis-à-vis the education of the children. Whereas the former is potentially homogenising (offering only state run secular schools), the latter is consistent with a plurality of different school types: some might be religious, others secular; some might specialise in a specific academic area (like drama or science), others may provide a general education. The pluralistic approach would provide parents with a choice over how their children are to be educated; and it would prevent the state from having to favour a determinate conception of the good. Yet, even then, certain liberal values ought to be universally respected, even if in diluted form. As we have witnessed, political liberalism may not be a comprehensive doctrine, but that does not mean it is uncontroversial or equally accommodating of all religious or philosophical beliefs.⁵³⁴ Some modicum of critical thought must be encouraged even within religious schools. Without a minimum degree of rational reflection, citizens

⁵³³ Callan, E., 'Political Liberalism and Political Education', *Review of Politics*, 1996, p.5-33 This point is also made in Levinson, M., *The Demands of Liberal Education*, Oxford University Press, Chapter 1.

⁵³⁴ Macedo, S., 'Liberal Civic Education and Religious Fundamentalism: The case of God vs. John Rawls?' *John Rawls: Critical Assessments of Leading Political Philosophers*, Volume IV: Political Liberalism and The Law of Peoples, Kukathas, C., (ed.), Routledge, 2003, p.151

may not be able to understand their freedom to revise their conception of the good, or their obligation to treat others with respect or tolerance. Thus, while political liberalism can have no objection to religious schools, it must challenge dogma and censorship.

Consequently, we might discriminate between weak and strong religious instruction (in the context of a general education). Weak religious instruction might favour a specific doctrine, but would also point to the various arguments (religious and secular) that contest its veracity; moreover, weak religious instruction would allow (and sometimes require) children to read sources other than those which convey the central doctrine. A strong conception of religious instruction would, by contrast, inculcate belief by dogmatically imposing one version of the truth on pupils and by prohibiting heretical texts, thus rendering the pupils ignorant of alternative viewpoints. A liberal state should grant the first type of religious education but not the latter, which sanctions a type of doctrinal censorship that is unacceptable in an open society. And if advocates of a specific religion criticise this position as a veiled secularism, then we must point them back to rights of children to break with tradition, to the right of the state to promote openness, cooperation and tolerance, and to their right as parents to provide religious instruction outside the classroom.

Admittedly, this policy will generate controversial educational requirements. For instance, few concessions can be made to fundamentalists regarding the teaching of science in schools. Fundamentalists have argued that science in general (and Darwinism in particular) is a comprehensive doctrine and as such should be considered sectarian; reasonable people may believe that in some areas science pulls up short. Yet this argument is unpersuasive. Of course science pulls up short in some areas, but it is a mere truism to claim that human knowledge is incomplete; and anyway, this provides no reason not to teach the scientific knowledge that we do have. Moreover, science is not a comprehensive doctrine in the Rawlsian sense: while it makes claims about the nature of the external world, it is silent on questions about what is good or what gives life meaning. Indeed, people who would restrict the teaching of science are usually motivated by the fact that they do not want their comprehensive worldview to be challenged. Yet, a liberal society is a market place of ideas, and whilst it does not prohibit the free expression of religious sentiment, neither

does it give religious sects any special protection against competing ideas, or guarantee them members. To this extent, even in religious schools, scientific claims must be rejected on their own terms. It is insufficient to say that a scientific theory is false because it conflicts with one's view about how the world came into being; reasons must be provided to explain *why* it is false; there-in lies the difference between belief and knowledge (and the primary aim of education must surely be to impart knowledge).⁵³⁵ Unless children are educated to approach science in this way, they will be unfairly limited in their view of reality. Admittedly, some religious devotees might present their objections to Darwinism in scientific form. This is entirely legitimate, so long as it is presented in an honest fashion. That is to say, a teacher might legitimately point to the weaknesses of evolutionary theory, but only if he also discusses the (compelling) evidence that supports it. Good scientific thought allows and indeed requires that openness.⁵³⁶

Education and Equal Opportunity

Having affirmed that a liberal society ought to sanction a plurality of school types, so long as certain core liberal values are respected, let us move on to the issue of equal access. A consequence of granting greater choice in education is that it becomes more difficult to ensure equal opportunity. Admittedly, equity in education is not always presented as being of overriding concern - some people concede more importance to the right of parents to privately finance the education of their children. Two questions therefore have to be settled: First, ought we to allow parents to purchase an advantaged education for their children? Second, if we insist that education ought to be financed solely from public funds, how are we to provide for choice in schooling?

Let us first deal with the issue of privately financed schooling. According to libertarians like Hayek, it is unjust to prevent parents from investing in the education of their children. The proscription of private education ignores parents' moral right to make a material sacrifice in order to progress the education of their child. What is

⁵³⁵ For an excellent defence of 'liberal science' see Rauch, J., *Kindly Inquisitor*, The University of Chicago Press, 1993

⁵³⁶ In the US, some religious devotees are asking for equal curricular time between Darwinism and Creationism. I view this as an unreasonable demand, even if the amount of time devoted to religious and scientific matters in school is less important than the way each is taught. The crucial point is that Darwinism should not be portrayed in relativistic terms - if one claims it is false, one must give scientific reasons as to *why* that is so.

more, Hayek is not troubled by the notion that this will thereby confer on some children an undeserved advantage: that some children might enjoy the advantages of a favourable home atmosphere is an asset to society, which egalitarian policies can destroy. Finally, the attempt to manufacture equal opportunity in education will necessarily repress some children's natural talents: "The desire to eliminate the effects of accident, which lies at the root of 'social justice,' can be satisfied in the field of education, as elsewhere, only by eliminating all opportunities which are not subject to deliberate control."⁵³⁷ In sum, if we were to forbid all opportunities to children beyond those available to the least fortunate, significant harm would be done to children's welfare, parental liberty, and the 'growth of civilisation'.⁵³⁸

Some consider this a strong defence of private education, although I am not convinced. First, according to what moral imperative must we prioritise conditions that facilitate an amorphous phenomenon like the 'growth of civilisation'? Surely our responsibility is to the individuals whose opportunities are delimited or expanded by education? Second, while an egalitarian rubric may well place limitations on parental liberty, this is nonetheless justified since it ensures that no child is arbitrarily advantaged by the wealth of the family into which she is born. It is unfair to make educational opportunities dependent on circumstances over which a child has no control. Moreover, the issue is not simply a case of liberty versus equality, for as Berlin argues, the future worth of children's liberty is also at stake:

"It is, I believe, desirable to introduce a uniform system of primary and secondary education... If I were asked why I believe this, I should [point to]... the intrinsic claims of social equality; the evils arising from differences of status created by a system of education governed by the financial resources or the social position of parents rather than the ability and needs of the children; the ideal of social solidarity; the need to provide for the bodies and minds of as many individuals as possible, and not only of members of a privileged class; and, what is more relevant here, the need to provide the maximum number of children with opportunities for free choice, which equality in education is likely to increase. If I were told that this must severely curtail the liberty of parents who claim the right not to be interfered with in this matter – that it was an elementary right to be allowed to choose the

⁵³⁷ Hayek, F.A. von, *The Constitution of Liberty*, Routledge & Kegan Paul, 1960, p.385

⁵³⁸ *Ibid.*, p.384-6

type of education to be given to one's child, to determine the intellectual, religious, social, economic conditions in which the child is to be brought up – I should not be ready to dismiss this outright. But I should maintain that when (as in this case) values genuinely clash, choices must be made. In this case the clash arises between the need to preserve the existing liberty of some parents to determine the type of education they seek for their children; the need to promote other social purposes; and, finally, the need to create conditions in which those who lack them will be provided with opportunities to exercise those rights (freedom to choose) which they legally possess, but cannot without such opportunities, put to use."⁵³⁹

2.

Berlin is clear about the need to eliminate money and privilege from education, for a host of reasons that pertain to fairness and equality. However, his most interesting argument appeals to liberty itself: equality in education provides for the *future worth* of children's freedom. In the first instance, education is often a route from poverty, a means by which a person can secure fulfilling employment. To the extent that an education can lead to greater material wealth, persons are thereby placed in a position to take advantage of their basic freedoms, to advance their ends or conception of the good. Moreover, education provides a knowledge base that allows us to act upon our basic civil and political liberties. Without a decent education, we could vote, but we might not understand the relative merits of the candidates; we could stand for election, but we would be unable to articulate a persuasive sermon; we could subscribe to any reasonable morality or religion we like, but we would be incapable of comprehending its full message; we could resist arbitrary arrest, but we might not be able to defend ourselves in court. In short, a decent education improves the worth of the basic liberties.

