

Chapter 3

Liberty

Introduction

One enjoyable, though probably fruitless, way to spend an afternoon would be to discuss which is the most prominent or important political value, which ideal carries most clout in political debates – in public bars or parliaments. Candidate values might include justice (more particularly, human rights or equality), democracy, and certainly, liberty. It is hard to think of a political manifesto that does not trumpet the prospect of liberty – and it is easy to think of fractious political disputes where freedom¹ is a contender on both sides of the issue. Freedom in education requires the provision of educational opportunity for all, free at the point of service, some say; others, that it signals the parents' freedom to choose the education they judge best for their child. These different aspirations may collide if resources do not permit them both to be fulfilled.

Liberty, liberalism, libertarianism

We shall examine the different ways in which liberty may be appealed to, but one thing is sure: whoever makes such appeal is attempting to claim the moral high ground. Just why this is so is a matter of delicate analysis, not least since 'the meaning of this term is so porous that there is little interpretation that it seems able to resist',² as Isaiah Berlin notes. Before we proceed in this direction, however, it will be useful to distinguish the value of liberty from a couple of other terms closely associated with it – 'liberalism' and 'libertarianism'.

Of the two, 'liberalism' is the hardest to capture in a nut-shell definition. As with other '-isms' in the domain (conservatism, socialism . . .) it signals a cluster of political ideals advocated (and put into practice) within a tradition of political thought and political activity. Major contributors to the literature of liberalism include thinkers as diverse as Locke, Montesquieu, the Federalists, Constant, de Tocqueville, J.S. Mill, T.H. Green, Karl Popper, F. Hayek and latterly, John Rawls and Joseph Raz – and this is a very selective list. Probably the only thing that unites members of this list is that they all subscribe to a strong value of individual liberty – and even then we should note that they speak in different voices when this value is canvassed for our endorsement. For some, the heart of liberalism is captured in Locke's claim that all men are born free and equal; others shudder at the commitment to equality. For still others, liberalism requires the opportunity to participate in democratic institutions; some liberals discount this, insisting that democracy represents a separate or subordinate value, or no value at all, or even a threat to liberty.

Conspicuously, liberalism amounts to a different political agenda in different places. In Britain, liberalism as a political movement is a halfway house between conservatism and socialism, shifting in policy content as these other political movements veer away from or move towards the middle ground. In the United States, liberals have bleeding hearts, and for many 'liberal' has become a dirty word. Anyone who advocates welfare programmes, indeed much public spending beyond what is necessary for defence and law and order, is likely to be castigated as liberal.

Key liberal themes include the right to private property and

advocacy of the rule of law as well as defence of the traditional freedoms – freedom of speech and artistic expression, freedom of association, religious freedom, freedom to pursue the work of one's choice and freedom to participate in political decision procedures. 'Liberalism' is a poor, but indispensable, label, perhaps best understood when one has a clear idea of the movements or ideologies which most conspicuously oppose it in its different manifestations.

Libertarianism is a much less amorphous creature. It is the theoretical stance of one who strictly limits the competence of government to collective defence, the protection of negative rights, rights of non-interference, and enforcement of contracts. The state on this account has the two tasks of the night-watchman – to guard the city walls against outside attack and to patrol the city streets, ensuring that citizens are not murdered, raped, robbed or defrauded. The state has no role in the provision of education, health-care or social security payments, no duty to redistribute resources amongst citizens for purposes other than the rectification of violations of rights. We shall study the libertarian agenda in Chapter 4. In the meanwhile we shall try to understand better the concept of liberty.

Analysis

Philosophical analysis promises clarification, but with a concept as diffuse and battle-scarred as liberty, we should not expect quick results. We shall soon see that there are many concepts of liberty, as Berlin suggested. It is not that the term is ambiguous in any straightforward way. 'I sat by the bank and wept' is quickly sorted out, but a dictionary won't tell us what Patrick Henry had in mind when he cried 'Give me liberty or give me death!' If there are indeed more than two hundred senses to this word, I would rather someone else took on the job of charting them. We need to put some limits on the enterprise of analysis.

In the first place, we shall focus on liberty as a political value. There are two aspects to this demand: we can ignore obviously non-political usages and we shall insist that a proper analysis makes clear why proponents of liberty have claimed it as a value.

The former point is perhaps trivial; political philosophy has no interest in explaining why liberty bodices are so called or in relating freedom of speech to newspapers which are free, gratis and for nothing (as against frank, fearless and free!). The latter point – that freedom is a value – is of considerably more importance, since there are clear accounts of freedom which can be criticized and rejected on the grounds that they offer either no account of why freedom is a value or an account that is plainly defective. One way of arguing for this conclusion is to claim that liberty is not a value-neutral concept, it is always normative, always accompanied by a positive ethical charge. Thus to describe a condition as one of liberty is to attribute a positive value to it and hence to begin making out a case for it. On this account, it would be self-contradictory to disvalue a liberty or to describe a condition of liberty as wrong or evil. John Locke clearly employed the concept of liberty in this way when he made a sharp distinction between liberty and licence, claiming that the state of nature as he describes it, is ‘a State of Liberty, yet it is not a State of Licence’,³ since man is governed by the law of nature.

