Freedom from a Mainly Logical Perspective

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The object of this paper is to lean on plain logic, rather than on ethics, in order to clarify and strengthen the concept of liberty. It will focus on the rule system that divides the universe of feasible acts into those that may and those that, on pain of some sanction, must not be done. Some rule systems are more compatible with freedom than others. Explication of the concept also demands some consideration of rights and obligations. Offering partial excuse for this undertaking the paper opens in section 1 with a summary critique of certain alternative treatments of the notion of liberty that are prominent in current discourse and that, or so it is argued here, are not conducive to clear thinking about the matter. Section 2 sets out the logic of the presumption of liberty, while section 3 contains the substance of the rule-based freedom concept proposed by this paper.

Liberty and freedom will be used interchangeably to provide some relief from the monotony of the text.

1. Some Prominent Notions of Liberty

Minimum Coercion

'Liberty is the absence of coercion.' More precisely, since in the Hayekian scheme some coercion is accepted as unavoidable, liberty is the state of affairs where coercion is at its necessary minimum level.[1]

This attempt at definition looks deceptively straightforward. In fact, it leaves us almost empty-handed. It can be briefly shown why. However, before going any further, we must remember that coercion is understood as a state monopoly. Hence its level is centrally decided.

We may take it, to start with, that coercion for its own sake is

[1] F. A. Hayek, *The Constitution of Liberty*, 1960, London and Chicago, pp. 12, 21.

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excluded as unnecessary. What remains must be instrumental, and no more than is necessary for achieving its purpose. For each possible purpose, there may be a different minimum level of coercion.

Assume next that coercion is employed for the sole purpose of enforcing a rule against killing innocent people. Its necessary minimum level may then be quite low. Should, however, the protection of property be added to the protection of life, more coercion would be needed to enforce the corresponding rules. The progression might continue if public health or the control of some nasty externalities were also to be enforced. Would liberty increase or decrease as coercion increased?

The necessary minimum of coercion exerted by the monopolist state may bear some relation to what is needed to ensure the survival of continuity of its government. One state may ensure this by upholding the 'rules of just conduct'. Another may choose to buy the consent of a majority coalition by redistributing to it the 'excess' money of the minority. It is not implausible that the latter policy would require less coercion than the former.

The only contribution the idea of a minimum level of coercion makes to an understanding of freedom is that freedom will be less if coercion is used for its own sake, rather than as a necessary instrument to achieve a purpose. Obviously, a definition of liberty is not accomplished without selecting, out of the myriad of possible purposes, the one, or the combination of some, that is the most congenial with liberty. This the statement about minimum coercion does not do.

Two Concepts That Are One

For nearly a century, it has been a habit to explain the significance and attraction of freedom by identifying two purportedly different kinds, the freedom *to* do or *of* doing and the freedom *from* being wrongfully hindered in one's action. Some argued that the first mattered more, others thought the second was safer, more valuable and closer to the essence of freedom. The separate existence of the two kinds, under the bizarre algebraic designations of 'positive' and 'negative', came to be widely accepted. This became particularly the case after an influential formulation of much literary merit[2] helped to mask the paucity of solid content in the idea.

'I am free to pursue my peaceful purposes', a 'positive' liberty, *entails* that 'I am free from wrongful hindrance in pursuing my

[2] I. Berlin, *Two Concepts of Liberty*, 1958, Oxford.

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peaceful purposes'. If I am free to pursue X, I must *eo ipso* be free from measures to frustrate me. Conversely, if I am free from such obstacles, then I am at liberty to pursue X. Likewise, 'freedom of speech', has as its corollary, that the person who can express himself freely, is free from gagging or other violence or the threat thereof should he say the wrong thing. The rule against gagging binds everyone including the government, and its enforcement must be similarly effective to deter government as well as private gagging. How this can be achieved raises some obvious questions, but *if* there is freedom of speech, such questions must have been satisfactorily resolved.

Any number of analogous pairs of 'positive' and 'negative' freedoms could be constructed. Each pair is like a coin, with 'heads' on one side and 'tails' on the other. Whether it is lying heads up ('positive') or tails up ('negative'), it is the same coin and has the same value. There are no heads-coins and tails-coins.

It is not helpful for understanding how things work to spread the belief that there are different kinds of coins and they influence the social order, or affect human happiness, in two different ways. (The disservice to understanding has been aggravated by those who, impressed by the positive-negative notation, have come to speak of 'positive and negative rights'). Clearly, *if* a given act X is a freedom, *then* there must be an enforced rule against obstructing X except in rule-specified circumstances under which doing X would itself be a breach of the rules. If there were no such rule, a person proposing to perform X would run the risk of another arbitrarily stopping him or punishing him if he persevered,—even if, with respect to innocuous acts, the risk were small. Calling speech a 'positive' freedom and the prohibition of gagging a 'negative' one obscures rather than highlights this necessary relation.