Thus, there is a strong rationale to ensure that universal standards in education are met and that every child is given an adequate opportunity to learn, neither advantaged nor disadvantaged by family wealth. Unfortunately, this is blatantly not the case in the UK. Children in independent schools have twice as much spent on them per head as those in state schools. The teacher-pupil ratio is 1:10 compared with 1:17 in state secondary schools and 1:23 in state primary schools. While pupils from independent schools amount to 7 percent of the total school-age population, they account for 29

⁵³⁹ Berlin, I., 'Introduction,' *Four Essays on Liberty*, Oxford University Press, 1969, p.iii-iv

percent of entrants to the top universities.⁵⁴⁰ Moreover, inequalities relate not just to academic performance: children at independent schools enjoy sporting, artistic and cultural opportunities that nurture strong and confident personalities. If we are to draw any conclusions from these figures, it is this: allowing parents to buy an advantaged education for their children is unfair on those who do not have the means to do likewise.

An easy solution to the problem of inequality would be to institute a uniform education system, which would ensure that a school represents the entire economic spectrum of society and that each child receives the same type of education. By levelling out the playing field in this way, the children of wealthy parents are not arbitrarily advantaged. As Adam Swift points out: "Education is, in part, a positional good: one's education leaves one better or worse placed in the competition for other desirable things – places at good universities, desirable jobs. Preventing some people from buying positional advantage increases the value of education received by the rest."⁵⁴¹ In other words, a uniform state education will be more effective at providing equal opportunity than a heterogeneous system that allows wealthy parents to purchase an advantaged education for their children. The problem, however, is that a uniform system is at odds with our previous conclusions about the type of education that follows from political liberalism. Whereas concern for equity promotes a uniform service, respect for liberty and pluralism promotes a fragmented provision. What, therefore, are we to do? Do we argue with Berlin that whilst the liberty of parents to send their children to a school of their choice is an important consideration, it must give way to the requirements of fairness and equal opportunity? Or do we argue with Galston that the relationship between parent and child is so fundamental to our being that to ignore freedom of choice in education is tantamount to the prevention of freedom of conscience?

We might respect both freedom and equity by adapting the type of inquiry favoured by Dworkin: we should ask what kind of education system citizens living in a liberal democracy would choose if they had equal resources and were subject to a partial veil of ignorance. The parties know that there is a wide plurality of religious positions and

⁵⁴⁰ Seldon, A., 'Rethinking the Private School Problem' *Prospect*, June, 2003, p.18-22

⁵⁴¹ Swift, A., 'Rethinking the Private School Problem' *Prospect*, June, 2003, p.20

conceptions of the good in society, and that the children (who will make use of the education system) vary in intelligence, although they are otherwise ignorant of their own vision of the good and life circumstances (whether or not they have children, whether or not they are religious, and so on). The only proviso is that the parties must ensure that all children receive an education. Equipped with this knowledge, what type of system will be selected?

Although highly speculative, we might offer the following as a rough suggestion. In the first instance, the parties will be motivated to select a pluralist education system that accommodates an array of comprehensive doctrines. Not knowing what philosophy or religion they subscribe to, the parties will protect their determinate interests by leaving the system open to all reasonable comprehensive doctrines.⁵⁴² Schools might therefore be granted a degree of autonomy to be run in accordance with a comprehensive philosophy or religious perspective. At the same time, the background culture and basic structure of society prevents the parties from instituting schools whose values challenge the liberal democratic ideal. Second, the parties will be averse to the idea of a private fee-paying system. Though private schooling may protect choice and promote pluralism (different schools compete for the patronage of parents), it does not take account of the unequal financial risks faced by the parties (equal resources are already assumed). Some citizens will have no children (meaning education will not impinge upon their personal wealth), while others will have several children (which could lead to an unacceptable burden on their resources). Given this uncertainty, the parties are motivated to spread the financial burden of education between them and hence decide that schools ought to be financed from general taxation. Third, the education system will benefit children of all abilities. Importantly, this does not mean that equal resources should be devoted to each child: for instance, a child with severe learning difficulties might require additional time and resources, and it would be unfair to ask parents to shoulder these extra costs. Yet equally, the system cannot be designed solely to satisfy the needs of the most vulnerable, for then the interests of the majority will be harmed. Therefore, the parties might agree in advance how much should be set aside for the special needs of students with learning

⁵⁴² An alternative solution might be to forbid all comprehensive perspectives, meaning no doctrine would be privileged. However, from behind the veil of ignorance, the parties do not know that they will *not* want their children (should they have any) to be instructed in accordance with their religion (should they have one). The only way not to foreclose certain options, then, is to leave the system open to a plurality of comprehensive perspectives.

difficulties. Whatever amount is agreed to, the system must be able to deliver a suitable education to all, free at the point of use.

Thus, we ought to work towards an education system that accommodates a plurality of school-types - to be financed from the public purse - which guarantees an education for children of all abilities. This might be realised through a voucher system. By this idea, schools are given greater independence than has traditionally been granted in the state sector. This would allow schools to provide a differentiated service, which would be responsive to the requirements of parents (schools might position themselves on educational or religious grounds). Parents would then use government-funded coupons to pay for what they consider to be the most suitable education for their children; they would choose between the schools that were competing for their business. This notion has its origins in the writing of free-market liberals like Friedmann and Hayek, but it works equally well as an egalitarian scheme. The vouchers ensure equality of resources (mirroring our thought experiment), since each parent is given the same purchasing power. A voucher scheme therefore protects choice from a position of equity. This system would also avoid allegations of government bias since the existence of different school types - including religious schools - would be driven by overall demand.

It is pertinent at this point to compare the voucher scheme for education with the policy for healthcare discussed earlier. Although both policies are derived from a thought experiment in which the policy makers are subject to a partial veil of ignorance, the outcomes are different: whereas citizens would be allowed to top-up their medical coverage by investing in a more comprehensive insurance policy, the voucher system expressly forbids the supplementary financing of education. This is because the equality of resources assumed in the thought experiment is preserved through a voucher scheme that gives each parent equal purchasing power. To give parents the right to supplement the voucher scheme with private finance would undermine the equality condition far more radically than would the right to purchase additional medical care. This is because education is to a greater extent than healthcare related to the competitive element in society; education is a 'positional good' that can greatly affect a person's opportunities in life.

Still, additional supports may be required if the voucher system is to work successfully. For instance, if a parent decides to send his child to a religious school at the far end of town, then transport to and from school may have to be provided if the choice is to be feasible. In the absence of such support, parents may find it easier simply to send their children to a more conveniently located school, irrespective of its academic reputation. In other words, efforts should be made to ensure that parents are able to make 'active choices' regarding their children's education. Without a proactive approach to the voucher scheme, it may fail to accomplish what it promises. Experiments with the voucher system in the US suggest that better-educated, more affluent parents are more likely to deliberate over the choice presented; poorly-educated parents are more likely to rely on 'hearsay' or 'blind luck' when choosing.⁵⁴³ Still, these problems suggest only that the practical implementation of the voucher scheme could be improved, not that the scheme itself is fundamentally flawed.

Under what conditions might schools be allowed to compete for vouchers? In order to operate the voucher scheme fairly and efficiently, the following safeguards might be introduced:

- Schools must not discriminate in their admissions policies against children on grounds of race, class, religion, or intelligence.
- Schools must make pupils aware of their civil rights and civic responsibilities through citizenship classes.
- Reliable standards of education should be established via examinations in core subjects like mathematics, languages and sciences.