I am inclined to think this is right, but there are plenty of reasons to give one pause. ‘Is liberty of the press a good thing?’, ask pundits and parliamentarians, anxious that they might be found out. This question would only make sense if the use of ‘liberty’ here does *not* imply that liberty is a positive value, if the usage is in some way non-standard – which it may well be, finding a purely descriptive meaning in terms of the specific institutional practices of a particular state. My own view, which could not be defended without some measure of stipulation, is that this debate may indicate the only distinction that can be drawn between liberty and freedom. The concept of freedom, I believe, is thinner than that of liberty and carries less evaluative baggage. ‘Ought citizens be free to . . .?’ is a perfectly straightforward question. We have no difficulty in thinking of some freedoms as worthwhile and others not so. If I could tidy up the language, I would do so, distinguishing two kinds of freedom: that which we approve I would designate liberty; that which is disreputable I would call licence. Sadly, I am impotent in these matters, so let us leave this matter of terminology unresolved.

This does not mean, however, that the connection between

liberty or freedom and value is indeterminate. Whilst it may not be a conceptual truth that liberty is valuable, it must still be required that philosophical accounts of liberty explain why it has generally been accepted as valuable and why its advocates regard it as valuable. Of course the political philosopher need not endorse such accounts – they may bear witness to widespread illusion – but if so the error must be comprehensible.

Second, despite my insistence that we focus on liberty as a political value, we must not draw the lines of conceptual demarcation too tightly. John Stuart Mill begins his essay, *On Liberty*, with a disclaimer in the first sentence: ‘The subject of this Essay is not the so-called Liberty of the Will, so unfortunately opposed to the misnamed doctrine of Philosophical Necessity; but Civil, or Social Liberty.’

Mill may be right to separate these philosophical questions. It may turn out that the metaphysical question of whether or not there is such a thing as free agency is quite independent of issues concerning political liberty. But we cannot *begin* our enquiries with such an assumption in place since it may turn out that an account of the value of political liberty which is successfully embedded within a wider account of free action will be deeper and more satisfying. A link between a satisfactory account of free agency, considered generally, and political or social freedom may also help us with our first objective – to see why liberty is of value to its protagonists.

Mill’s specific objective limits the range of the concept of liberty in another way, since it ought to be an open question whether, as he believes, the question of liberty is exhausted when we have investigated ‘the nature and limits of the power which can be legitimately exercised by society over the individual’ (as the quotation above continues). Mill imposes this latter restriction deliberately because he believes that, in his day, democracy poses sharp threats to civil liberty. He has in mind the possibility of majority tyranny and the levelling spirit of democracy which may lead to an intolerance of social experimentation and personal eccentricity. He believed de Tocqueville’s reports of democracy at work in America: give a measure of power to everyone at the town meeting and conformity will soon become a parochial priority. These dangers are real, but as we shall see, liberty may require democratic

institutions just as surely as democratic institutions require strong liberties.

Isaiah Berlin: negative and positive liberty

Isaiah Berlin's Inaugural Lecture, 'Two Concepts of Liberty', has proved to be one of the seminal contributions to political philosophy in the twentieth century. It is remarkable for the resonance of its analytical apparatus and the depth of its historical foundations. It is also notable for the strength, and perhaps dogmatism, of its conclusions. Berlin distinguishes negative and positive liberty and, on his account, these different senses of liberty are elicited as the answers to two different questions.

If we ask, 'What is the area within which the subject – a person or group of persons – is or should be left to do or be what he is able to do or be, without interference from other persons?' we characterize an agent's negative liberty. 'Political liberty in this sense is simply the area within which a man can act unobstructed by others.' If we ask instead, 'What, or who, is the source of control or interference that can determine someone to do, or be, this rather than that?'⁴ we aim to describe the agent's positive liberty. This is summarized later as 'the freedom which consists in being one's own master'.⁵

Negative liberty

Let us look more closely at negative liberty. The clearest exponent of the simplest version of negative liberty was Thomas Hobbes, who defined a free man quite generally as, 'he, that in those things, which by his strength and wit he is able to do, is not hindered to do what he has a will to'.⁶ Negative liberty is often glossed as the absence of coercion, where coercion is understood as the deliberate interference of other agents. In recent times, the most rigorous version of negative liberty, 'pure negative liberty' has been articulated by Hillel Steiner, but since it is an implication of Steiner's analysis that not even the most draconian laws can inhibit liberty, because they render acts ineligible rather than impossible, I judge that it has little relevance to political philosophy, despite its

influence.⁷ Negative liberty, of the Hobbesian kind that is compromised by coercive threats as well as other modes of prevention, is often contrasted with theories (if there are such) which imply that mere inabilities inhibit liberty. Berlin quotes Helvetius to make this point: 'It is not lack of freedom [for people] not to fly like an eagle or swim like a whale.'⁸

The evident truth of this conceals a difficulty, nonetheless. Suppose I can't walk because my enemy has tied me up or broken my leg. Here, too, there is a straightforward inability but we would judge this to be a case of freedom denied because the inability is a direct result of another's action. But suppose that my inability to walk is the result of a medical condition – and this condition can be remedied by an operation which I cannot afford. Am I unfree if others fail to pay for my treatment? The case differs from my inability to fly like an eagle in two ways. First, humans can walk in normal circumstances but they will never be able to fly like eagles. Second, the condition is remediable whereas human flightlessness is not. Do these differences count? Before we tackle this question, let us see how this problem arises within Berlin's account of negative liberty.