There are alleged positive 'freedoms' whose bogus character is revealed when we obtain them by translation from the negative version. The negative 'freedom from hunger' translates into the positive 'freedom to eat when hungry'. When you do not have food, this 'freedom' implies that someone else is supplying the food. Your alleged freedom turns out to be a right, matched by another's obligation enabling you to exercise it (cf. also section 3. infra.).

The Inalienable 'Private Sphere'

One strand of the classical liberal tradition has singled out the 'private sphere'—matters being the sole legitimate concern of the individual and his family and no business of outsiders—as an area

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of primary significance to liberty. What you do in the privacy of your home, how you dress, what you read, and how you use your back garden were by and large to be taboo subjects not to be meddled with by others, least of all by the state. With this taboo held in respect, liberty was considered to be, if not assured, then at least not greatly endangered.

An implicit drawback of the idea of a privileged sphere, of course, is that it is almost asking for intrusions into the area outside the privileged one. The vegetable patch in your back garden is firmly yours, but your market garden on the town's fringe is only conditionally so, not to speak of your shares in the vegetable-canning factory. When the private sphere is more deserving of protection than things outside it, the suggestion is made (as it has only half-jokingly been made) that people should be 'allowed' to own their toothbrush but may claim no sovereignty over less intimate objects.

Nevertheless, the idea of special protection strikes a chord and remains attractive. The attempt to integrate it into social choice theory[3] has created a considerable academic stir both for this reason and also for its ingenuity and its vast capacity to be misinterpreted. This putative impossibility theorem, called the 'liberal paradox', defines a rule of minimal liberty L and a rule of Pareto-optimality P in such a way that the two cannot in general be both satisfied. One possible inference is that we would normally expect even the least radical social choice rule to aim at Pareto-optimality, hence even such a mild rule could violate minimal liberty. The L rule, by contingently contradicting the P rule would then serve as the guarantor of minimum liberty at the contingent cost of abandoning Pareto-optimality.

The contingency in question is reciprocal preferences. I prefer my back garden to be a vegetable patch rather than a lawn. My neighbour (who overlooks my back garden) would rather have it as a lawn. He bribes me with a rare stamp I covet to convert my vegetable garden to a lawn. We both prefer the social state where he looks out on to a lawn and I have the stamp to the social state where he has the stamp and I the vegetable garden. The former state is Pareto-optimal as no further transaction could make either of us more satisfied without making the other less satisfied. However, according to the alleged 'liberal paradox', I am to have a 'right' (more precisely, a liberty) to determine a social state of affairs by choosing from a pair of alternatives in my private sphere, I do this

[3] A. K. Sen, *The Impossibility of a Paretian Liberal*, 1970, *Journal of Political Economy*, Vol. 78.

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provided everyone has made his or her choice before me or independently of me. By letting my neighbour 'buy' my choice, I have surrendered this 'right' and violated the *L* rule.

Short of outlawing reciprocal preferences, the only way reliably to protect 'minimum liberty' from the attraction of Pareto-optimality is to exclude trade in certain liberties by making them inalienable. Thus is reached the strange result that in order for persons to enjoy even 'minimum' freedom, the freedom to dispose of these freedoms by converting them into other freedoms, rights and possessions they would rather have, must be abolished. In order for freedom to be greater, it must be smaller.

'Rights' to Freedoms

Contemporary thought about liberty has been steered in a little noticed manner by an influential theory of justice[4], in which we have a liberty if, or because, we secure a right to it. This theory proposes that deliberating under suitable circumstances, rational persons would choose a social structure that would satisfy the two principals of justice. The second need not detain us. The first, the principle of liberty, is formulated with what seems to be anxious care:

> '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' (p. 302)

Basic liberties are presumably different from liberties that are not basic. They are said to comprise the political liberties associated with democracy and the rule of law, and the freedoms of speech, assembly, conscience and thought. Apart from the last two (which are free in any event since they cannot be monitored), it is easy to see in what sense the others may be given a special status of 'basicness' setting them apart form the remaining universe of freedoms and calling for particular confirmation. Such intention, however, is negated by the inclusion, in the same list of 'basic' liberties, of the 'freedom of the person along with the right to hold (personal) property' (p. 61). Failing explicit restrictions, the 'freedom of the person' must comprise everything, basic or not, that the person is free to do. It is, as far as anyone can tell, the shorthand symbol for the entire list of licit acts persons may choose from.

What meaning, then, can it have to say that persons have a 'right'

[4] John Rawls, *A Theory of Justice*, 1972, Cambridge, MA and Oxford.

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to liberties? A right to a liberty would be an oxymoron in any case, for if you need a right to perform an act, the act is not a liberty but a privilege only the rightholders have. Others do not, for if they did, the right would be pointless. It is clearly not in this sense that the word 'right' is meant to function. Nor, as we have just seen, is it reserved to distinguish some basic class of liberties deserving of special confirmation that less basic ones do not deserve or require, for the 'total system of basic liberties' appears to be all-inclusive.