Let us consider each of these conditions in turn. The first condition generates a problem inasmuch as successful schools will receive more applications than they can accommodate. As such, there must be a means to select pupils. Race and class are immediately ruled out as irrelevant prejudices that ought to play no part in selection. This follows directly from the principle of equal opportunity. A religious criterion is perhaps more difficult to judge because faith-based schools are allowed in the system. However, the voucher scheme is meant to empower, not delimit, parental choice. As

⁵⁴³ Levinson, M., *The Demands of Liberal Education*, Oxford University Press, p.152-4

such, non-religious children should be allowed to attend faith-based schools and should have the right to opt out of religious ceremonies, teachings and assemblies.⁵⁴⁴ Intelligence is perhaps the least controversial criterion that could be used in a selection process. Indeed, at the academic extremes of genius and learning disabled there is a strong case for employing this criterion. However, for the vast majority of pupils who are either slightly above or below average ability, intelligence tests might place artificial constraints on their educational attainments. Pupils might be channelled into an educational environment that does not reflect their best interests or requirements. As such the problem of selection might be best settled by invoking a purely arbitrary procedure. A lottery might be the least unfair means of selection for over-subscribed schools, since it would give every pupil an equal chance of admittance. The Milwaukee Parental Choice Programme in the US has used this criterion.⁵⁴⁵

Part II - Liberty, Irrationality and Harm

Let us now turn to a more difficult issue, namely, the right of a government to detain or forcibly treat people who are incapacitated by mental illness. Should the state have the right to restrict the freedom of those whose behaviour is irrational or self-destructive? What criteria would justify this position? Should we distinguish between the restraint of a person on grounds of paternalism (the prevention of self-harm) and on grounds of public interest (the prevention of harm to others)? How intrusive, pervasive and debilitating should intervention be in each case?

Regarding the issue of mental illness, the UK government seems not to recognise the moral distinction between harm to others and harm to oneself. Under the Draft Mental Health Bill (2002), a person will *automatically* be subject to compulsory powers if the following conditions are met:

- The patient is suffering from a 'mental disorder'

⁵⁴⁴ The reasons for a non-religious parent to send their child to a religious school would obviously be based on considerations of educational excellence, not religious doctrine.

⁵⁴⁵ Brighouse, H., *Egalitarian Liberalism and Justice in Education*, University of London, 2002, p.23

- The mental disorder is 'of such a nature or degree as to warrant the provision of medical treatment'
- A patient is 'at substantial risk' of causing 'serious harm to others'; or is a risk to his or her own 'health or safety'
- 'Appropriate medical treatment is available in the patient's case'⁵⁴⁶

This section aims to persuade the reader of two fundamental points. First, that there is a crucial moral difference between paternalistic intervention and intervention to prevent harm to others (the latter is more easily justified). This rubric derives from Mill's distinction between self-regarding conduct and other-regarding conduct. Second, that it is wrong to ground mental health legislation primarily on the notion of risk; such a move places insufficient importance on the rights and liberties of those diagnosed with a mental illness.

Mental Illness, Liberty, and the Harm Principle

"The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others." – J.S. Mill, 'On Liberty'⁵⁴⁷

According to Mill, the state is justified in forcibly detaining someone who poses a threat to the safety and well-being of others. This principle rightly commands broad support. Yet, there is a problem in its application: establishing whether someone is a risk to the public is extremely difficult to determine. Modern sensibilities suggest that the ascription of criminality ought to be retrospective: the restriction of an individual's liberty ought to be dealt with by criminal law. We think of citizens as being free within the bounds of the law, innocent until proven guilty of a crime - only then can we legitimately imprison someone. To pre-empt the matter by imprisoning individuals on grounds of their criminal potential would place such sweeping and intrusive restrictions on liberty as to be inconsistent with all but the most tyrannical of political systems. Unfortunately, it is this standard that currently shadows the lives of those diagnosed with a mental illness; their personal freedoms are far less certain than

⁵⁴⁶ <http://www.doh.gov.uk/mentalhealth/draftbill2002/index.htm>

⁵⁴⁷ Mill, J.S., *On Liberty and Other Essays*, Oxford University Press, 1991

the basic rights and liberties that most citizens enjoy. My task is to strike a blow against this injustice.

Let us begin by considering the nature of mental illness. According to the British Psychological Society, mental illness is a broad term that encompasses a wide range of diagnoses, including 'schizophrenia', 'psychosis', and 'manic depression'.⁵⁴⁸ Symptoms include hallucinatory and delusional experiences as well as strong fluctuations in mood. About one person in a hundred will be diagnosed with schizophrenia in their lifetime; the same number will be diagnosed with manic depression. Yet, the dichotomy of 'mental health' and 'mental illness' can also be misleading – inasmuch as both appraisals merely describe behaviour, there is a continuum that extends from extreme and unusual behaviour to normality.⁵⁴⁹ Moreover, since psychiatric diagnoses indicate nothing about the causes of the behaviours, prognosis does not automatically follow from diagnosis – there are variables that obfuscate the relationship between causes, symptoms and treatment.⁵⁵⁰ Not only does this mean that certain treatments work for some but not for others, it also makes it difficult to undertake risk assessments.

Many people assume that a diagnosis of psychosis means that individuals must resign themselves to a life of illness and disability. In fact, the course of psychotic experience is very different for different people – many people who have distressing psychotic experiences at some time in their lives never have them again, and less than a quarter remain permanently affected. Some people who continue to have psychotic experiences nonetheless manage to sustain a high quality of life. It is possible for people who experience enduring psychotic episodes to find lasting employment and enjoy enduring relationships. Many of the difficulties faced have more to do with stigmatisation, social isolation and poverty than with the psychotic experiences themselves.⁵⁵¹

⁵⁴⁸ The British Psychological Society, 'Recent advances in understanding mental illness and psychotic experiences,' June 2000

⁵⁴⁹ *Ibid.*, p. 16

⁵⁵⁰ *Ibid.*, p. 16

⁵⁵¹ *Ibid.*, p. 14

Mental illness, therefore, ought not to be presented as an unmanageable madness, which requires punitive measures to safeguard the public. As the BPS points out, the threat to others from those diagnosed with mental illness is only marginally greater than those without diagnosis:

"A very few people with diagnoses of mental illness commit violent acts, including homicide. It is very slightly more common for people with such diagnoses to commit such violent crimes than it is for those without diagnoses. However, 95 percent of homicides are not committed by psychiatric patients and most psychiatric patients are not dangerous. Moreover, specific diagnoses such as schizophrenia do not predict dangerousness."⁵⁵²

The BPS continues:

"If you wanted to predict whether a person was going to be violent in the future, the most important factor to consider would be whether they had been violent in the past. Whether or not they had a diagnosis of mental illness would be less important than their alcohol or drug use, their age, their gender and their social circumstances and their relationship to the potential victim."⁵⁵³

Despite the tenuous link between mental illness and violence, there ought to exist legislation that allows for the compulsory short-term treatment of those with a mental illness who exhibit violent tendencies. Some specific psychotic experiences are linked to higher rates of violence, such as 'command hallucinations' (voices that instruct a person to harm others) and 'delusions with hostile content' (a fixed and rigid belief about the need to harm others).⁵⁵⁴ Such factors should always be considered when making a risk assessment. More broadly, the threat of violence will be greatly enhanced where a person has been violent in the past or where a person is exhibiting abnormally aggressive tendencies or hostile behaviour. The latter is likely to be an emergency situation, in which the affected party is already 'out of control'.⁵⁵⁵ When

⁵⁵² Ibid, p.49

⁵⁵³ The British Psychological Society, 'Recent advances in understanding mental illness and psychotic experiences,' June 2000, p.51

⁵⁵⁴ Ibid, p.49

⁵⁵⁵ Davison, G.C., Neale, J.M., *Abnormal Psychology*, 7th Edition, John Wiley & Sons, 1998, p.605

such conditions obtain, then compulsion is obviously justified, so long as rigorous safeguards are met.

