

## PHL271 Handout 6: Liberty

### §1 Liberty and the Law

Today our focus shifts from the debate over the conditions of legal validity—the conditions that govern when something counts as a law or legal system—to a debate over the nature and scope of liberty (or freedom).

Three questions will frame our discussion of liberty:

1. *Taxonomic Question*: What is liberty?
2. *Scope Question*: Under what conditions (and to what extent) can—or should—limits be placed on liberty?
3. *Value Question*: What is the value of liberty?

The Scope Question connects our discussion of liberty—an apparently moral feature—to our wider interest in the law.

Laws frequently mandate (or proscribe) certain actions; they also regulate transactions. Thus these laws (and legal systems) place limits on individual liberty. So we can ask the Scope Question as a question about the limits of the law:

*Legal Scope Question*: Under what conditions (and to what extent) can—or should—the law place limits on liberty?

Notice that both Hart and Dworkin could engage with the Legal Scope Question, despite their disagreement over the connection between law and morality.

As a legal positivist, Hart was open to the possibility of morally wicked legal systems. Yet he recognised the importance of moral critique. For him, the Legal Scope Question concerns the conditions under which a legal system counts as moral (or, inversely, when a legal system deserves moral criticism).

Note: there exists a bit of wrinkle with respect to Hart's attitude towards the Legal Scope Question. Remember that Hart agrees with the Hobbesian view that a legal system must protect individuals from death and extreme harm. This 'minimal moral content' of the law entails a necessary constraint on a legal system's ability to restrict the liberty of individuals (i.e. if a system were to exceed this constraint, it wouldn't count as a legal system)

By contrast, Dworkin endorsed a more intimate tie between law and morals than Hart. For him, an answer to the Legal Scope Question has the potential to bear on whether an edict that restricts our liberty counts as a law (or legal system) at all.

*Observation:* The Scope Question depends upon the Taxonomic and Value Questions, and the Value Question depends upon the Taxonomic Question.

This comes out most clearly in Isaiah Berlin's article 'Two Concepts of Liberty' (1969). He provides a sophisticated discussion of the connections between our three questions.

## §2 Mill on Liberty

Perhaps Mill's central contribution to legal and political philosophy is his answer to the Legal Scope Question. (We already saw a version of his answer at work in Dworkin's discussion of the *Dronenberg* case.)

*Mill's Principle:* the state cannot restrict an individual's pursuit of her interests *unless* this pursuit undermines the ability of others to pursue their interests.

Here's Mill: 'As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion. But there is no room for entertaining any such question when a person's conduct affects the interests of no persons besides himself, or needs not affect them unless they like...' (p. 325)

Mill's Principle is often put more simply: the law can only restrict those actions which would harm others.

When put in terms of 'harm', the application of the principle requires a right account of what constitutes the relevant sort of harm. As Mill makes clear on p. 325, the principle doesn't apply to every unpleasant consequence of our actions.

*Question:* what does it take for something to constitute a harm? What kinds of harms should we include when interpreting Mill's Principle (see also the bottom of p. 354 of Berlin's article for a discussion of this point)?

## §3 Two Concepts of Liberty

Negative Liberty ("Liberty From"): a subject is free (in the 'negative' sense) to the extent that her pursuit of her goals isn't limited by *interference* from other people. ['By being free in this sense I mean not being interfered with by others. The wider the area of non-interference the wider my freedom' (p. 343); 'the freedom which consists in not being prevented from choosing as I do by other men' (p. 350)]

Berlin thinks this interference could be either *intentional or unintentional*, and either *direct or indirect*; it is the *human* source of the interference that matters. Mere incapacity—whether intellectual, physical, or metaphysical—is not the sufficient for the existence of a lack of political freedom.

*Question:* given this inclusive conception of negative liberty, restrictions on our actions that we might not otherwise classify as 'coercive' (the opposite of

‘free’) will count as restrictions on our freedom (Berlin’s example: poverty). How might this result alter our answer to the Value Question for the case of negative liberty?

*Related Question:* how should we understand the circumstances of racial, social, economic, or gender inequality? In other words, should we treat such inequality as the product of coercion (and so a restriction of our negative liberty), or as merely the product of natural circumstance?