The sole coherent explanation that would give a *raison d'être* to 'right' in the principle of liberty is this: classes of acts are not free by virtue of their intrinsic harmlessness, the lack of a sufficient reason for prohibiting them, or their *de facto* licitness under a given system of rules. They are free if each person has a right to perform them. This right is accorded equally to each as the over-arching social contract that enshrines the principles of justice, or some equally fundamental move in the creation of society. The rights need not be accorded once and for all. They may be produced and distributed in a continuous process by the political authority of the era. Democracy would naturally assume the task.

An interesting though unsaid corollary of the notion of the 'right to freedom' is that if such rights are necessary, prior to the creation of these rights and their vesting in each person, the act in question —in fact, all acts destined to become freedoms—must have been unfreedoms. Everything must have been prohibited, though it is not easy to imagine how or by whom. It took the granting of a right to lift the prior prohibition, whose existence is assumed by postulating the need for a right to overcome it. (Cf. Section 2. infra on the presumption of unfreedom.)

Free Choice And Acceptable Choice

Many ordinary-language references to liberty treat it as something less austere, more involved than a clearly defined single characteristic of the relation between persons, their acts and rules, or the characteristic of social states of affairs in which the rules satisfy certain conditions. Tacitly and sometimes even explicitly, liberty is represented as a composite of a variety of desirable qualities of man's condition in his society, or of that society as a political entity. Among these desiderata, justice, material well-being and various kinds of equality stand out. A compact expression of this amalgam is the frequent claim that for choices to be free, they must be acceptable.[5] Acceptable choice is circumscribed in tantalizingly vague

[5] B. M. Barry, *Justice As Impartiality*, 1995, Oxford.

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ways, but seems to boil down to all the alternative slots available for people to fill being reasonably good without any slot being much better or much worse than the rest. A free society would then resemble a sort of flatland Nirvana, where choices outside the purely personal sphere would be matters of large indifference.

The everyday example is the wage earner faced with the choice of accepting or rejecting the terms of a job on offer. If a comparable job is open to him elsewhere the choice may be acceptable. If, on the contrary, there is just not other job, he would have to take the only one on offer even on insulting terms, for in his country there is no unemployment pay, so that the next-worse alternative would be starving to death.

To say that he cannot, in the name of free choice, possibly choose to starve is rhetorical, literally untrue, but difficult to contest. Yet death is seldom the only alternative. How about the possibly numerous other jobs all of which are worse than the best available, but all better than death? Is the choice between the best and the next-worse one acceptable? Declining the best and taking the next-worse is counter-preferential. It contradicts rationality if the latter requires acting according to one's preferences. Yet is it perhaps 'acceptable', hence free, if it is not much worse than the best? Working down the list of alternatives, there will be one (well short of starvation), which will be judged 'unacceptable'. How far down the list is it? The idea that 'free' must mean 'acceptable' depends on there being a dividing line where 'acceptable' ends and 'unacceptable' begins. No such line is particularly obvious. Taken rigorously, the only patently acceptable choices are between pairs of indifferent, i.e. equally good, alternatives. In unequal pairs, taking the better one is a choice 'one cannot refuse', hence it is not a free choice.

We are thus moving ever closer to a world that is free only if it abounds in equally good opportunities. Identifying free with acceptable (even in a diluted, non-rigorous sense of the latter) surreptitiously creates a compound notion in which one part, freedom, is inseparable from other parts such as the distribution of wealth, the level and stability of employment, public support for all worthy objectives and any other feature a society needs for its citizens to feel cosy and comfortable. In this way the meaning of freedom is progressively broadened until it becomes the container that holds all the values. (Something similar seems to have happened to the notion of justice, 'just' now increasingly means what is nice and unjust what is not nice.).

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2. The Presumption of Liberty

Liberalism: Freedom As An Organising Principle

The once firmly held and now more hesitant and tentative belief that a good society is a liberal one rests on the intuition that most people throughout most of their lives like freedom for its own sake and dislike surrendering it to the will of others. Liberty has the rank of a final value that needs no justification and bears no explanation. It is tempting, though mistaken, to conclude from this that liberty is a paramount principle that is 'lexically' prior to any other and that must prevail in all questions of social organisation. This conclusion is mistaken, not because liberty is not a good principle, but because the proposition that it has a 'lexical' priority over other values, so that no part of liberty, however small, is ever worth giving up for some part of another value, however large, is groundless and implausible if put forward as a descriptive statement and extravagant as a prescriptive one. Tradeoffs between freedom and other, (presumably just as final) values, such as justice, order, national independence, traditions, prosperity and so forth take place all the time and, while the 'exchange rate' that prevails in particular cases between particular competing values may well tell a tale about the character of the society in question, the fact of exchange is indisputable. It goes almost without saying that liberalism is the least well placed of political doctrines to object to tradeoffs that reduce freedom and increase some other value. As I have argued in Section 1 with respect to the inalienability of certain 'private' liberties, disposing of one liberty to acquire another (or a right or a possession) is itself a liberty. So is the disposal of some liberty in exchange for another value. Liberalism, that cannot renege on tolerance of the plurality and rivalry of values, can hardly claim primacy for liberty on grounds of some hierarchical top rank attaching to the latter. By the way, it is probably this very tolerance that accounts for the permeability of liberalism, the weakness of its 'immune system' and the relative ease with which it is colonised by elements of other doctrines, notably socialism. A classic example is the emergence of an American liberalism that is far removed from liberalism as understood outside America.