Berlin insists that we should distinguish between the value of (negative) liberty and the conditions which make the exercise of liberty possible.⁹ Thus there may be freedom of the press in a country where most citizens are illiterate. For most, the condition which would give point to the freedom – literacy – does not obtain. In these circumstances, Berlin would insist that illiteracy does not amount to a lack of freedom. Clearly something is amiss in a society which fails to educate its citizenry to a level where they can take advantage of central freedoms, but that something need not be a lack of freedom. A basic education which includes literacy may be an intrinsic good, or it may be a human right. Its provision may be a matter of justice, its denial, transparent injustice. But however this state of affairs is described, we should distinguish a lack of freedom from conditions under which it is hard or impossible to exercise a formal liberty.

Berlin has his own reasons for insisting on this point. He has a laudable concern for clarity; obfuscation and confusion result if different values are elided by careless argumentation. More importantly, he wants us to recognize that different fundamental

values may conflict. The demands of justice or security may require the truncation of liberty, or vice versa, in circumstances of moral dilemma or irresolvable tragedy. There is a natural tendency to seek escape by assimilating the strong differences, by attempting to redescribe the awful circumstances as having only one value at stake – in which case we can take whichever course of action maximizes the unifying value or minimizes its violation. For Berlin, these are strategies of self-deception. They lead to ‘absurdities in theory and barbarous consequences in practice’.¹⁰

It is hard to dispute this claim. The twentieth century is replete with examples of regimes which have instructed their subjects that solidarity or the service of the state comprise true justice, real freedom, genuine democracy or the greatest happiness, wrapping up all tensions and incipient conflicts in a totalitarian cocoon which silences the clamour of otherwise inescapable debate. This tendency is the chief target of Berlin’s philosophical endeavours and we should endorse his aims. However, it is difficult to relate this general caution to the issue concerning liberty and its conditions.

In the first place, it is worth noting that Berlin himself cannot maintain the distinction wholeheartedly. Negative liberty *has* been curtailed by ‘social and economic policies that were sometimes openly discriminatory, at other times camouflaged, by the rigging of educational policies and of the means of influencing opinion, by legislation in the sphere of morals’.¹¹

It would seem that the key to determining whether such policies inhibit negative freedom is whether the limiting condition on the exercise of liberty was either an intended limitation or, if unintended, a limitation which it is possible to abolish. Policies which are openly or covertly discriminatory are likely to be unjust, but if they restrict opportunities available to others they offend against freedom as much as justice. Berlin is quite correct to insist that we should keep separate values distinct. But we do not confuse or conflate different values when we condemn a practice that offends two or more of them – we strengthen the criticism.

There is another error induced by Berlin’s emphasis on the clear-minded discrimination of different values. No one could object to the distinction between liberty formally achieved and the satisfaction of conditions which are necessary if the full value of

liberty is to be attained. It is important that both be implemented and vital that breakdowns or shortcomings be accurately identified if remedies are required. Nonetheless, if it is true in a particular case that the full value of liberty is not obtained, because of remedial illiteracy or physical handicap for example, then the prime reason for reforming the inhibiting conditions will be liberty itself. If we *have* identified social conditions which frustrate the achievement of a recognized good, then that good itself serves to vindicate efforts to eliminate these conditions. Suppose we discover that a system of land tenure has become a cause of famine; we don't need any reason beyond the abolition of famine to tackle the conditions which created it. And the same is true of liberty; if freedom of the press is worthwhile, being necessary if citizens are to be informed participants in the democratic process, this is reason enough to secure the condition of widespread literacy which enables citizens to make use of it.

What is really at stake here is an issue of political rhetoric. If we are concerned to effect reform in health provision or education or social security, it may well be that we have a choice of values that we can cite in order to gain support for our proposals. We can advance our cause under different banners. Social justice and freedom may both serve; in which case, it is a matter of practical, strategic judgement which value we highlight in our campaign. The temper of the times, signalled by the success of an opposing party, may favour an appeal to liberty. The astute politician may then argue that liberty requires obvious conditions on social provision to be met if the proclaimed value is to serve as more than a shelter for the privileges of the rich. This rhetoric may succeed or it may fail. The electorate may judge the argument which has been advanced as too elaborate to be convincing – and vote against. Having learned his lesson, the astute politician will try a different route and rediscover social justice.¹² I stress that this process of selecting values in which to couch political rhetoric is philosophically respectable. We do not equate or confuse the different values of liberty and social justice when we recognize that a case for specific reforms can be supported by either or both. Which value we choose for a particular campaign is not a matter of philosophical propriety. Both could be advanced together if this were thought to be effective.

We have reached a capacious understanding of negative freedom by exploiting materials furnished by Isaiah Berlin. The most obvious difference between his proposal and ours is that we are more ready to countenance as hindrances or obstacles, conditions which limit persons' opportunities; which conditions may not have been imposed by human agency, but if they can be eliminated, they ought to be.

How do we identify conditions which ought to be eliminated? On the account, thus far, I am unfree with respect to any opportunity which I cannot presently take, but which I could take advantage of were others to resource me. I am therefore unfree to visit the moon, whereas I am not unfree to fly like an eagle. Does this fact, of itself, establish a claim on my behalf against those individuals or governments which could furnish me with the necessary resources (as they have found them for some fortunate others?) If claims of freedom are moral claims, as I insisted at the beginning of this chapter, we need some further account of which opportunities *ought* to be available to persons, since I take it that no one would identify a case of unfreedom in my inability to make a moon landing.