Positive Liberty (“Liberty To”): the freedom that consists in ‘being one’s own master’ [The transition from discussion of negative to positive liberty happens on pp. 348–349: ‘For the “positive” sense of liberty comes to light if we try to answer the question, not “what am I free to do or be?” but “By whom am I ruled?” or “Who is to say what I am, and what I am not, to be or do?”’]

Here is Berlin’s (rather involved) characterisation of a desire for positive liberty: ‘I wish my life and decisions to depend on myself, not on external forces of whatever kind. I wish to be the instrument of my own, not of other men’s, acts of will. I wish to be a subject, not an object; to be moved by reasons, by 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 – deciding, not being decided for, self-directed and not acted upon by external nature or by other men as if I were a thing, or an animal, or a slave incapable of playing a human role, that is, of conceiving goals and policies of my own and realising them. This is at least part of what I mean when I say that I am rational, and that it is my reason that distinguishes me as a human being from the rest of the world. I wish, above all, to be conscious of myself as a thinking, willing, active being, bearing responsibility for my choices and able to explain them by reference to my own ideas and purposes. I feel free to the degree that I believe this to be true, and enslaved to the degree that I am made to realise that it is not.’ (pp. 349–350)

*Question:* does Berlin succeed in characterizing a single notion of positive liberty?

How might these two notions of liberty come apart? While Berlin focuses on what I’ll call ‘Rousseau’s Paradox’ (cf. pp. 350–352), Hobbes’s account of our exit from the state of nature provides a much clearer example of the distinction between the two sorts of liberty.

*Aside: Hobbes on Liberty*

When we’re in the state of nature, we’re in a position to have absolute *positive* liberty: without allegiance to a master or a state, we are free to make decisions by appeal to our own goals and plans.

Yet the state of nature remains intolerable because we have no secure *negative* liberty. At least in principle, everyone in the state of nature is able to interfere with everyone else (and thereby frustrate the goals or desires of others).

We can read Hobbes as arguing that the absence of any secure negative liberty within the state of nature—in particular the absence of a negative liberty to survive—should rationally motivate us to abandon our positive liberty by submitting to a sovereign. At the price of this positive liberty we buy a modicum of secure negative liberty.

What I've called 'Rousseau's Paradox', by contrast, develops the 'being one's own master' metaphor in a way that places positive and negative liberty at odds.

As Berlin sketches it on p. 351, the 'paradox' conflates two different claims:

1. A subject *would* choose an action (or would seek a goal) X, if he were in a position to appreciate what is good for him
2. A subject *actually* chooses an action (or seeks a goal) X

The conflation of these two claims arises from the idea—central to Rousseau's political philosophy and also potentially latent in Plato's Republic—that we can distinguish the 'rational' self from the 'appetitive' self: the rational or 'true' self can choose something even if one's present conscious self isn't in a position to recognise that choice.

Given that the aims of the rational and appetitive selves often conflict, a state that acts at the direction of the rational self (or at what would be the direction of the rational self) will thereby restrict the *negative liberty* of the appetitive self. We're left with the odd result that (taking the rational and appetitive selves together) I can maximize my positive liberty while thereby restricting my negative liberty.

#### §4 Value of Liberty

Berlin's discussion of the value of liberty (cf. pp. 354-356) is interesting in part because of how it manifests his *value pluralism*. Pluralists recognise both the existence of multiple values (e.g. justice and liberty and integrity), and the fact that these values can be in conflict.

Berlin actually endorses the stronger claim that the values are *necessarily* in conflict: there can be no 'final solution' on which the tensions between the various values are fully resolved.

Given the necessary conflict between these values, we have no choice but to choose between incompatible valuable ends. And the necessity of this choice is what makes freedom to choose—liberty—valuable in itself.

#### §5 Liberty and its Limits

On p. 355 we have an argument for the claim that 'the liberty of the strong... must be restrained'. The basis of the argument isn't Hobbesian game theory, but instead a pluralist acknowledgement of the fundamental character of our respect for certain other values: justice, etc. Unrestricted liberty is the enemy of justice, fairness, and so on.

*Question:* does this argument require Berlin's strong claim that our fundamental values are necessarily in conflict?

We'll return to the Value and Scope questions next time...