Many liberal writers, sensing that the primacy of freedom cannot be derived from claims about its being superior to other final values, choose very reasonably to treat it as an instrumental value that is exceptionally suited to help bring forth other, more final ones. As such, it is a better organising principle of society than any possible

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rival. This is at least implicitly the rationale of many arguments, often well supported empirically, that freedom in learning and research is, in unexpected ways, more fruitful for the advancement of knowledge than hierarchically directed efforts. Similar findings abound concerning the superior economic efficiency of the unfettered freedom of contract over central command of resource allocation, pricing and regulation.

These arguments are very solid. They also happen, overtly or implicitly, to contradict some of the most cherished tenets—the primacy of collective over individual choices, the redistribution of property and income in socially desired ways—that public opinion wishes the organising principle of society to incorporate.

Debates about these matters and their consequences rapidly and inevitably shift to the realm of subjective beliefs, flexible interpretations of history, wish-inspired prophecies. On that terrain, *bona fide* contestation of freedom's instrumental value need never die down, let alone the contestation that permits itself the convenience of bad faith.

However, while value-based arguments for or against it are inconclusive and may cancel each other out, the role of freedom as the paramount organising principle of society can be defended by recourse to elementary logic and epistemology, almost completely avoiding reliance on controversial ethical propositions.

The Presumption of Liberty

As a preliminary, it may be helpful to recall some basic means available for evaluating the probability (and, in the limit, the truth) of descriptive assertions. Such assertions are verifiable, or falsifiable, or both. Suppose it is being asserted that in a bag that passes for being full of white marbles, some are in fact black. This can be verified by taking handfuls of marbles out of the bag until in one handful we find at least one black, at which point the task of verification has been discharged and sampling the marbles may stop. Alternatively, falsification may be undertaken by taking handful after handful of marbles as long as no black one is found. If the bag is emptied with no black marble turning up, falsification has been successfully completed. Both means of getting closer to the truth are feasible. The choice between them is not a matter of logic, but of relative efficiency. If verification looks easier, the burden of proof would normally rest with the challenger of the presumption that all the marbles are white. If falsification is cheaper, the burden of proof rests with the proposer of the presumption that all the

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marbles are white.

Instead of a bag of marbles, consider next a very large haystack made up of countless wisps of hay. It is proposed to feed the hay to priceless racehorses. The proposition is challenged by the allegation that there is at least one needle in the haystack. The proposer could falsify this by taking the haystack apart wisp by wisp, examining each until none was left unexamined. Only then would the presence of needle(s) be falsified. The number of wisps of hay in the stack is countless; examining each is, in practice, no different from making an endless series of examinations, something that is not a matter of cost, but of unfeasibility. Verification, however, is possible and may be successful after only one or a few handfuls of hay have been examined, especially if the challenger has grounds for his challenge and knows where in the haystack he should first look. The burden of proof lies indisputably upon him. This is due to the asymmetry between the two means of testing the validity of the assertion about the needle—an asymmetry that in turn is a logical corollary of the assumption we may reasonably make to the effect that there are virtually numberless wisps of hay in the stack.

Consider finally the matter that directly concerns us here, namely the determination of whether a certain act X is free or unfree. A person proposes to perform X. Reasons may be advanced why he should not be allowed to do so. They may involve the interests of other persons or of posterity, or prevailing rules that may be applicable, or anything else the imagination may conjure up. A challenger asserts that one or some of these reasons are sufficient for prohibiting X. The proposer may well show each reason that is advanced to be insufficient, but new ones can always be construed. No matter how many he has rebutted, he can never demonstrate that none is left unrebutted. The case is one of the haystack containing infinitely many wisps of hay, any one of which may be concealing a needle. It is logically impossible to falsify that X is (or should be) unfree. Verification of it, however, is logically perfectly possible if the challenger can mount a strong enough case that at least one reason speaking against X is a sufficient one. In deciding whether X is free or unfree, the burden of proof is on the challenger who contests its freedom.

The same, almost mechanical reasoning answers questions of crime and of property. The accused is presumed to be innocent until proved guilty. The burden of verification lies on the accuser and the accused is incapable of assuming the burden of falsification. In any case, the accused cannot be both innocent and guilty. Nor can he be neither innocent nor guilty.