I have in mind a condition of freedom which has been described by Ralph Wedgwood as *social empowerment*.¹³ On this account, the ingredients of freedom will comprise 'the social conditions that confer favourable prospects with respect to wealth, income, and the knowledge and skills that can be acquired through education',¹⁴ as well as the standard list of liberal freedoms – so long as those social conditions are attainable. But again, not all social empowerment is of value. We should not empower potential bank robbers by reducing legal limitations on their access to weapons or by granting them resources to purchase them. A principle of liberty which is going to be useful must enable us to identify *justifiable* claims for empowerment – and I don't think this can be achieved within the framework of the negative concept of liberty. In order to advance, we need to specify the opportunities that *ought* to be available to claimants. This requires the development of a positive concept of liberty.

Positive liberty

This is how Isaiah Berlin introduces the concept of positive liberty:

The 'positive' sense of the word 'liberty' derives from the wish on the part of the individual to be his own master. 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 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 realizing 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 references to my own ideas and purposes. I feel free to the degree that I believe this to be true, and enslaved to the degree that I am made to realize that it is not.¹⁵

This is a capacious nut-shell. But we shall see that the notion of positive liberty is more expansive yet. As Berlin develops his historical-cum-conceptual story, a sequence of ideals, initially attractive then progressively more sinister, is charted. To summarize, in cavalier fashion:

- (a) *Self-control and self-realization.* This involves my working on my own desires – ordering, strengthening, eliminating them – in line with a conception of what it is right or good for me to do or be. This is a complex notion, with its heart in a sophisticated account of freedom of action. In modern times the development of this account can be traced through Locke, Rousseau, Kant and Hegel. It has re-emerged in the recent work of Harry Frankfurt and Charles Taylor.¹⁶ We are well

used to the idea that we exhibit self-control when we resist temptation. Freedom of action consists in our ability to appraise the desires which prompt us to act and to decide whether or not to satisfy them. On this account, the paradigm of freedom consists in our going *against* what we most want, doing what we think best. But as Hegel pointed out, the best of all worlds for the free agent is that in which what, after due reflection, we believe is the right thing to do is also what we discover we most want.

- (b) *Paternalism*. Suppose I am not able to exercise this self-control. I may be ignorant of what is best for me. I may not understand the full value of alternatives. Like the child who does not wish to take the nasty-tasting (but life-saving) medicine, I mistake my real interests. In such circumstances, the wise parent will not be squeamish. She will force the medicine down. Might it not be justifiable, then, for *you* to exercise the control over me that I am unable to achieve or sustain? Might not my freedom require whatever control over me that *you* can exercise – absent my own powers of self-control? This thought is particularly apt where your paternalistic intervention creates for me or sustains conditions of autonomous choice that my own activities thwart. This is a deep issue, which we shall examine later, but it is hard to see how some varieties and instances of paternalism can be rejected. And it is hard to deny that my freedom is promoted when you liberate me from temptations that I would reject were I in a calmer, saner or more knowledgeable condition, when you empower me to act, despite my self-inhibiting dispositions.
- (c) *Social self-control*. But if I exercise my freedom through self-control, and if you promote my freedom by appropriate paternalistic intervention, may not my freedom be further enhanced by institutional measures that I endorse? In the republic of Rousseau's *Social Contract*,¹⁷ citizens achieve moral and political liberty by enacting laws, backed by coercive sanctions, which apply to themselves as well as to others. If, as an individual, I cannot resist a temptation which will likely cause me harm, wouldn't it be a wise stratagem to devise some social mechanism which will bolster my resolve? If I realize that the threat of punishment against me will keep me on the straight

and narrow path which wisdom alone cannot get me to follow, shouldn't I institute and accept social restraints which are more forceful than my unaided moral powers? And in doing so, don't I expand my true freedom? Ulysses tied himself to the mast to resist the Sirens' call. As a result, he gained a freedom lost to his unfortunate shipmates. Addicts of all sorts can seek the discipline and social order of the clinic or self-help group as a means of liberation. A wise citizen in a democratic state will establish laws and voluntarily submit to the regulatory power of the state where self-control cannot suffice, and thus achieve freedom – or so the argument goes.

- (d) *State servitude*. An unwise citizen, unable to exercise immediate self-control and insufficiently far-seeing to enact or endorse devices of social coercion, can nevertheless attain freedom indirectly and at second hand if the state effects the necessary control, notwithstanding his disapproval or lack of participation. The state can control us in the service of our real interests – and thereby make us free. This is a recipe for totalitarianism – in four seductive philosophical steps!

This is a brief, analytic summary of Berlin's potted history. But I think it carries the drift. More importantly, it shows the complex dialectic whereby a plausible and historically influential understanding of freedom of action can be elaborated into a doctrine of social freedom. Second, and equally important, it illustrates how the doctrine of positive liberty acquires its moral content. The central thought – that liberty is the opportunity or capacity to achieve something *worthwhile* – is explicit at the first stage of the argument in the ideal of self-realization. This canvasses one's freedom as the control of her desires in the light of some conception of the good life, some account of the virtues, some principles of right action.

Berlin himself favours the sparse, negative concept of freedom, believing this can accommodate all political aspirations to the core liberties and enable us to locate liberty within a range of potentially conflicting values. His chief criticism of positive liberty is that the sequence of ideals we have just canvassed represents a slippery slope. If we endorse the initial equation of freedom and self-control, we shall be unable to arrest a fall into the

embrace of the ideals of totalitarianism, whereby the state promulgates a conception of the good life and yokes everyone into its pursuit. The most potent criticisms of Berlin deny this. But before I discuss this response, I should deal with another influential objection to his analysis.