Unfortunately, recent proposals by the British Government do not adequately protect individuals against unnecessary compulsion. Draconian mental health legislation is currently being primed, which would allow for significant restrictions of liberty. Under the Draft Mental Health Bill (2002), a person will *automatically* be subject to compulsory powers if two qualified medical practitioners judge that the four conditions (listed above) are met.⁵⁵⁶ Crucially, however, the first and fourth criteria utilise definitions that are broad enough to allow for the wrongful use of compulsory powers. The first criterion defines a mental disorder very broadly as 'any disability or disorder of mind or brain which results in an impairment or disturbance of mental functioning'.⁵⁵⁶ This definition makes no reference to specific diagnostic categories such as 'psychosis' or 'manic depression'; and it is broad enough to include groups of people such as the learning disabled.⁵⁵⁷ The fourth criterion defines appropriate medical treatment as 'treatment for mental disorder provided under the supervision of an approved clinician'; and for this purpose 'treatment' includes -- nursing, care, habilitation (including education, and training in work, social and independent living skills), and rehabilitation (which covers the same areas as habilitation).⁵⁵⁸

The case with which the first and fourth criteria could be satisfied ensures that the proposed legislation would effectively allow individuals to be indefinitely detained on the basis of 'risk'. Both lawyers and psychiatrists are extremely critical of this proposal, believing it to be a populist response to public fears and insecurities.⁵⁵⁹ The legislation would place significant pressure on health professionals to make accurate risk assessments and would transform their role from being primarily concerned with healthcare to an orientation of social control. Notwithstanding the blurring of professional boundaries, there is also the problem of accurately identifying risk; it is widely accepted by mental health professionals that the prediction of dangerousness is

⁵⁵⁶ <http://www.doh.gov.uk/mentalhealth/draftbill2002/index.htm>

⁵⁵⁷ http://www.mentalhealth.org.uk/html/content/response_mhb_engwales_0902.pdf

⁵⁵⁸ <http://www.doh.gov.uk/mentalhealth/draftbill2002/index.htm>

⁵⁵⁹ Gray, S. et al., *Criminal Justice, Mental Health, and the Politics of Risk*, Cavendish Publishing, 2002, p.3

fallible, especially where there is no prior record of violence.⁵⁶⁰ As Gray et al. point out:

"The current research literature and the experience of our clinicians has very little to say about how we might reliably and validly evaluate risk in someone who has never previously committed a serious criminal offence."⁵⁶¹

Consider the risk that psychopaths pose to the public. Although there is strong evidence that a diagnosis of psychopathy can predict recidivism across all forensic populations, the diagnosis itself does not determine criminality - there are many people who meet the criteria for psychopathy but who never commit a serious crime.⁵⁶² Thus, psychiatrists might be able to predict that previous offenders diagnosed with a psychopathic disorder will re-offend; but there is no known way to establish whether psychopaths who have not yet offended will ever offend. This raises a crucial moral dilemma: if we agree with Rawls that justice is the first virtue of social institutions, then should we allow for the detention of individuals without a history of violence if psychiatry can only imperfectly identify which of those individuals will become serious offenders? If, as Rawls claims, each person possesses inviolability founded on justice that even the welfare of society as a whole cannot override, can we legitimately imprison, say, five men on the basis that three of them would otherwise commit a serious offence?⁵⁶³ There is good reason to think not. It is for this reason that the legislation falls short - it ought to stipulate in advance that threat to others must be demonstrable or judged to be imminent; otherwise, it is possible that many people will be wrongly detained.⁵⁶⁴

The proposed legislation also provides inadequate safeguards in relation to the appropriateness of treatment. The new criteria allow for extremely controversial

⁵⁶⁰ Davison, G.C., Neale, J.M., *Abnormal Psychology*, 7th Edition, John Wiley & Sons, 1998, p.605 Statistical methods are often unhelpful as a means to determine risk. For example, some ethnic groups indicate higher rates of violent crime than others; does this then mean we can predict the risk an individual poses on the basis of his ethnicity? Of course not. The same lesson can be drawn for the correlation between mental illness and criminality.

⁵⁶¹ Gray, S. et al., *Criminal Justice, Mental Health, and the Politics of Risk*, Cavendish Publishing, 2002, p.8

⁵⁶² Ibid, p.7-8

⁵⁶³ Eastman, N., 'The Ethics of Clinical Risk Assessment and Management' in *Criminal Justice, Mental Health, and the Politics of Risk*, Gray, S. et al., (eds.) Cavendish Publishing, 2002, p.56-7

⁵⁶⁴ Given the social pressures that will be placed on psychiatrists to avoid 'false negatives' (i.e. failure to identify and detain a dangerous psychopath), they will be motivated to err on the side of injustice and imprison harmless individuals. Ibid, p.61

medication, therapies and surgical procedures to be administered on a compulsory basis. For instance, where an individual is deemed incapable of consenting to treatment, the proposed legislation allows for non-consensual surgical operations that will destroy the functioning of brain tissue. Other non-consensual treatments - such as antipsychotic drugs - are equally controversial. As Davison and Neale point out, "The side effects of most antipsychotic drugs are often aversive to the patient and sometimes harmful and irreversible in the long run, and the drugs do not truly address all of the patient's psychosocial problems."⁵⁶⁵ Such invasive and contentious treatments ought to require more stringent safeguards, one of which should be active patient consent.⁵⁶⁶

In light of these problems, many professional and charitable organisations argue that the Government's proposals are fundamentally flawed, misconceived, and unworkable; they are likely to infringe on individuals' human rights and undermine the more positive aspects of current mental health policy.⁵⁶⁷ More broadly, the proposed legislation ignores the principle of reciprocity (whereby individuals are properly consulted on their treatment plan, with appropriate obligations on their part), abolishes checks and balances (such as the powers of discharge by the Nearest Relative), and sweeps away the important principle that compulsion should only be used as a last resort.⁵⁶⁸ In short, the Government's proposals move the legislation in the wrong direction. The criteria for compulsory treatment should therefore be amended to include the following safeguards, all of which are recognised in UN guidelines:⁵⁶⁹

- In relation to risk management, threat to others must be clearly demonstrated or judged to be imminent; even then, compulsory treatment ought to be undertaken as a last resort, and the measures ought to be the least restrictive available (so long as the safety of the patient and general public is protected). Independent advocates may be employed to make this principle effective and to ensure that persons are not detained for longer than is necessary.

⁵⁶⁵ Davison, G.C., Neale, J.M., *Abnormal Psychology*, 7th Edition, John Wiley & Sons, 1998, p.614

⁵⁶⁶ http://www.mentalhealth.org.uk/html/content/response_mhb_engwales_0902.pdf

⁵⁶⁷ The Mental Health Foundation and the British Psychological Society, among others, level such criticism.

⁵⁶⁸ http://www.mentalhealth.org.uk/html/content/response_mhb_engwales_0902.pdf

⁵⁶⁹ UN Resolution 46/119, 'Principles for the protection of Persons with Mental Illness and the Improvement of Mental Health Care', 1991

- There should be a duty for full information to be provided on any proposed treatment and for informed consent to be sought in every case. Where informed consent is not obtained, treatment must be the least invasive available. Special safeguards should apply to controversial treatments. Psychosurgery and other intrusive and irreversible treatments for mental illness should never be carried out on a patient who is an involuntary patient in a mental health facility.
- The treatment of every patient shall be directed towards preserving and enhancing their capacities to pursue a vision of the good. People with mental health problems should have the right to choose whatever lifestyle is best for them and have that choice respected, so long as the conditions for compulsory treatment are not met.

Mental Illness, Suicide and Paternalism

"Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest." – J.S. Mill, 'On Liberty'⁵⁷⁰

As mentioned, Mill's harm principle provides clear ground for coercive practice if it is necessary to protect the physical integrity of citizens; to this extent, Mill would accept that there are grounds to restrict the liberty of people who are a demonstrable threat to others. Yet, it is less clear what his opinion is of paternalism. On the one hand, he suggests that we cannot compel others to act in accordance with our vision of the good; we ought to leave people alone, to live as they see fit, for better or worse, so long as they do not harm other people. However, Mill concedes that people can sometimes act in ignorance of their true interests, like the man who strides across a damaged bridge, not knowing of its danger. In these circumstances, he writes, we can justifiably restrict the man from proceeding, at least until we alert him of the danger.

This type of argument allows for limited paternalism with regard to our topic; we might say that suicide ought to be allowed only if it can be shown that it is undertaken out of an enduring desire or belief. What circumstances demonstrate such conviction? This is a difficult question to answer, but we might say that a person's desire to commit suicide should be accepted if it is consistent with his overall plan of life and if it is persistent across time. For instance, people who have contracted a fatal illness

⁵⁷⁰ Mill, J.S., *On Liberty and Other Essays*, Oxford University Press, 1991.

have been known to commit suicide to avoid a protracted, degrading and painful death. In other words, there are rational grounds for taking one's own life if it is consistent with one's overall vision of the good. To this end, we might follow Sartre and assert that suicide is the final freedom that dignifies mankind; for whatever else we have, we have the choice of whether or not to end our existence.

