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Positive and Negative Liberty

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POSITIVE AND NEGATIVE LIBERTY

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I. INTRODUCTION

What is liberty? Much of the contemporary philosophical debate over this question revolves around the issues raised in Isaiah Berlin's *Two Concepts of Liberty*.[1] In this essay, first delivered as his inaugural lecture at Oxford in 1958, Berlin distinguishes between a negative and a positive sense of liberty. In broad terms, negative liberty means freedom *from*—from interference, coercion, or restraint—while positive liberty means freedom *to*, or self-determination—freedom to act or to be as one wills.

Berlin acknowledges that, on the surface, these two concepts may seem to be "at no great logical distance from each other—no more than negative and positive ways of saying much the same thing."[2] But he argues that historically the two notions have developed in very different directions. Theories of negative liberty recognize that there is a core area in which individuals must be free from state interference if they are to live a truly human life. The positive view of freedom as self-determination, on the other hand, implies a distinction between two selves—a higher self that determines and a lower self that is subject to determination. Berlin argues that, in the history of political thought, it is all too easy for this higher self to become identified with society or the state, or with a particular thinker's view of an ideally good or rational life. Freedom may then come to be defined as obedience to the will of the state or conformity with a preconceived pattern of conduct. In this way, Berlin contends, under the positive view freedom tends to be transformed into its opposite—into tyranny or even totalitarianism.

Two Concepts of Liberty is justly regarded as a classic, which brilliantly illuminates the negative and positive notions of liberty. To one who rereads the essay today, however, perhaps the most striking thing is the way in which Berlin's analysis of liberty is distorted by the political circumstances in which the essay was written. As I have noted, Berlin

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1. Isaiah Berlin, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118 (1969).
2. *Id.* at 131-32.

was writing in the late 1950s, at the height of the Cold War. He casts the debate between negative and positive liberty as a crucial battle in "the open war that is being fought between two systems of ideas,"[3] and between the political systems allegedly based on them—Western liberal democracy and totalitarian regimes of the left or right.

The ways in which this distorts Berlin's account are not difficult to perceive. According to Berlin, negative freedom is what "the classical English political philosophers"—such as Hobbes, Locke, Bentham and Mill—meant when they talked about liberty.[4] As a celebrated statement of this position, Berlin cites John Stuart Mill's assertion that "[t]he only freedom which deserves the name, is that of pursuing our own good in our own way."[5] Of course, this statement implies that government should interfere as little as possible with the exercise of individual liberty. Taking the statement on its own terms, however, Mill characterizes liberty as freedom *to*—to develop our own natures, to pursue our own good. In other words, Mill's celebrated statement of negative liberty turns out to represent precisely the positive conception that Berlin rejects. As we shall see, much the same can be said of Locke's theory of liberty. In fact, Berlin's clearest examples of the negative conception are taken from Hobbes and Bentham[6]—philosophers not primarily known for their libertarian views.

As I have suggested, these difficulties in Berlin's analysis may be attributed largely to the ideological circumstances of the 1950s. With the passing of the Cold War, it may be easier to understand the relationship between positive and negative liberty in our political tradition.

In this essay, I wish to briefly explore the concept of liberty in classical English and American political thought (by which I mean the period from the time of Locke through the middle of the nineteenth century). The classical view of liberty, I shall argue, was far richer and more complex than Berlin acknowledges—or than it is often represented as being by either its critics or its defenders today.

In discussing the classical conception of liberty, I do not mean to imply that there was a single, monolithic view. The nature of liberty was one of the central issues of classical thought. It was the subject of endless debate in pamphlets, treatises, sermons, and political discourse. Although there was no one definitive view, however, it is possible to sketch a conception that was accepted in broad outline by many writers

3. *Id.* at 121.
4. *Id.* at 123-24.
5. JOHN S. MILL, ON LIBERTY 14 (David Spitz ed., 1975); *see* Berlin, *supra* note 1, at 127.
6. *See* Berlin, *supra* note 1, at 123 n.2.

during this period. A useful starting point is Blackstone's account of liberty in his *Commentaries on the Laws of England.* Blackstone's discussion is valuable for our purposes not only because it is broadly representative of classical thought,[7] but also because of its great influence on the American legal tradition up until the present century.