MacCallum's response

Gerald C. MacCallum, Jr proposes an alternative analysis. For him, freedom is best understood as a triadic relation between agents, opportunities and preventing conditions. Thus each statement of freedom (and unfreedom) can be unpacked in terms of this schema: x is free (unfree) from y to do or be z . This analysis of freedom statements carries the implication that all freedom is both negative and positive – freedom *from* as well as freedom *to*.¹⁸ Joel Feinberg has argued for a similar analysis, finding additional variables through, for example, a distinction of internal and external constraints: an inhibiting neurosis, such as agoraphobia, can restrict my freedom as strongly as a locked door.¹⁹

How can one adjudicate this dispute? Berlin, himself (and one of his recent defenders, John Gray)²⁰ claims this is mistaken; a person in chains may wish to rid themselves of their chains without having any clear idea of what they wish to achieve through their freedom. This strikes me as a possible but most unusual case. It is certainly not a paradigm of negative freedom, since, in the standard case, MacCallum's analysis not only will apply but must apply if we are to identify the demand for freedom. Taking the example literally, one will generally suppose that the prisoner wishes, at least, to move around unshackled, but there may be more at stake. The demand that I be unshackled may be predicated on a case for freedom of assembly, freedom to attend church, freedom to engage in any activity from which I am effectively disbarred – and it is as well to know which freedom is at stake.

Gray's objection to Feinberg's more sophisticated analysis is equally unpersuasive, viz., that since the admission of internal constraints allows 'as *constraints on freedom* constraints and evils (such as headaches, disabilities) that are not unfreedoms at all' freedom is obliterated as a distinct political value.²¹ Feinberg can

reply directly that the distinctness of freedom as a political value is best captured by investigating which constraints do, and which do not, inhibit *political* freedom. Headaches may cripple personal freedom. They are not likely to figure amongst the constraints that politicians either impose or could alleviate, but if they do so figure, they limit political freedom, too.

I conclude that, so far as the analysis of the language of freedom is concerned, the criticisms of McCallum and Feinberg must be well taken. Linguistic analysis does not permit us to draw the distinction which Berlin employs. But this is not the end of the matter. McCallum goes further, arguing that the use of analytically unsound labels will lead to confusion and error as we affix them to inappropriate positions. He thinks we should avoid dubbing Smith a theorist of negative liberty or Jones a proponent of positive liberty since most philosophers of historical significance will advance complex doctrines which are best viewed as a combination of the two. I think this caution is timely, too.

However, I don't think that Berlin has made this mistake; despite the grand sweep of the historical materials he surveys, he is remarkably sure-footed. Moreover, I suspect that Berlin is right in his claim that much of the literature on political liberty can be fruitfully placed within one or other of two major traditions within the history of ideas. Berlin's chosen apparatus for identifying the different traditions – distinguishing two leading questions – is certainly clumsy, but the distinction he draws captures a very real difference.

We can pinpoint this difference by considering a problem concerning freedom of action. Take the case of the addict. What I want most now is a cigarette – and so I smoke one. I don't, however, want to be a smoker. When I smoke, do I act freely? On that starkly negative conception of freedom elaborated by Hobbes, my freedom is attested by my getting what I most want. No one has stopped me doing what I please. On the alternative conception of freedom, described above as the first step on the road to positive liberty, I have not acted freely. If I don't want to be a smoker, if I want to be in a condition where I don't want cigarettes, if I view myself as a pathetic appetitive creature whose desires have got out of control, the experience of doing what I most want to do will be the very experience of unfreedom, a personal slavery to obnoxious desires.

What is distinctive here is that I disvalue getting what I want. We shall discuss this view, most familiar perhaps from Kant's moral philosophy, later under Rousseau's rubric of 'moral liberty'.²² This dispute cannot be adjudicated here, but notice how sharp the conflict is. The one example gives rise to diametrically opposed verdicts concerning the smoker's freedom of action and the difference between the two verdicts derives from the applicability to the judgement of whether I act freely of normative considerations concerning whether what I do is best. On the Hobbesian account of free action norms concerning what I ought to do are irrelevant. On the Rousseauian or Kantian view, they are central.

We can shift the discussion towards an analogous political dispute. Do all coercive laws limit my freedom? The coercive instruments of the state, generally the police, may just stop me from getting what I want, but in the usual case the whole apparatus of the criminal law (police, courts, prisons) works by raising the potential cost of illegal activities – a cost specified by the conventional tariff of punishment. There are two views one might take. On the first, I am unfree whenever the criminal law proscribes what I want to do. Suppose what I most want is to eliminate my rival for promotion. The bad news is that since this is illegal, I am unfree to kill her; severe penalties are prescribed for murder. Judging that the possible gains are not worth the risk, I refrain. The good news is that the disvalue of my unfreedom is outweighed by the value to her of her survival.

A very different (positive) analysis of freedom requires that the option variable, what it is that I am not forbidden to do when I am free to do it, is not satisfiable by an action that is morally wrong. Suppose I make a very bad moral mistake and think that all is permissible in love and war and business, including the killing of rivals for promotion. On this positive analysis of freedom, my error is compounded. Since it is wrong to murder rivals, murdering rivals is not the sort of thing one could logically (or conceptually) be free to do. It follows that one's freedom is not impugned by laws that threaten punishment for those who are convicted of murdering their rivals for promotion. Extrapolating from this example to the common case, one's freedom is not limited by coercive laws which prescribe punishment for wrong-doing. It is, in Locke's

phrase, licence, not liberty, that is curtailed. It is not a case of the bad news (my freedom's being limited) being outweighed by the good news (less murder). There is no bad news when I am stopped or inhibited from doing what is wrong in any case. Opportunities to do wrong with impunity do not enhance my freedom. If I am inhibited from doing what I most want by what I believe the state demands of me – and hence resist the temptation to murder the competitor – my freedom will not be abrogated. As we saw above, citizens should welcome the power of a state which constrains them to keep to what they know is the right path. If we think of freedom as the condition of social empowerment canvassed above, almost paradoxically, we can recognize the coercive agency of the state as enabling us to do what we believe to be right, refraining from wrong-doing and pursuing the good life.