Yet, it is one thing to make a calculated decision to end existence, fully aware of our actions; it is altogether different to face this impasse encumbered by hysteria or emotional distress. People diagnosed with mental illness are far more vulnerable to suicide of this type than other groups.⁵⁷¹ Intervention might then be justified in order to save persons from mistaken but irrevocable acts of self-destruction; by this view, suicidal desires are passing afflictions or aberrations that should be fought. In other words, there are reasons to doubt that a person diagnosed with a mental illness who wishes to commit suicide is acting out of his enduring beliefs: the self-destructive impulse may be born of a depression or confusion that will eventually pass.

A more difficult ethical dilemma arises when a person repeatedly attempts suicide, thus demonstrating a consistent desire to end his existence. Should we force that person to stay alive under all circumstances, irrespective of the cost to individual liberty? Are we entitled to place that person under restraint for an indefinite period of time? The noted psychiatrist Thomas Szasz argues that suicide prevention is only justified where there are reasons to think the decision is impulsive; otherwise, preventive interventions may require us to encumber a person with powerful psychotropic medication, in which case there is little joy to be gained from life anyway.⁵⁷² Consequently, Szasz recommends that we allow persistently suicidal patients the option of drafting a treatment plan or 'psychiatric will' (when in a balanced and reasonable state of mind) regarding appropriate intervention should they attempt to take their life again. It is true, of course, that if a non-intervention order was agreed to, the consciences of health professionals may be burdened with doubt and regret regarding the death of a person who could have been saved: how do we know that such a person would not have come to regret a suicide attempt? Still,

⁵⁷¹ The British Psychological Society, 'Recent advances in understanding mental illness and psychotic experiences,' June 2000, p.51

⁵⁷² Szasz, T., 'The Case Against Suicide Prevention', *American Psychologist*, 41, 1986, p.808

despite this haunting uncertainty, it would be wrong to force someone to stay alive if there were pervasive and unambiguous evidence that he wished to die. That is not to say the case for paternalism ought to be wholly dismissed: the ethic sketched here would apply only to the most serious cases, where persons repeatedly attempt suicide and where appropriate treatments were unsuccessful. To the extent that suicidal tendencies are seen as remediable, through medication and therapy, there are reasonable grounds to forcibly intervene to prevent self-destruction.

Again, it is important that risk is properly assessed and that compulsory powers are invoked for the right reasons. Mental health legislation is not designed to enable the state to coerce those whose behaviour is simply unconventional or offensive to our sensibilities. By its very nature, mental illness is characterised by unusual beliefs, bizarre perceptions and strange lifestyles. Behaviours might include swearing at people for no reason, defecating in clothes, tearing up money, and talking to an imagined person.⁵⁷³ It is therefore important that any decision to use compulsory powers is not grounded on an aversion to these rather odd behaviours; rather, the use of compulsion can only be justified paternalistically if there is firm evidence that a person is about to commit an act of serious self-harm. Professionals therefore ought to ask whether a person diagnosed with a mental illness is distressed by his or her experiences. If the person is not, and there is no serious risk to others, there is normally no need to intervene.⁵⁷⁴ Indeed, if a person with apparent mental health difficulties decides to live with the symptoms and forego treatment, then the authorities should respect this decision: "It is important for professionals to recognise that a decision not to take medication is not necessarily irrational or illness-related, and may be in the best interests of the person."⁵⁷⁵ Personal freedom is as dear to people with mental ill health as it is to anyone else. Just because a given course of action does not accord with convention or reason does not mean that a person's decision should be overruled. Freedom, as Berlin often reminds us, is not only for the rational.

⁵⁷³ Davison, G.C., Neale, J.M., *Abnormal Psychology*, 7th Edition, John Wiley & Sons, 1998, p.612

⁵⁷⁴ The British Psychological Society, 'Recent advances in understanding mental illness and psychotic experiences,' June 2000, p.60

⁵⁷⁵ The British Psychological Society, 'Recent advances in understanding mental illness and psychotic experiences,' June 2000, p.

What is more, something infinitely precious may be lost with psychological intervention, namely, the vitality of an unrestrained human personality and the creativity that flows from it. In his article 'From Hope and Fear Set Free', Berlin points out that certain artistic talents or streaks of genius belonging to those of unsound mind may be destroyed or limited by acts of paternalism.⁵⁷⁶ Anecdotally, we can identify many great artists and thinkers who suffered from mental illness: 'We of the craft are all crazy' said Byron of his fellow poets.⁵⁷⁷ Van Gogh is the most celebrated artist whose work was touched by madness; he famously cut off his ear in a state of depression. Yet, if Van Gogh had been administered psychotropic drugs to fight his manic depression, would the world have witnessed his artistic genius? In truth, if we intervene to counteract the effects of mental illness, we may well destroy or limit human creativity; and we may exorcise the soul of an irreducible human personality.

Still, forcible intervention *is* usually justified if someone is about to take imminent, drastic, damaging and irrevocable action regarding his or her own person; and if this comes only with a loss to art or progress, then such is the price of our humanity. Only, we must ensure that such intervention is truly necessary. The problem with the previously discussed legislative proposals from the British Government is that the criteria for compulsion are rather broad. Coercion should only be used as a last resort, a principle that ought to be enshrined in legislation. As the BPS argue:

"In the past, mental health services have often adopted a paternalistic approach, and in the context of limited resources extensive use has been made of the powers of coercion available under mental health legislation. This has led to a situation where many people have experienced mental health services as coercive and restrictive and has often been a barrier to the establishment of the trusting, collaborative working relationships which are the cornerstones of an effective service."⁵⁷⁸

⁵⁷⁶ The empirical link between creativity and mental illness is increasingly being affirmed by psychological research. Creative people often step outside the habits and assumptions of psychological normality; artists are more likely than the general population to be insane, suicidal, or neurotic. See Wade, D., 'You don't have to be mad to be creative but it helps' in *Sunday Times Magazine*, November 2003, p.52-60

⁵⁷⁷ See Wade, D., 'You don't have to be mad to be creative but it helps' in *Sunday Times Magazine*, November 2003, p.52-60

⁵⁷⁸ The British Psychological Society, 'Recent advances in understanding mental illness and psychotic experiences,' June 2000, p.66

As such, a collaborative, voluntary relationship must be encouraged between mental health services and clients. We should not rule out forcible intervention, especially if the client, in a different state of mind, indicates that he consents to such treatment. But mental health services should look to collaborate rather than compel: they ought to provide support and opportunity, empowering people to forge a conception of the good.

Indeed, it is not necessarily the symptoms of mental illness themselves that undermine persons' chances in life – rather, success is inexorably linked with social environment. People living in deprived inner-city areas are much more likely to be given a diagnosis of schizophrenia than people living in more affluent suburban areas. This might be because poverty and social isolation trigger psychosis in vulnerable individuals; it might be because the development of psychotic experiences is disadvantageous for social functioning and employment opportunities, meaning those affected will drift into lower income brackets.⁵⁷⁹ Either way, social exclusion and poverty often combine to exacerbate the problems faced by the mentally ill. Yet, the identification of these social problems also points to the way forward. As the BPS recognise, certain measures, such as the opportunity for paid employment, are central to the maintenance of mental health:

“People who are under-occupied are much more likely than others to experience an increase in the intensity or frequency of their psychotic experiences and work can bring about clinical improvement, particularly when paid. Indeed, there is evidence that getting back to work has a greater positive impact than any other single factor.”

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It is important, then, to extend meaningful employment opportunities to the mentally ill. Some people might require special programmes, but others are as able as any other similarly qualified citizen. Unfortunately, people with a diagnosed mental illness are subject to significant prejudice: people are less likely to be offered jobs if they admit

⁵⁷⁹ The British Psychological Society, ‘Recent advances in understanding mental illness and psychotic experiences,’ June 2000, p.12

⁵⁸⁰ The British Psychological Society, ‘Recent advances in understanding mental illness and psychotic experiences,’ June 2000, p.64

to having previously been patients in a psychiatric hospital.⁵⁸¹ It is important to overcome this prejudice and to insist on equal opportunities. The mentally ill ought not to be viewed as pseudo-citizens who should be institutionalised but as equal members of the community with rights to work and live in accordance with a vision of the good.