II. THE CLASSICAL CONCEPTION OF LIBERTY[8]

A. Natural Liberty

Like most classical writers, Blackstone begins with natural liberty—the freedom that would be enjoyed by individuals in a state of nature, before the establishment of civil government. He defines natural liberty as "a power of acting as one thinks fit, without any restraint or control, unless by the law of nature."[9]

At first glance, Blackstone's definition may seem to embody the negative view that Berlin advocates. On closer analysis, however, we can see that this definition includes both a positive and a negative element. The first branch is positive: "a power to act as one thinks fit." Liberty then is not merely an absence of constraint but a power—the capacity to act in accord with one's own reason and free choice.

Blackstone's approach is neither novel nor idiosyncratic, but reflects a long tradition of understanding liberty as a power to act. This view may be traced back to classical Roman law,[10] and was shared by many writers in the scholastic tradition, whose works had an important influence on the development of modern natural rights theory.[11] John Locke developed a philosophical account of liberty in terms of power in his *Essay Concerning Human Understanding.*[12] According to Locke, liberty was the power to act in accordance with one's own will, and was ultimately rooted in the capacity for reasoned judgment. As the radical

7. *See* JOHN P. REID, THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION 9, 64-65, 117-19 (1988).

8. For a structural overview of this conception, see the Appendix.

9. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *125 (St. George Tucker ed., 1803 & photo. reprint 1969). For a similar definition, see JOHN LOCKE, TWO TREATISES OF GOVERNMENT II § 4 (Peter Laslett ed., student ed. 1988) (3d ed. 1698) (defining the natural liberty of men as the *"perfect Freedom* to order their Actions, and dispose of their Possessions, and Persons as they think fit, within the bounds of the Law of Nature, without asking leave, or depending upon the Will of any other Man").

10. *See* JUSTINIAN, INSTITUTES 1.3.1 (defining liberty as a power (*facultas*) to do what one desires, so long as it is not prohibited by the law).

11. *See* RICHARD TUCK, NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT 5-31 (1979).

12. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING bk. II, ch. XXI (Peter H. Nidditch ed., 1975) (4th ed. 1700).

thinker Richard Price observed, liberty in this sense meant "self-determination" or "self-direction."[13] Thus, far from being alien to the classical conception of liberty, as Berlin would have it, self-determination was an essential element of that view.

Natural liberty also has a negative element: it is the power to act "without any restraint or control."[14] It is true, as Blackstone adds, that this liberty is limited by "the law of nature." But that law, lacking effective means of enforcement outside civil society, is more a matter of internal guidance than of external constraint.[15] In this respect, natural liberty comes close to being a pure form of negative freedom.

Most classical writers, however, believed that such unrestrained freedom was radically defective. As Blackstone put it,

> no man, that considers a moment, would wish to retain the absolute and uncontrolled power of doing whatever he pleases: the consequence of which is, that every other man would also have the same power; and then there would be no security to individuals in any of the enjoyments of life.[16]

Therefore, to secure their liberty, and to obtain the other benefits of a common life, individuals enter into society and agree to obey its laws. In so doing, they give up a part of their natural liberty—the unrestrained right to act as they think fit—but gain something more valuable: civil liberty, which is the liberty that belongs to individuals as members of society.[17]

B. Civil Liberty

As Blackstone defines it, civil liberty is "natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public."[18] For purposes of analytical clarity, we should distinguish between the private and public aspects of the classical idea of civil liberty. In its private aspect, civil liberty refers to the individual's freedom in relation to other individuals in society. In a positive sense, it means the power to act as one thinks fit, within the bounds of civil law; from a negative standpoint, it means freedom from all restraints not authorized by law. Private civil liberty, in other words,

13. RICHARD PRICE, OBSERVATIONS ON THE NATURE OF CIVIL LIBERTY, THE PRINCIPLES OF GOVERNMENT, AND THE JUSTICE AND POLICY OF THE WAR WITH AMERICA (5th ed. 1776), *in* POLITICAL WRITINGS 21-22 (D.O. Thomas ed., 1991).