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The same simple structure of argument operates for property. The possessor cannot falsify a general challenge claiming that his title is invalid, for there may be infinite reasons why it might be so. He enjoys the presumption of good title; it is for the challenger to prove that it is not good. 'Possession is nine parts of the law'.

It takes no particular insight to realise that the presumptions of innocence and of property are special cases of the presumption of liberty. They are derived by the same source in the asymmetry between verification and falsification. Perhaps more interestingly, the two special cases provide telling and tangible examples of what it means that freedom is the organising principle of a society.

Finally, some light is also cast on the strength of the rational case for liberty compared with other, potentially rival, organising principles. Liberty gains its rank from its presumption being a corollary of the non-falsifiable nature of certain types of claims, which shifts the burden of proof on to the challenger of liberty. One other organising principle, namely Pareto-optimality or unanimity, shares a similarly strong defensive position. It is owed, not to unfalsifiability as is the case with liberty, but to its being *prima-facie* better for all than its alternatives. Evidently, however, Pareto-optimality may complement liberty, but is not its rival as an organising principle.

Nothing logically intrinsic lifts potential rivals to the rank of organising principles. Some version of equality, the closest competitor in popular sympathy, is an organising principle by virtue of value being attached to it by many persons, but there is nothing consistent with orderly thinking that would prevent others from placing little or no value on it.

Everything That Is Not Permitted Is Prohibited

It is tempting to think that as the presumption of freedom is merely a formal consequence of a certain proposition being unfalsifiable, inverting the proposition sweeps the presumption of freedom away and puts the presumption of unfreedom in its place with the same compelling simplicity. The manoeuvre consists in replacing the haystack that may have a needle in it, by a stack of needles that may have a wisp of hay in it.

In this upside down version of the problem of knowing whether an act is free, the roles of proposer and challenger are reversed. It is the person wishing to perform X who proposes that it is, or should be, free. He must show sufficient reason. The challenger denies that there is any such reason, but he is unable to falsify the proposer's claim. To decide the issue, the proposer must verify that a sufficient

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reason speaks for X (that there is a wisp of hay in the stack of needles—he knows where to look for it). Failing verification, it is taken to be the case that no sufficient reason speaks for X. There is a presumption of unfreedom.

It is now clear why the presumption of freedom and of unfreedom are not logically equivalent. The verification-falsification asymmetry produces the former if no feasible act is prohibited unless there is sufficient reason for doing so. It produces the latter if no feasible act is permitted unless there is sufficient reason for doing so. The presumption of freedom prevails in a world where, once all reasons have been weighed, the insufficient ones discarded and the sufficient ones retained, there emerges a rule system which, in effect is a system of prohibitions. By implication, everything that is not so prohibited by the rules is free and will be presumed to be such. In the contrary case, every reason having been duly weighed and some found sufficient to permit certain feasible acts, a rule system will emerge, consisting of permissions. (In 'rightsist' parlance, confusingly enough, such permissions are also called 'rights'.) By implication, everything not so permitted is unfree or presumed to be such.

However, for the system of permissions to be at all meaningful, prior to its emergence every feasible act had to be a prohibited act, the emerging rules lifting the prohibition from some and leaving it upon the less favourably considered residue. This, in turn, irresistibly suggests that the prohibitions got attached in some manner to the acts to begin with, for if they had not, there would be nothing to lift by granting permissions. Permission would be redundant. A supposition of initial prohibition of the universe of feasible acts is necessary. It is also absurd. Hence we feel entitled to dismiss the presumption of unfreedom as an absurdity.

3. The Rules Of Liberty

Feasibility and Liberties

It is trivial that the enabling condition of freedom is feasibility. I am, alas, not free to have a stately home, but the star football player surely is. Trivial, too, is the idea that if all feasible acts were free, freedom would have no separate meaning but could only serve as a synonym for feasibility. Theorizing about freedom had best start from feasibility and show how it comes about that only some feasible acts are free.

I believe it lends clarity to such a theory to treat the set of a per-

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son's feasible acts as given for our purpose. It is widespread practice to say that riches make you freer and poverty less free. It is also commonly held that knowledge makes for more and ignorance for less freedom. (It is currently fashionable to speak of 'capability' to encompass such variables.) However, it seems to me preferable not to commingle elements that have well-defined distinct meanings, but to account for them separately. When a rise in wealth or knowledge expands the feasible set, one should ascribe the expansion to wealth or knowledge. Freedom, and its rise or fall, is better understood if considered relative to a given feasible set.Changes in freedom will thus be essentially attributed to changes in the rule system that, in the first instance, divides the feasible into free and unfree. Of two feasible sets under identical rule systems, we would describe the larger as richer in wealth or knowledge, whichever factor was responsible for its having a larger size.

Freedoms (liberties) and free acts will be treated as synonymous. (There are no free thoughts, nor unfree ones. Prohibitions of thoughts could not be enforced and would be futile). A free act is a relation between one person and one act, such that (a) the person may perform the act, or forbear from performing it, without incurring a sanction under the prevailing system of enforced rules, and (b) the same relation holds with respect to every similarly placed person if subject to the same system of rules.