I have outlined two opposing positions. Which is best? The question is still open despite my biased exposition of the differing claims they make. A theory of freedom developed in recent years takes a very clear view of the issue.

The republican theory of freedom

The republican theory of freedom has its recent origins in the work of Quentin Skinner and has been developed in some depth by Philip Pettit and Jean-Fabien Spitz.²³ The republican theory has classical foundations in the ideal of liberty proposed for the Italian city-states of the Renaissance. Historically, it was an aspiration for both states and citizens, celebrating both their independence from potentially dominant neighbours and a constitution which was republican, with citizens (generally, some portion of the adult male population) taking up public offices and living under the rule of law. Such a constitution contrasts notably with despotic or monarchical regimes; citizens have a robust moral and civic standing – they are not slaves or the ethical subordinates of arbitrary rulers. This way of thinking about liberty is the product of a distinctive tradition, with respectable classical sources. It incorporates a specific conceptual analysis and is claimed to present an attractive political ideal.

It is glossed by Pettit as 'non-domination':

someone dominates or subjugates another, to the extent that

1. they have the capacity to interfere
2. on an arbitrary basis
3. in certain choices another is in a position to make.²⁴

Non-domination is to be distinguished from non-interference, from self-mastery and from that collective self-mastery which is exhibited in participation in directly democratic decision procedures. It is a *status* concept, expressive of the equal comparative moral and legal standing of all citizens. So, against those theorists who value negative liberty, it is claimed that one can be subject to dominion without interference. If a woman has a gentle master, a master, perhaps, who is susceptible to her wiles, if he will not interfere so long as, like Sheherazade, she can spin out his entrancement, she is free according to the negative theory, but not on the republican account. As a dancing girl, *raconteuse* or slave, or, in modern times, a clever wife with a doting husband but no legal rights against his possible molestation, she is unfree even if, *de facto*, in charge.

Further, we may be subject to interference but not dominated, by just coercive laws. These will be laws that are not arbitrary – and non-arbitrariness comes in two forms: the laws are enacted by the processes of a proper constitution and they are in accordance with citizens' interests as informed by their values. In the first form, we have the 'empire of laws, and not of men'.²⁵ This wonderful slogan is more perspicuous for what it excludes rather than designates. It excludes the caprice of monarchs and the whim of suspicious dictators. It includes (probably) a host of constitutional devices intended to protect the innocent citizen from this sort of unpredictable intervention in her daily business. Laws must be enacted by the citizens or their representatives, promulgated widely and comprehensible universally; offices should be open to all on the basis of ability and popular endorsement.

Second, the laws which direct citizens' conduct and legitimize sanctions against criminals should be fully in accordance with their interests and values. It is possible that laws which are ideal in point of their provenance can still get it wrong. In which case, an aberrant majority, say, will still prescribe arbitrarily. Such laws,

impeccable in point of their source, will infringe freedom. So, we may conclude that arbitrariness in two distinct fashions must be absent if laws (or other coercive social instruments) are to leave freedom intact.

This is a complex and wide-ranging theory of freedom; what holds it together is the idea of non-domination. I have my doubts about this. Non-domination is an important and central personal and political value, and the republican theorists deserve great credit for giving it new life. It is related in clear ways to liberty. The difficulty, to my mind, is that the theory gives the concept of non-domination too much work to do. Non-domination can be understood narrowly, embracing differences of status or quasi-moral authority; here what is vital is a *capacity* to interfere in the actions of others solely on the grounds of differential status. Slave-owners best exemplify this model of domination. Their interference in the lives of the slave will be arbitrary in that the slave will have to do *whatever* the slave-owner wishes. His demands may be more or less onerous in fact, but it is clear who is the master and who is dependent on the master's requirements.

The slave's debilities are twofold: she is subject to the master's commands and dependent on his graces. She is both biddable and vulnerable. For Rousseau, dependency was the great vice of economic systems which foster inequality; differences in property holdings are soon magnified into differences of social status which are then entrenched as differences of political power. Strikingly, dependency becomes symmetrical. Everyone suffers, though not plausibly in equal measure, when the masters become dependent on their slaves.²⁶ In *The Phenomenology of Spirit*, Hegel amplifies this criticism of human relationships which are marked by domination and subordination.²⁷ In disbarring the possibility of mutual recognition, they distort the self-images of the protagonists to the point where they are both incapable of fulfilling their potential as equally human self-consciousnesses. This material, which stresses the psychological damage inflicted in unequal power relationships, has been used to criticize all manner of social dependencies: men/women, husband/wife, employer/employee, imperial power/colony. At its heart is a thesis concerning the personal and social importance of reciprocal, mutual recognition and the necessity of various forms of equality in achieving this.

I concede that this thesis has strong implications for politics; it calls directly for some version of equal citizenship, most evidently that of equal participators in a democratic decision-making procedure. Non-domination, thus construed, amplifies that strand of thinking about liberty which stresses self-control in both its personalized and social versions – important elements in the positive conception as described by Berlin. It is hard to see how non-domination, identified in this narrow fashion, can be used to place limits on a sovereign power which comprises a body of equally powerful citizens.