14. 1 BLACKSTONE, *supra* note 9, at *125.

15. *Id.* at *39-41, *125; *see also* J. LOCKE, *supra* note 9, § 136.

16. 1 BLACKSTONE, *supra* note 9, at *125.

17. *Id.*

18. *Id.* (citing JUSTINIAN, INSTITUTES 1.3.1).

is the same thing as natural liberty, modified by civil society. It is liberty under law—in this case, the private law of civil society which governs the rights and obligations of individuals with respect to one another.

As lawyers, we generally talk less in terms of liberty than in terms of rights. In classical thought, liberty was a general concept whose content consisted of specific rights. The content of private civil liberty was what Blackstone called "the absolute rights of individuals": the rights to personal security, personal liberty, and private property.[19] According to Blackstone, these rights had their origin in nature—in this sense they were natural rights—but they were fully defined under the law of civil society. It is important to observe that these rights were not merely negative but also positive—they were not simply rights against interference by others, but rights to be secure in one's life, liberty and property under the law.[20]

The individual's liberty in relation to the state, on the other hand, constitutes public civil liberty. On its negative side, it requires that individuals remain free from state control except where necessary for the good of the community. This is negative liberty in the sense we most commonly use the term today—freedom from unjustified interference by government. Again, this liberty can be expressed in terms of specific rights—the constitutional rights against governmental interference with life, liberty and property, with free speech, and so on, set forth in the Bill of Rights and the Fourteenth Amendment.

In classical thought, however, public civil liberty had a crucial positive dimension as well. The function of law and government was to regulate individual liberty for the public good—above all, in order to protect the rights of other members of society. Thus, Blackstone argues, "the law, which restrains a man from doing mischief to his fellow-citizens, though it diminishes the natural, increases the civil liberty of mankind."[21] From this positive perspective, it may be said that "civil liberty, rightly understood, consists in protecting the rights of individuals by the united force of society."[22]

This conception of liberty as protection is positive in two respects. First, as we have seen, classical thought holds that liberty cannot subsist in the absence of law. Moreover, natural liberty is unbounded and hence indefinite. It is through the law of civil society that liberty becomes posi-

19. *Id.* at *121-45.

20. *See* Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 533 (1991).

21. 1 BLACKSTONE, *supra* note 9.

22. *Id.* at *251.

tive—that is, realized and determinate.[23] Second, as a member of society an individual has a claim to be protected in his rights by the community. This is a positive liberty, or at least a positive right—a claim on the community to provide something to which the individual is entitled.

It is useful to compare the classical conception of liberty with the position advanced by one of Berlin's most penetrating critics, Gerald MacCallum. In a well-known article, MacCollum argues that liberty is always a triadic relation, under which subject X is free *from* constraint Y *to* do action Z.[24] On this view, liberty is always both negative and positive.

As far as it goes, MacCollum's formula captures the classical view well. Thus, in the context of civil liberty, an individual is free *from* unauthorized restraints *to* act as he thinks fit. On the classical view, however, a conception of liberty requires a fourth element as well—the *law* that governs the relation. Liberty cannot subsist without a law that gives a right to freedom on one hand and prohibits interference with it on the other. As Locke expressed it: "*Liberty* is to be free from restraint and violence from others which cannot be, where there is no Law"; thus, "*where there is no Law, there is no Freedom*."[25] On the classical view, then, we should say that liberty generally takes the following form: subject X is free *from* constraint Y *to* do action Z *under* law L. In the case of natural liberty, this is the law of nature. In the case of private civil liberty, it is the private law of civil society.