An act or class of acts may be unfree for all persons yet be free for the collectivity acting together. This will typically be the case when the rules are made by collective choice and the collectivity preempts a class of acts (e.g. taxing individuals) for itself while barring it to individuals. Anticipating a little, we should note that the free act, a one-person one-act relation, may be temporarily or permanently transformed into a right/obligation, a two-person one-act relation. However, it is not anomalous to treat obligations as in a loose sense part of the free subset of the feasible set, for the origin of a freely assumed obligation is always a freedom. A person cannot sensibly be described as obliged to do, or refrain from doing, something that he was not free to do in the first place because the act in question was prohibited, unfree to begin with.

Since the present framework gives pride of place to sanctions, and since liability to sanctions demarcates unfree acts from free ones, it is not otiose to clarify a frequently voiced misunderstanding. It contends that since every act has an opportunity cost and a sanction can always be expressed in terms of cost to the person subjected to it, every act is as free as every other whether or not it is subjected to a sanction, the only difference being quantitative as some

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acts cost the agent more than others. Killing a man is as free as giving him alms, except that killing is liable to cost you more. An oft cited example is parking your car and paying the meter, or parking it 'illegally' and paying a fine. The difference lies partly in the intent of the fine which is to punish, and partly in its hoped-for effect which is to deter. The parking meter, on the contrary, is meant to equate the number of cars seeking to park in a given location to the places available. If no cars ever parked in that street, the sanction should be judged a success. If the street was meant for parking and no cars parked there, the parking meters would be judged a failure.

The Benefit Of Coordination

Several types of interaction among persons are mutually beneficial. Of these, coordination is critically relevant to freedom. Two or more persons may all coordinate on the same behaviour, or some on one behaviour and others on another that is complementary to it. In the game of 'respect another's property', each coordinates on the same behaviour; neither steals or robs the other or trespasses over his land or defaults on a contractual commitment. In 'first come, first served', the second comer waits until the first comer is served. The coordinated behaviour is an equilibrium in that neither party can do better than he is doing given the behaviour of the other party. Most of these coordination problems have more than one equilibria. For instance, in 'property' one equilibrium is that both steal and another is that neither steals. In the former case both end up poor, in the latter both prosper. 'Neither steals' is a superior equilibrium to 'both steal'. It is reached either in an evolutionary process, or more directly in a sequential game where the participants adjust to each other's retaliatory strategy and abandon deviation.

Though there is no assurance that people always escape the inferior and always reach the superior equilibrium, commonsense rationality (of what game theorists define as the 'bounded' type) favours the hypothesis that over history the better equilibrium gets selected more often than the inferior one.

An equilibrium that is widely adhered to is a convention. If virtually everyone in a society strongly prefers that everyone adheres to the convention (though not all will always do so), we will say that the convention has become one of that society's rules. Needless to say, not all rules arise as solutions of coordination problems, i.e. as conventions. Initially, however, this analysis will be confined to those that do. They are the spontaneous rules.

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Failure to achieve a coordination equilibrium may profit one section of society. For instance, a disequilibrium in which some rob and everyone else merely endures it (without seeking to deter and punish it) may for some time secure superior benefits to those who are strong and clever robbers. Society as a whole, however, will probably secure a greater benefit in the inferior equilibrium where everybody retaliates with robbery to robbery, and even more so in the superior equilibrium where hardly anybody robs while those who do risk sanctions.

Torts represent the primary area where conventions of reciprocal good behaviour offer the most obvious and palpable benefits. History, and the customs preserved among primitive people, bear out the conjecture that whatever other rules a society may generate, a fairly comprehensive set of rules against torts will be among the first to emerge. They will most probably cover the respect of life and limb, property and reciprocal promise (contracts). The probability of rules emerging that are seamless and leave no significant gap in the defence against torts is of the same type as that of profitable opportunities in a reasonably unfettered market not remaining unexploited for long.

Less compelling than rules against torts, but also likely to emerge and with a good deal of empirical evidence showing that they do tend to emerge, are rules of what we might call efficiency and civility. Rules of efficiency assure that people drive on the same side of the road, talk to one another in some common language and accept intrinsically worthless token money in the discharge of debts. Rules of civility make social proximity less disagreeable and occasionally downright agreeable.

Enforcement

Every equilibrium is, by definition, self-enforcing in that no one in that state can improve the benefit from his own behaviour, given the behaviour he expects from his opposite number. If I expect you to drive on the left, the best I can do is to drive on the left too, and the same goes for you. Rules of efficiency are generally self-enforcing in this straightforward fashion. However, they are few in number; nor are they perhaps the most crucial of all rules.