Physician Assisted Suicide

"Everyone has the right to kill himself. That's his freedom. I have nothing against suicide as a way of vanishing." - From Milan Kundera's *Immortality*.⁵⁸²

Many great novels have portrayed suicide as a great freedom, a means by which we can exit from an existence that cannot be endured. Perhaps the greatest of these novels, *Anna Karenina*, makes this point most forcefully. When Anna throws herself in front of a train, we feel the tragedy, but we recognise that it was her liberty and her choice to end her life. Suicide, then, is the final freedom. Or at least, it is for most of us: some people, incapacitated by illness or disease, wish to die but are unable to undertake the physical act. Such people are forbidden their final freedom.

In March of 1997, a group of eminent American scholars presented argument to the US Supreme Court in favour of a constitutional right that would allow physician-assisted suicide.⁵⁸³ This argument followed test cases in Washington State and New York in which it was ruled that the US Constitution forbids the government from flatly prohibiting doctors to help dying patients end their lives. In spite of these rulings and the sustained argument of the so-called Philosophers' Brief, the Supreme Court later declared against physician-assisted suicide by a vote of nine-to-nil. Building upon the arguments of the Philosopher's Brief, I will attempt to demonstrate the error of that decision. It is a basic freedom to be allowed to die in accordance with one's overall plan of life.

⁵⁸¹ The British Psychological Society, 'Recent advances in understanding mental illness and psychotic experiences,' June 2000, p.54

⁵⁸² Kundera, M., *Immortality*, Faber & Faber, 1992

⁵⁸³ Rawls, J., Thomson, J., Nozick, R., Dworkin, R., Scanlon, T.M., Nagel, T., 'Assisted Suicide: The Philosophers' Brief', *New York Review of Books*, March, 1997

The Philosophers' Brief sets out some technical legal argument for the right to physician-assisted suicide; yet its most persuasive sentiment is based on an appeal to the value of liberty:

"Certain decisions are momentous in their impact on the character of a person's life – decisions about religious faith, political and moral allegiance, marriage, procreation, and death, for example. Such deeply personal decisions pose controversial questions about how and why human life has value. In a free society, individuals must be allowed to make these decisions for themselves, out of their own faith, conscience, and convictions."⁵⁸⁴

The problem, of course, is that the conscious thoughts of the terminally ill are often radically dislocated from their capabilities. In this circumstance, people require an external agent to attend to their wishes. They might ask for help in order to prolong their existence – to be nourished and cared for – but equally they may require assistance in ending their existence. The decision to end life may be inspired by manifold reasons, not all of which will derive from the motivation to escape from physical pain. Even if it were possible to eliminate pain from a dying patient – and it is often not – some who are dying are equally determined to avoid what they consider to be the indignity of ending life overpowered by drugs that have all but eliminated conscious existence.⁵⁸⁵

Though one might disagree with physician-assisted suicide for religious or philosophical reasons, one cannot reasonably forbid the opportunity to those who abide by an alternative perspective. It is entirely a decision for the individual, which should be made in accordance with one's conscience, free from the coercive legal restraints that prohibit doctors from assisting with a patient's suicide. This argument feeds into the political liberalism advocated by Rawls: the legality of physician-assisted suicide ought to be insulated from comprehensive ideas – that suicide is a sin, for instance – which characterise many religious views.⁵⁸⁶ The decision to prohibit must be taken on grounds that any reasonable citizen could accept.

⁵⁸⁴ Ibid.

⁵⁸⁵ Ibid.

⁵⁸⁶ See for instance, Rawls, J., 'Commonweal Interview', *John Rawls: Collected Papers*, Harvard University Press, 1999, p.617-619

There are several arguments against physician-assisted suicide that can be formulated in purely political terms. Perhaps the least persuasive of these invokes a democratic-majoritarian perspective, namely, that the legal protection of physician-assisted suicide would provide a right whose existence most people would disagree with (they would not merely be content not to exercise the right). In this instance, the argument for liberty is surely stronger. If we are free to determine our own good with regard to relationships, religion, and politics, then why not in relation to our own death? As the *Philosophers' Brief* points out, people ought to be free to make the deeply personal decision about their death for themselves and must not be forced to end their life in a way that appals them, simply because the majority thinks it proper. Indeed, Ronald Dworkin, in an earlier article, contends that to forbid someone the right to die, simply to acquiesce the moral majority, is "a serious, unjustified, unnecessary form of tyranny."⁵⁸⁷

Other objectors point to the moral difference between an act and omission. It is one thing to withhold treatment and allow a patient to die naturally; it something altogether different to administer lethal medication to a patient. Yet, this moral distinction does not hold up to scrutiny – both acts and omissions can be morally culpable. For instance, a doctor is normally wrong if he omits to resuscitate his patient, although he is right if his patient is terminally ill and has asked not to be revived. Equally, a doctor is wrong if he knowingly acts against a patient's wishes not to receive a certain procedure on religious grounds, although he would be right to act in this way were his patient not to object. So the distinction between act and omission does not necessarily have moral import; the crucial distinction is between assistance and non-assistance. This criterion gives strength to the argument that there is no moral difference between a doctor who terminates a treatment that keeps a person alive and a doctor who helps a person end his own life by providing him with lethal pills to be ingested as and when the patient decides.

The strongest argument against physician-assisted suicide refers to the unreliability of safeguards. Marjorie Hornik, a New York social worker, admits to significant

⁵⁸⁷ Dworkin, R., 'Do We Have a Right to Die?' *Freedom's Law*, Oxford University Press, 1996, p.146

discomfort about the prospect of legalised assisted suicide: "I see on a daily basis the pressures which exist to marginalize...[the elderly and chronically ill]. So many of our elderly are already vulnerable to feeling that they are or will soon become a 'burden' to society or to their families. The legalising of assisted suicide will add yet another pressure on them to 'bow out' quietly and graciously."⁵⁸⁸ She also points to the increasingly distant relationship between doctors and patients, a result of the economic pressures on health services. Instead of doctors acting as guardian and family friend, the relationship becomes less intimate and more bureaucratic. As such, "If assisted suicide is legalised, we will see what is now considered as a desperate and extraordinary solution for the few become yet another possible outcome on the care map."⁵⁸⁹ In short, Hornik fears that assisted suicide could become an institutionalised norm in virtue of the increasing numbers of elderly patients competing for scarce medical resources.

Whether or not this latter fear is justified, Hornik is correct to point to the significant pressures placed on the elderly to 'bow out graciously'; the power of relatives to influence the decisions of weak and vulnerable family members should not be underestimated. Yet, as the Brief points out, "even people who are dying have the right to hear and, if they wish, act on what others might wish to tell them."⁵⁹⁰ Indeed, we steer a course through life in part by listening to those around us; we are constantly subjected to the pressures and expectations of others regarding our conduct, yet this does not annul our choice. In some circumstances, we make our decisions knowing that others might not agree with us; at other times, we acquiesce to the desires of those we care about. Whatever might be said about the morality of such decisions, it is surely not up to the state to determine what and who influences our deliberations.

Again though, critics argue that safeguards requiring doctors to obtain active patient consent may in practice leave scope for abuse. Given the fragile condition of the terminally ill, patient consent will often be ambiguous, meaning assisted suicide could be carried out without the clear authority of the patient. Herbert Hendin argues that

⁵⁸⁸ Hornik, M., 'The Philosophers' Brief: An Exchange', *New York Review of Books*, May, 1997

⁵⁸⁹ Ibid

⁵⁹⁰ Rawls, J., Thomson, J., Nozick, R., Dworkin, R., Scanlon, T.M., Nagel, T., 'Assisted Suicide: The Philosophers' Brief', *New York Review of Books*, March, 1997

medical evidence demonstrates this to be the case. In the Netherlands, where physician-assisted suicide is legal, between 900 and 1000 patients' lives are ended each year without their explicit consent.⁵⁹¹ Hendin also complains that many Dutch physicians have merely facilitated the death of patients; they have often failed to provide an independent assessment of patients' mental health and have frequently neglected to discuss palliative options.⁵⁹² Another study has revealed clinical problems with the practice of physician assisted suicide, not least that physicians who intend to provide assistance with suicide are sometimes required to administer a lethal injection themselves because of the patient's inability to take the medication, or because of problems with completion (a longer than expected time till death, failure to induce coma, or induction of coma followed by awakening of the patient).⁵⁹³ Yet, while such clinical problems must obviously be addressed, there is evidence that the Dutch experience has been a partial success – it has brought relief and dignity to many patients who otherwise lacked the ability to end their lives; it enabled many to escape from debilitating and relentless diseases.⁵⁹⁴ Regarding the issue of patient consent, an independent report that followed the legalisation of physician-assisted suicide in the Netherlands found that "close monitoring of the [decision to end life] is possible," and that there was no evidence of "less careful decision making" nor of a significant increase in the number of decisions to end life.⁵⁹⁵

Yet, even if Dutch practices are found to be lax, there is no reason that stricter regulations could not be introduced, which would require unambiguous consent to assisted suicide. As a whole, the state would have to provide robust protection against abuse of the legal right to assisted suicide. It would have to be content that a terminally ill patient who wishes to die is not making a judgement based upon an impulse or a passing depression. Any decision to grant assisted suicide must judge that the patient's choice is informed, competent, uncoerced and stable. There must be

⁵⁹¹ Hendin, H., 'Euthanasia Consultants or Facilitators?' *Medical Journal of Australia*, 170 (1999), p.351-352 This was prior to the Dutch euthanasia legislation in 2001, which allows for doctors to end life without explicit patient consent.