C. *Political Liberty*

Most classical writers believed that civil liberty could not be fully secure except in a society that recognized political liberty as well. Political liberty was defined as the power of the community to govern itself,[26] and that of citizens to participate in self-government.[27] Once again, this liberty can be characterized in both positive and negative terms. From a

23. The view that freedom is made positive though law is most fully developed in the philosophies of Kant and Hegel. *See* IMMANUEL KANT, THE METAPHYSICS OF MORALS § 44 (Mary Gregor trans., 1991) (1st ed. 1798); G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT §§ 3, 211-14 (Allen W. Wood ed. & H.B. Nisbet trans., 1991) (1st ed. 1820). But the same view is implicit in earlier natural rights thought, which represents the movement from the state of nature to civil society as necessary for the realization of natural rights.

24. Gerald C. MacCollum, Jr., *Negative and Positive Freedom*, 76 PHIL REV. 312 (1967), *reprinted in* LIBERTY 100 (David Miller ed., 1991).

25. LOCKE, *supra* note 9, § 57.

26. *See, e.g.*, PRICE, *supra* note 13, at 22.

27. *See* WILLI P. ADAMS, THE FIRST AMERICAN CONSTITUTIONS—REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 156-57 (Rita Kimber & Robert Kimber trans., 1980); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 24-25 (1969).

positive perspective, the political freedom of the community consists in its power to make and enforce laws for the public good. From a negative standpoint, the community is free to the extent that its power is unrestricted. In both respects, however, the community's power is governed by the law of the constitution, which confers governmental power on one hand, and on the other hand limits that power in order to protect the civil liberty of individuals from undue interference by the state.[28]

Political liberty may be viewed as an extension of natural liberty, which, as we have seen, consists of the natural power to do as one thinks fit. This natural power can be no greater than the strength possessed by each individual. Political liberty enables individuals to achieve though collective action what they could not have accomplished through their own unassisted efforts. A paradigm example is the protection of rights, which cannot be adequately defended by each individual on his own, but only, as Blackstone says, by "the united force of society."

Economic regulation may be understood in similar terms. Although it limits the natural liberty of individuals to pursue their own good, such regulation may be necessary to promote the good of the community, on which the private good of individuals may depend. In such a case, as Blackstone says, although the regulation diminishes natural liberty, it increases the civil liberty of individuals. Moreover, where the regulation is adopted by the individuals themselves in their capacity as citizens, their action constitutes an exercise of political liberty, by which they attain a good through collective action that they could not have achieved on their own.

To summarize the classical conception: Natural liberty is the power to act as one wishes without interference by others. Civil liberty is natural liberty bounded and protected by law. Finally, law is not simply imposed on individuals, but is an expression of their collective political freedom. As Richard Price put it, running through all "the different definitions of liberty, there is one general idea[:] the idea of self-direction, or self-government," by both the individual and the community.[29]

D. An Illustration

To illustrate the classical conception of freedom, let us consider how its categories might apply to one of the central problems of modern con-

28. Similarly, the political liberty of the citizen consists positively in the power to participate in self-government (*e.g.*, through the right to vote), and negatively in the absence of restrictions on this power, except to the extent authorized by the constitution.

29. PRICE, *supra* note 13, at 22.

stitutional law, the issue of abortion. A woman has the natural liberty to act as she thinks fit, particularly with respect to her own body. This includes the freedom to terminate a pregnancy. Like all natural liberty, this right may be subject to limitation in order to protect the rights of other persons. We are back, then, to the question of when the fetus becomes a person. At common law, this line was drawn at the point of quickening, roughly midway through pregnancy. Prior to that point, no crime was committed in obtaining or performing an abortion.[30] Beginning in the nineteenth century, however, many states enacted statutes that prohibited abortion in most circumstances.