How can one assert, though, that the rule of contract is self-enforcing, i.e. that it is an equilibrium (requiring no helping hand from an all-powerful third-party enforcer such as the state)? Here, the inferior equilibrium is that neither party executes his part of the contract and the superior one is that both parties do. In the latter

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case, though, the second performer would secure an outstandingly higher benefit by defaulting instead of executing his commitment. Since such deviation from the coordinated solution would have to be expected, the first performer would also expect to do better by not executing the contract, and both parties would sink to the inferior equilibrium.

The superior coordinated solution of mutual performance becomes self-enforcing by virtue of a contingent retaliatory behaviour each participant has an interest to adopt as the response to deviation from the coordinated behaviour on the part of his opposite number. Retaliation punishes and deters deviation. The cost of getting punished, weighed by the probability of not getting away with it, must be such as to reduce the expected benefit of deviation, pushing it below the benefit from the coordinated behaviour. The cost of occasionally adopting the retaliatory behaviour, in turn, must not exceed the benefit expected from protecting the coordination equilibrium from the danger of being lastingly upset by an excessive amount of deviation.

Though such assessment is speculative, neither of these two conditions looks unduly exacting. Admittedly, unlike the protection of conventions that yield palpable benefits, there is less basis in reason for assessing whether, for example, the rule against killing peaceful strangers would prove to be self-enforcing thanks to the near-general adoption of a contingent 'strategy' of killing the killers, or other dissuasive sanctions. Perhaps all one can say is that no assurance of conventionally administered retaliation would be any more likely, but perhaps also no more unlikely, to eradicate violent crime than the often ponderous and seemingly endless procedures of state judicial authorities.

Spontaneous And Rule-Made Rules

Hitherto, we have been solely concerned with convention-based rules that emerge spontaneously among groups of interacting individuals. Such rules have no identifiable author, depend on no law-giving authority, are self-enforcing in diverse ways, and are shaped by the requirements of the type of interaction, (e.g. access to scarce seats on the next bus) for the right type of coordinated behaviour (e.g. queuing). Such spontaneous, convention-based rules are almost certainly the oldest rules of mankind and have striking cross-cultural stability. Across the world and across history, ingrained rules about killing and maiming, thine and mine, exclusive property, pecking order, mutual aid and so forth hardly change,

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though like every kind of rule, they are not uniformly respected and their enforcement is not always fully successful.

It is a fact of life that while this basic layer of ageless and spontaneous rules does not altogether disappear, it gets progressively overlaid by what I propose to call statutory or (more tellingly) rule-made rules. Why the latter tend to be superimposed on the former is a vast subject that will not be touched here. A rule-made rule is so named because it derives its validity (and, in the view of many, its legitimacy) from being created according to a rule to which new rules or changes of old ones must conform in order to be binding. Thus, if 'the Leader has ordered it', or if 'the king in his council has decreed it' or if it is 'duly passed by representatives elected by majority vote under universal adult suffrage', the new rule or rule-change has been effected by applying the rule-making rule in force at that time, and is binding on all. Whether the rule of rule-making is easy or difficult, simple or complicated, is of secondary importance. The important fact is its power to generate binding rules.

The sum of the requirements the passage of a new rule must satisfy in order to count as binding—i.e. the sum of provisions of the rule of rule making—has been aptly baptised the 'rule of recognition'. The name was given by a jurist of immense distinction and it is almost impious to suggest that there is an even more telling name for it. I will nonetheless call it the 'rule of submission'. For its all-important significance lies in the fact that, except freak cases of popular frenzy, the substance of the rules created under its aegis is not unanimous. It is virtually always a decision by some (the dictator, the king in his council, the legislative assembly) on behalf of, and binding upon, all. It is a rule at least some would not have chosen and would undo it if the rule of rule-making allowed it, i.e. if it were not a rule of submission of all to some. If one accepts it as the valid rule for making rules, one implicitly accepts whatever rules it may generate, although one is fully aware that some or all of these future rules may be contrary to one's interests, preferences or convictions.

It is trite that any rule that is supposed to enjoy unanimous consent to its making non-unanimous decisions, is a rule of submission. It is likewise trite that if such a rule is employed to its logical limit ruthlessly to exploit some for the benefit of others, it risks ultimately to bend or even to break. It is, however, no less a rule of submission for all that.

The fundamental difference between spontaneous and rule-made rules, then, is that regardless of the substantive content of each, the spontaneous rule is generated in a manner consistent with freedom

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and the rule-made rule is one that is inconsistent with it. The latter is designed to relegate to the unfree category an (albeit unpredictable) part of the feasible acts of an (often quite predictable) dissenting segment of the society that must obey the rule.

It is in this very general sense that the nature of the prevailing system of rules determines how free the society that obeys them is.

A less general and more mundane determinant is, of course, the substance of these laws. Spontaneous rules serve to protect equilibria under which everyone is doing as well as he can, given that everyone else is also doing so. Rule-made rules, whatever else they accomplish, typically also improve the situation of some at the expense of worsening that of others—a redistributive rather than a pure Pareto-improving function.