⁵⁹² Hendin, H., 'Euthanasia Consultants or Facilitators?' *Medical Journal of Australia*, 170 (1999), p.351-352

⁵⁹³ Van der Wal, G., et al. 'Clinical Problems with the Performance of Euthanasia and Physician-assisted Suicide in the Netherlands', *The New England Journal of Medicine*, 342 (February 2000), p. 551-556

⁵⁹⁴ The most common disease that affected patients was cancer. Van der Wal, G., et al. 'Euthanasia, Physician-assisted Suicide, and Other Medical Practices Involving the End of Life in the Netherlands, 1990-1995', *The New England Journal of Medicine*, 335 (November 1996), p.1699-1705

⁵⁹⁵ Van der Wal, G., et al. 'Euthanasia, Physician-assisted Suicide, and Other Medical Practices Involving the End of Life in the Netherlands, 1990-1995', *The New England Journal of Medicine*, 335 (November 1996), p.1699-1705

a test, undertaken across time, to ensure that a person's wishes reflect their enduring principles and beliefs. The state ought to have the right override the request for assisted suicide where these conditions do not obtain, in order to protect citizens from mistaken but irrevocable acts of self-destruction. Yet, for all that rigorous safeguards are essential to make the right to assisted suicide feasible, that is not to say the option should be prohibited under all circumstances. People ought to be free to die, if that is their wish.

Conclusion

This chapter has considered the broad issue of personal freedom in circumstances that usually allow for comprehensive paternalism – the education of children, the care of those diagnosed with a mental illness, and the care of the terminally ill. In each of these cases, the paternalistic provision of social services is both necessary and humane. Young people, people who are subject to psychotic episodes, and those incapacitated by terminal illness cannot always be relied upon to make good decisions regarding their own welfare – but then, who can? As such, I have presented an argument in favour of personal freedom. In education, while parents should have the liberty to educate their children in a way that is consistent with their broader value system, their influence should not be allowed to impair the future value of children's freedom. With regard to mental illness, though there are circumstances in which short-term compulsion is in the interests of affected persons, that is not to say sweeping coercive powers ought to be available to the mental health services. Finally, with regard to those diagnosed with a terminal illness, I have affirmed the right to assisted-suicide. Whilst it is important that this right be supplemented with robust safeguards, there is no reason to think that this would not be bureaucratically manageable – laborious and thorough checks are a small price to pay for the potential gain in personal freedom.

Conclusion – Freedom and the Pursuit of the Good

A liberal concept of freedom, roughly put, is the opportunity to act unconstrained by the deliberate interference of other people. This idea -- which Berlin described as negative liberty -- does not allude to a hierarchy of inner selves (higher or lower; true or false). Human beings are what they are, and a liberal concept of freedom should not be loaded with assumptions about what is good, or rational, or prudent; it is agnostic regarding the desirability of human ends. Given the absence of constraints, one is free to sing or dance, just as one is free to maim or murder. In short, a liberal conception of freedom is anti-perfectionist. This conception of liberty as licence seems to encourage clear thinking. It allows us to identify those instances in which we accept limitations on liberty for the sake of other social goods such as justice, equality, security or community. At other times, the restriction of one liberty secures another; by prohibiting censorship on political ideas, freedom of speech and conscience is protected. By this view, it would obfuscate matters if we were to use the concept of liberty in such a way that we counted a loss of freedom only when men were prevented from doing something they ought to be allowed to do.

A liberal concept of freedom is therefore concerned with the avenues that are open to a man, irrespective of his abilities or desires or strength of character or personal morality. Paradigmatic constraints on liberty include physical compulsion and restraint, as well as threat. In the context of the modern state, this means that law -- inasmuch as it has a coercive component -- places specific limitations on freedom, even if the effect of some laws is to expand liberty in other directions. Even those laws that protect the private sphere, and otherwise provide for individual freedom, are restrictive of a specific freedom -- for instance, such laws deny me the opportunity to use my neighbour's property without consent. G.A. Cohen understood this point well. Yet, Cohen was less persuasive in his argument that laws protective of capitalist institutions restrict liberty to varying extents depending on one's personal wealth or class position. In truth, the laws that protect capitalist exchange restrict the liberty of those under its jurisdiction equally. The poor are not interfered with any more than the wealthy; they are not subject to additional or more intrusive laws; simply because they lack the resources of their fellows does not mean they are less free. Rather, they lack

the resources that would allow them to take advantage of their liberties in pursuit of a conception of the good. Importantly, however, the inability that comes with poverty matters as much as the unfreedom that comes with persecution. Consequently, a commitment to individual freedom requires a commitment to certain all-purpose means, upon which the *value* of liberty is dependent.

The second part of this thesis considered three broad questions. First, why should we privilege liberty over other values? Second, is freedom instrumentally, intrinsically or constitutively valuable? Third, what is the relationship between freedom and other social goods? The first question is concerned with justification; the second considers the ends at which freedom is directed; and the third investigates the mechanisms of support that are needed to make liberty valuable (and whether the state should assume responsibility for the provision of these goods).

Regarding the initial question of justification, the priority of liberty was judged to be uncertain if we begin from the premise of value pluralism. If no impersonal ranking of values is rationally possible, on what basis can we construct an argument in favour of the privileged status of liberty? If ultimate values are incommensurable, does freedom not become just one value among others? This relativist attack challenges the liberalism of both Raz and Berlin. However, the opposite strategy of entrenching the priority of liberty as a truth of reason is equally unsuccessful, and also more insidious. As we witnessed with Gewirth's 'principle of generic consistency', once the supreme value of freedom is identified as a rational truth, any actions that do not accord with reason can be suppressed or restricted without being said to offend against liberty. As such, a better approach would take a Rawlsian form: let us acknowledge that the priority of liberty cannot have any claim on being a necessary truth, but let us do our best to demonstrate that its priority is in our best interests if subject to a veil of ignorance.

We might put the issue of justification another way. Kant distinguishes between two types of freedom: *Wille* and *Willkür*. Whereas the former is a concept of moral autonomy (the freedom of the rational will to accord with the categorical imperative),

the latter is an expression of subjectively determined ends.⁵⁹⁶ Now as Berlin correctly points out, a vision of liberty that is based on rational autonomy is dangerous when employed as a political concept: it may lead to the restriction of *Willkür* without being said to constrain freedom (for such restrictions are the rational demands of *Wille*). We find this error in Gewirth, when he claims that to force medical treatment upon a badly wounded religious man is not to infringe upon his liberty since his behaviour is manifestly irrational. Yet, we also find that Berlin's critique of the rational will goes astray insofar as he implicates the use of this concept in Kant's argument for the liberal state.⁵⁹⁷ In truth, it is the concept of freedom as *Willkür* that animates Kant's political philosophy: individuals are under no *political* obligation to act in accordance with *Wille*; they are free within the bounds of the right to pursue whatever ends they wish, so long as these are consistent with the freedom of everyone else.⁵⁹⁸ What is more, any remaining doubts that a Kantian justification of liberalism is haunted by a menacing metaphysics is comprehensively dispelled by Rawls, inasmuch as he replaces Kant's *philosophical* conception of the person with a *political* conception of citizens as free and equal. It is in this regard that we can think of Rawls as the best type of Kantian: he utilises an anti-perfectionist conception of freedom as *Willkür* to derive rules of justice, along with assumptions about the moral equality and rational agency of inviolable human beings.