And yet Mill, famously, and Pettit, latterly, insist that it must. To be fully non-dominating on the republican account the laws must track the interests and values of the citizens.²⁸ Legislation, however non-dominating its source in democratic institutions, must be non-arbitrary in its content as well. Mill's solution was to insist that legitimate legislation should respect 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'.²⁹ Other philosophers have stressed the role of human rights in delineating the proper competence of the sovereign power, howsoever democratic it may be. These are issues we shall broach later. For the moment, let me conclude simply that I cannot see how such restrictions on the content of law-making can be derived from non-domination in the narrow sense that I have sketched. Perhaps a wider one will serve, but we should be wary of losing the clear content of the concept of non-domination as we extend its application. The real lesson we should learn from the republican theory of liberty is the necessary complexity of any persuasive account of the value of political liberty.

The value of freedom

In what follows, I shall attempt to give such an account. First though, let us review our progress so far. We have on the table versions of the ideals of positive and negative liberty charted by Berlin, together with an example of how (and how not) to construct a hybrid theory. All three are candidates for our philosophical allegiance; they have sound analytic credentials. How do

we select between them? My suggestion is that we accept as an anchor the thought that political liberty is a value and endorse that account, or construct a fresh one from the assembled ingredients, which best explains why it is precious to us, *in extremis*, why so many have been prepared to die in its cause.

This approach requires us to strike out negative conceptions which stress the intrinsic value of our being able to get what we want without being stopped. Unless what we want is itself of some value, the freedom to pursue it is just about worthless. Contrariwise, and this is the lesson of one way of thinking about positive liberty, the value of liberty is the instrumental value of whatever worthwhile opportunities liberty grants. So, freedom of thought and discussion is valuable because thought and discussion is valuable. Freedom of worship is valuable because religious worship is valuable. And so on. These would be poor liberties, though, if their exercise was compulsory. We would value being able to speak up at Hyde Park Corner a good deal less if we were required to do so once a year. So the *whole* value of liberty cannot be instrumental. In the most impressive recent work on freedom, Joseph Raz suggests that freedom is of value since it is defined as a condition of personal autonomy.³⁰ But personal autonomy turns out to be a very complex personal and social condition. Whilst acknowledging my debt to Raz's work, I want to develop from scratch – or at least from more classical philosophical material – an elaborate account of freedom which does justice to a range of persuasive views about the value of the condition. In so doing we shall interweave some of the doctrines that have been outlined above.

A theory of freedom is no doubt tidier if it can encompass the traditional problems of free will and free agency as well as the issue of political liberty. Theorists who attempt a unifying theory – Hegel, amongst the great dead; Stanley Benn in modern times³¹ – are ambitious, but for many, including John Stuart Mill, confusion and muddle are the intellectual cost of this synthesizing ambition. I have no brief for tidiness against truth, but I do believe that those strands of the positive liberty tradition which emphasize the link between freedom of action, generally considered, and political liberty contain an important insight. To make this point, I need to outline in more detail that strand of thinking about the nature of free action which I mentioned as the first ideal of positive liberty

and labelled 'self-control'. Readers who are properly sceptical about my conclusions are invited to pursue the literature on these difficult issues. Readers who are knowledgeable of the literature on free will will recognize what follows as a tendentious gloss.

Freedom of action

We do not act freely when nothing or no one stops us getting what we want, if we have no control over these wants. For many, as we have noticed, the experience of unfreedom is most acutely felt when one pursues the satisfaction of desires he despises himself for suffering. If I know my hands are clean, accept that no good purpose is served by washing them for the umpteenth time this morning, recognize that my obsession disables me from other, better, projects, and still find myself going to the hand-basin – since that, it appears, is what I most want to do, for reasons that are unfathomable to me, I get what I want, but act unfreely. To act freely, reason, in some fashion must be brought to bear on my desires. At its simplest, I must want to want what I try to get, appraising the first-order desires which assail me in the light of second-order desires which operate on them.³² But not just any second-order wants will serve to establish my freedom. What if I am uncritical, a 'wanton', in respect of my second-order desires?³³ True freedom is realized when actions are determined by desires which are ordered in the light of some conception of the good or are expressive of qualities of character (virtues) produced by strong evaluations of how it is best to live.³⁴

This account of free action is not new, although it is certainly fashionable. Important elements of it can be traced in Locke, Rousseau, Kant and, most thoroughly, in Hegel's *Philosophy of Right*. It captures one strand of thinking about autonomous action – we are free when we are in control of what we do, acting against what, phenomenologically, are our strongest desires when this is called for by reason or morality or the ethical demands of communities we recognize as authoritative.

This ancient and modern way of thinking about free action raises many difficult questions which I shall sweep aside for present purposes. There are two central points which I want to lift from

these discussions: the first can be expressed in positive or negative fashion; I act freely when I am the author of what I do, when my actions issue, in recognizable fashion, from my own deliberations. Reversing the coin, my freedom is evinced in actions that are not the product of brute nature working through me by prompting desires which I blindly follow. Further, if I follow rules or ordering principles when I oppose, control or select amongst the heterogeneous forces that assail me, these are rules which *I* select or endorse. They must pass some test or filter imposed by my capacity for reason, most famously the Kantian rule of the Categorical Imperative. Negatively, they are not alien impositions. They may have been taken on board at the command of some superior authority, be it parent, priest or politician, but such commands will be legitimate only if the commands directly or their putatively authoritative sources have passed some test of rational legitimization. (Some have asked, concerning Kant's Categorical Imperative: Where is the freedom in following rules which are the product of quasi-algorithmic calculation? One answer to this hard question is that the rules which pass the test are not the commands of anyone else.)