From Liberties To Obligations

Voluntarily to surrender a liberty is also a liberty. Incurring an obligation and acquiring a right are transactions that originate in liberties and, if of finite duration, revert to liberties. Taking a job is to surrender certain liberties, subjecting oneself to certain obligations and creating the corresponding rights for the employer. For these reasons, it seems to me best to treat such surrenders as part of the free, rather than of the unfree, half of the feasible universe, even though obligations respond to the verb 'must' and not to 'may'.

Obligations are one aspect, and rights another, of the relation between two persons,—the obligor and the rightholder—and an act the obligor must perform (or forbear from) at the demand of the rightholder. (These standard roles may sometimes be reversed, the rightholder performing the act and requiring the forbearance of the obligor to be able to do so, as in 'matrimonial rights' or the feudal lord's supposed *ius primae noctis*.)

The fundamental difference between freedoms and rights/obligations is that the former are one-person-one-act, the latter two-person-one-act relations. Despite this very straightforward and visible contrast, liberties and rights/obligations are ceaselessly confused.

I sought to make clear in Section 1 that 'positive' and 'negative' freedoms properly speaking are simply alternative expressions of the same act-and-rule relation; the 'positive' freedom of free speech describes exactly the same freedom as the 'negative' freedom from gagging (censorship), threats of illicit punishment in case you say the wrong thing, or any other illicit act raising the opportunity cost of free speech. However, among 'positive' freedoms many authors quite improperly also include the 'freedom' to choose the govern-

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ment, to be educated, to be informed, to find a suitable job, and so on. Each of these putative freedoms implies that someone else must do something if they are to be exercised: someone must make the government resign, someone must provide schools and teachers, someone must disclose the required information and someone must offer a job of the right sort. These are all obligations to be performed on demand, and they are all paired with a right, and not a 'positive' freedom, to demand and obtain them.

The inverse of this confusion mistakes liberties for rights. When we say that we have a 'right' to pursue happiness, we mean that we are free to do so. We do not mean that someone is obliged to arrange for us to be able to pursue it, let alone to make sure that we in fact catch it.

An obvious objection would be to say that while the pursuit of happiness may well be a liberty and not a right, it is inseparable from the 'negative right' of having the pursuit protected from torts and other illicit interference. Such defence transforms the venial sin of verbal confusion into a gross instance of defective reasoning. If the interference is a tort or otherwise illicit (rather than the everyday rivalry of all competitors for happiness), then it is a rule-violation. It is wrong and must not be done to me or to anyone else. This being the case, it is fatuous to give me, in addition, a 'negative right' that no such wrong shall be done to me, and to subject others to the obligation to forbear from doing this wrong, which the rules forbid them to do anyway. Not only is the idea of the 'negative right' redundant, but it also risks muddling up the common understanding of what is a rule and what is a right. At best, it is a belt-and-braces idea, suggesting that we need both a rule and a right to make sure that a wrong is recognised as such.

Conferred Rights, Sham Rights, Imposed Obligations

A classic, though presumably not very harmful, example of the misuse of terms is the incessant assertion of 'human rights'. What is asserted is that humans, by virtue of being such, are somehow entitled to require that certain major torts not be done to them or, more broadly that they be indemnified against major harms. Protection from torture or 'ethnic cleansing' would be typical of the first, famine relief or development aid of the second 'right'. The first, like 'negative rights' in general, refers to some universal rule and affirms that humans have a 'right' that the rule should not be violated. If the rule is not enforced, the right is a sham and the claim that it exists is untrue. Voicing it may or may not improve the

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chances that it will eventually be enforced. The 'human right' to be saved from natural catastrophes or mass misery tacitly asserts that someone somewhere is under an obligation to save the victims of catastrophe and misery. Here it is not a pre-existing rule that needs enforcing, but rather a new obligation and a new obligor must be designated and discharge of the obligation enforced. Failing that, the 'right' is a sham and may be harmful in raising false expectations. Asserting the right to be aided has been known to weaken the disposition to self-help.

Real rights, rather than sham ones, are created within a collectivity when the political authority, applying the rule of rule-making, confers them on a particular class of individuals, e.g. the unemployed or the sick, and ensures their actual exercise by imposing the corollary obligations on some other class, e.g. taxpayers. Needless to say, the right is not, or at least need not, be acquired in exchange for the assumption of a burden. Nor is the obligation voluntarily undertaken by way of a willing surrender of a liberty. Imposing the obligation to pay the tax is one of the foremost instances where collective choice pre-empts for itself a large part of the free subsets of individuals' feasible sets.

Proliferation And Shrinkage

Modern rule-making rules, notably those dependent on building voting coalitions, display a propensity for conferring new rights and extending old ones. They also seem to permit the imposition of the corollary obligations with almost surreptitious ease. The resulting proliferation of rights is widely regarded as a sign of progress and generosity. However, it is careless thought that lets the corresponding shrinkage of freedom to go on unnoticed.

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