The issue confronting the Supreme Court in *Roe v. Wade*, of course, was whether these statutes invaded the liberty protected by the Due Process Clause of the Fourteenth Amendment. In the terms we have been using, this issue related to the negative element of public civil liberty—that is, the individual's freedom in relation to the state (*see* Appendix, II.B.1), as well as to the constitutional limitations on the political freedom of the community (III.A). In *Roe*, the Court held that these statutes, to the extent that they sought to prohibit abortion prior to the point of viability (about the end of the second trimester), exceeded the legitimate bounds of state power under the Federal Constitution.

If the freedom to terminate a pregnancy is an aspect of natural liberty that the state may not abridge, then it is an aspect of civil liberty—not only public civil liberty, or freedom in relation to the state (II.B), but also private civil liberty, or freedom in relation to other individuals (II.A). Private interference with a woman's right to obtain an abortion—for example, by blockading an abortion clinic—thus would constitute a violation of her private civil rights.

According to the classical view, the state has an obligation to protect such rights by making and enforcing laws to prevent interference by others. This obligation derives from the positive side of public civil liberty (II.B.2). As I have argued elsewhere, this obligation was recognized in the American constitutional tradition prior to the Civil War, and was intended to be incorporated into the Federal Constitution through the Fourteenth Amendment.[31] The Supreme Court, however, has refused to find such positive rights in the Constitution.[32] Thus, the positive side of civil liberty remains largely a matter of state law.

30. *See, e.g.*, 1 BLACKSTONE, *supra* note 9, at *129-30; KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 14-15 (1984).

31. *See* Heyman, *supra* note 20.

32. *See* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989).

III. CONCLUSION

Having explored the classical conception of freedom, let us return to Berlin's argument in *Two Concepts of Liberty*. Does the positive conception of liberty tend to support tyranny or totalitarianism? This danger might indeed be posed by a pure theory of positive freedom that emphasized the power of the community to the exclusion of other forms of liberty. But it might equally be posed by a pure theory of negative liberty, as Hobbes's *Leviathan* suggests. By contrast to both of these extreme views, the classical conception viewed liberty as a comprehensive system which included elements of positive as well as negative freedom, exercised by both the individual and the community, and always regulated by law. According to the classical view, the essential point was to maintain a balance among the different sorts of liberty, so that the freedom of the community did not extinguish that of the individual, or vice versa.[33] The classical view, I would argue, not only better captures the nature of liberty, but also provides a better defense against tyranny than either the pure positive view that Berlin attacks or the pure negative conception that he defends.

33. *See, e.g.*, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 76-77 (1967). For an excellent example of this approach, see St. George Tucker's analysis of the different sorts of liberty in his edition of Blackstone. 1 BLACKSTONE, *supra* note 9, at *145 (Tucker ed. note).

APPENDIX:
THE CLASSICAL CONCEPTION OF LIBERTY

I. NATURAL LIBERTY

"a power of acting as one thinks fit, without any restraint or control, unless by the law of nature" (1 BLACKSTONE, COMMENTARIES *125)

- A. Positive *(power to act)*
- B. Negative *(immunity from restraint)*
- [C. The law of nature]

II. CIVIL LIBERTY

"natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public" (1 BLACKSTONE *125)

- A. Private civil liberty *(liberty of individual with respect to other individuals)*
  1. Positive *(power of acting as one thinks fit, within the bounds of civil law)*
  2. Negative *(freedom from all restraints not authorized by civil law)*
  3. Private law
- B. Public civil liberty *(liberty of individual with respect to state)*
  1. Negative *(natural liberty not restrained by civil law and government, except for public good)*
  2. Positive *(protection and regulation of natural liberty by civil law and government, to extent consistent with public good)*
  3. Constitutional law

III. POLITICAL LIBERTY

- A. Of the community
  1. Positive *(power to make and enforce laws for public good)*
  2. Negative *(immunity from restraints on this power)*
  3. Constitutional law
- B. Of the citizen
  1. Positive *(power to participate in making and enforcement of laws by community)*
  2. Negative *(immunity from restraints on this power)*
  3. Constitutional law