In relation to the ends at which liberty is directed, Raz is unique in offering a strongly perfectionist argument. He might not utilise the concept of *Wille* (rational freedom) but he does stipulate that *Willkür* (personal freedom) ought to be directed at valuable ends. The state is therefore charged with providing valuable opportunities for its citizens; more specifically, it must foster the conditions in which citizens can act autonomously, not only because of current socio-economic realities, but also because autonomy is an intrinsic good. However, contrary to Raz, I suggest that the state ought to remain agnostic about what is good or valuable. The liberal state, within the boundaries of the right, ought to respect the revealed preferences of individuals, however eccentric, imprudent, unhelpful or morally ambiguous. As Berlin puts it: "Most modern liberals, at their most consistent, want a situation in which as many

⁵⁹⁶ Williams, H., *Kant's Political Philosophy*, Blackwell, 1983, p.69, 110

⁵⁹⁷ Berlin, I., *Four Essays on Liberty*, Oxford University Press, 1969, p.153, Footnote 1

⁵⁹⁸ Williams, H., *Kant's Political Philosophy*, Blackwell, 1983, p.69, 110

individuals as possible can realise as many of their ends as possible, without assessment of the value of these ends as such, save in so far as they may frustrate the purposes of others."⁵⁹⁹ The work of Berlin is therefore characterised by anti-perfectionism, even if he makes strong claims about the intrinsic value of liberty. This latter belief stems from his broader account of human nature and rests specifically in the value he suggests human beings find in making free choices. By contrast, Rawls thinks of liberty as having an instrumental value: its worth derives from the opportunities that it generates; the liberties conferred upon us by the right merely allow us to pursue the good (it is the good that is intrinsically valuable). This position is certainly less controversial than the belief that there is intrinsic value in being able to make free choice, irrespective of the ends at which freedom is directed. This notion might be criticised as being fetishist.

Regarding the relationship between liberty and the all-purpose means that make it valuable, Gewirth and Rawls are the most instructive. In *Reason and Morality*, Gewirth suggests that agents prize the generic goods required to pursue their purposes. These goods, according to Gewirth, are freedom and well-being. Freedom allows the agent to control his action by making unforced choices, such that his action is a means of pursuing what he considers good. Well-being, which is minimally composed of the basic goods that sustain life (food, clothing, shelter, and confidence in the possibility of attaining one's goals), allows one to act purposively towards one's ends. Without these goods, the agent would be able to act either not at all or only in certain very limited ways. Gewirth's understanding of generic goods is comparable to Rawls's conception of primary social goods. For Rawls, primary social goods refer to rights, liberties, and opportunities, the social bases of self-respect, and income and wealth. Such goods are viewed as all-purpose means to agents' ends; they are instrumental to the pursuit of their purposes. As such, these goods are 'things that every rational man is presumed to want'. These goods normally have a use 'whatever a person's rational plan of life'. On this point, Gewirth and Rawls agree: there are certain generic goods that assist the individual in the pursuit of purposes; hence purposive agents prudentially value such generic goods. To a greater extent than Berlin or Raz, Gewirth and Rawls discuss the link between liberty and the capacities

⁵⁹⁹ Berlin, I., *Four Essays on Liberty*, Oxford University Press, 1969, p.153, Footnote 1

that allow for the pursuit of purposes. These capacities derive from the primary social goods identified above. That is to say, if liberty is to be valuable to individuals, they must have access to those social goods that allow for its exercise: freedom is valuable because it allows us to act upon our conception of the good; but unless we are endowed with certain capacities, it becomes difficult to realise such a conception.

The extent to which primary goods should be provided by the state is a question of distributive justice. Rawls' argument was explored in most detail here, primarily because his broader justification of liberty was held to be the most persuasive. That is not to say the other theorists do not touch upon the issue of distributive justice. Yet, often this only developed the emergent problems of their more general argument. For instance, according to Raz, the state ought to sponsor an array of valuable opportunities, thus enabling autonomous choice. Yet, how, in Raz's pluralistic universe, are these valuable opportunities to be identified? How can we identify morally worthwhile ends from an array of incompatible and incommensurable values? There are no satisfactory responses to such questions. Or again, Gewirth's distributive argument potentially conflicts with the rational truth of his 'principle of generic consistency'. For instance, if it is a necessary truth that an egalitarian distribution of social goods is derived from Gewirth's premises, why place this outcome in doubt by opening it up to the uncertainties of a democratic mandate?

Rawls' distributive argument is the most persuasive of the four considered. His principles of justice are a rational response to the uncertainties of the original position. Moreover, and importantly for my overall argument, his argument protects not only the right to basic liberties, but also the fair value of those liberties. This is a concern of utmost importance for Rawls. He explicitly calls for the fair value of the political liberties to be protected; and he argues that the difference principle sufficiently protects the value of other basic liberties, without damaging additional human concerns, such as economic efficiency. I wish to draw attention to the force of this ethic in Rawls' work (that liberty must be made valuable for those who possess it by fairly distributing primary goods), for it is often overlooked.⁶⁰⁰ Yet, that is not to say Rawls' argument is without difficulty. Most importantly, as far as distributive justice

⁶⁰⁰ Indeed, the only critic to really engage with it is Norman Daniels. See pages 122-4

is concerned, he fails to properly distinguish between the effects of choice and chance. He rightly points out that many of our capacities, which are vital to our pursuit of the good, are a product of social and genetic factors over which we have no control and hence are undeserved (thus paving the way for an egalitarian distribution of primary social goods). However, as Dworkin points out, sometimes our successes and failures in life are attributable to the choices we make or the effort we apply. Unfortunately, Rawls' difference principle is blind to this notion.

The final part of the thesis attempted to partially accommodate the notion of desert in relation to the type of social policies that are consistent with the broader argument, namely, that a system of basic liberties ought to be complimented by an array of social goods if individuals are to be empowered in their pursuit of a conception of the good. To some extent, my treatment of social policy was superficial, given limitations of space and time. Nonetheless, I suggested several ideas that could be said to empower individuals in the pursuit of their purposes. I began by asserting that the point of market society is to produce opportunities for wealth production and to allow individuals to act on their economic freedom. However, a *laissez faire* society produces significant casualties, and hence the capacity of many people to pursue a vision of the good is undermined. The task, then, is to generate conditions in which people have a good chance to pursue their own ends without undermining personal responsibility or transgressing against basic freedoms. I argued this could be achieved through a mixed economy that fostered economic independence, personal responsibility and the principle of reciprocity. Specific policies that might facilitate this included asset-based welfare, conditional unemployment benefit and universal basic health care.

The issue of paternalism was discussed in the final chapter. Here the debate was still policy oriented, but the focus was on those areas that have in the past disempowered individuals: the schooling of children; the treatment of the mentally ill; and the hospitalisation of the terminally ill. I touched upon the type of support that is necessary to empower individual choice, and I examined the reach of that choice. Often this produced controversial ideas: allowing people to take their own life, conceding some ground to religious schooling, and allowing people commonly thought to be dangerous to live in the community. That is not to say I found no role

for paternalism in society; the paternalistic provision of social services is both necessary and humane. Only, this should be kept to a minimum; notwithstanding serious threat to persons' well-being, individuals should be encouraged to forge a life for themselves.

As a whole, my argument upholds that which Kant held to be true, namely, that: "No-one can compel me to be happy in accordance with his conception of the welfare of others, for each may seek happiness in whatever way he thinks fit, so long as he does not infringe upon the freedom of others to pursue a similar end which can be reconciled with the freedom of everyone else."⁶⁰¹ This is the classical liberal notion that self-regarding conduct should not be interfered with by moralisers, reactionaries, or cynics. Yet, Kant's argument is incomplete, for the pursuit of our purposes requires more than rights to basic liberties; it also requires access to primary social goods. In other words, while each person may seek happiness in whatever way he thinks fit (so long as he does not infringe upon the rights of others) we are nonetheless obliged to support the *worth* of each other's freedom. We are responsible to each other for the conditions in which all can reasonably pursue a determinate vision of the good.

⁶⁰¹ Kant, I., 'On the Relationship of Theory to Practice in Political Right', *Kant's Political Writings*, Reiss, H., (ed.), Nisbet, H.B., (trans.), Cambridge University Press, 1970, p.74

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