The second point we should notice is that freedom of action, far from being constrained by rules or principles of conduct, requires their positive endorsement and efficacious employment. There is a danger that this point may look overly restrictive and overly moralized. Do I not act freely when I select the colour of toothbrush I wish to use? What rules or principles are in play here? Most choices that we make can be effected absent of any moral considerations. When did *you* last take a decision that hinged on scrupulous moral deliberation?

A plausible response to this objection is to claim that free actions must be *sensitive* to appropriate moral considerations when these are in play. The free agent has a moral gyroscope, finely balanced and firmly set. He will be alert to circumstances in which principles of conduct may impact. Suppose there has been trouble and strife in the family caused by careless use of toothbrushes (and what issue is in practice too trivial to disturb domestic harmony?). If Fred has promised that he won't buy a pink one again, alarm bells should ring as he approaches the supermarket shelf. If he is insouciant and thinks only of what colour would match his razor,

something has gone wrong. If the alarm bells *never* ring for Fred – and this sort of moral blindness is chronic – we have a case of someone who is not fully in control of his actions. Contrariwise, if Fred thinks through what colour toothbrush to buy in the light of the agreements that he has made and the principles which dictate fidelity to those agreements, his actions are not unfree simply because they are constrained by his moral scrupulousness.

I don't think an acceptable account of political liberty can be *derived* in any thoroughgoing fashion from insights such as these concerning freedom of action. But they are suggestive. They are likely to colour the story told by one who accepts them. They may delineate the contours of the favoured account, as we shall see.

Autonomy

A different starting point can take us towards a similar conclusion. On the starkest conception of negative liberty, that of Hobbes, we act freely when we are not hindered in getting what we want, given that this is physically achievable. Mill, in a careless moment, endorses this account: 'liberty consists in doing what one desires.'³⁵ The value of freedom can be swiftly inferred. It is the value of getting what we want, doing as we please. Thus put, the value of freedom is instrumental; it amounts to the value of whatever we want, which our freedom is instrumental in enabling us to get. If we are unfree in a given respect, we either cannot get, or can get only at too great a cost or risk (of punishment, generally) whatever is the object of our desire. This account of the value of freedom has the great virtue of being simple and straightforward. Moreover it enables us to rank freedoms in respect of their value to us. This will be a function of the value of the activities that freedom permits. The more important is the object of desire, the more important the freedom to get it, the more serious the restriction in cases where we are made unfree.

The weakness of this account should be evident from our consideration of freedom of action. Although I am prepared to admit the general importance of getting what we want and, *a fortiori*, the freedom that permits us to achieve it, we cannot assume that this is true across the board. What the agent wants may be plain evil – the

thrill of causing pain and suffering to someone else – or harmful to the agent himself. In such cases, since the satisfaction of his desire is not itself a good, neither is the freedom to achieve it. We should conclude that freedom is an instrumental good only where there is some positive value to the agent's satisfaction of his desire. If freedom is an intrinsic good, good *per se*, its goodness must be at least, in part, independent of the value of the opportunities it makes available. So even where the choice is that of doing something evil or refraining, the news is not all bad, since there is some positive value to the agent in being able to actively select amongst the options available.

This idea has to be treated very carefully, since it has great intuitive appeal. What is the value of choice? Minimally, choice is just plumping, going for one alternative rather than another with no grounds to guide one's selection. Do I choose heads or tails when you toss a coin, do I put my chips on the red or the black at the roulette table? No doubt I would feel (and be) deprived if you were to both toss the coin and choose heads for me. It would be a funny roulette table were the croupier to place the bets! So the value of choice even in this minimal situation is not negligible. Nonetheless, the value to me of just plumping is not great. The lottery punter who goes for the Lucky Dip rather than selecting her own six numbers has forgone little of value.

But not all choices are as experientially bereft as these. Mill himself dwelt on the value of choice to the chooser. He described what he called 'the distinctive endowment of a human being' as 'the human faculties of perception, judgement, discriminative feeling, mental activity, and even moral preference' and claimed that these 'are exercised only in making a choice'.³⁶ What sort of choices did Mill have in mind? Clearly it was not choices of the 'heads or tails' variety, nor even more challenging ones, concerning the texture of the anaglypta wallpaper, perhaps. He was concerned rather with choices amongst alternative plans of life.

Again, this is a point which must be advanced carefully. It is not sufficient that we have in mind something like big moral decisions. This is the Kantian value of autonomy. It is realized when human agents deliberate about the right thing to do. They apply the rational will, a transcendental capacity to employ reason to test or generate moral principles in the light of which they thereupon act.

We can grant that Kantian autonomy is exercised under conditions of freedom which permit agents significant opportunities to work out what is the right thing to do, but if this is the core value of freedom we may find that freedom does not provide the best circumstances in which autonomy may be developed. In the aptly named 'Kantian Gulag',³⁷ Flint Schier points out that

autonomy can flourish under the most oppressive and despotic regimes. Poets like Mandelstam and Akhmatova continued to produce their own poetry even in the darkest moments of Stalinist terror and repression. Bruno Bettelheim has told us how communists and priests in particular were able to maintain their moral gyroscopes even in the grotesquely convulsed circumstances of Nazi concentration camps.

Schier noticed how survivors of the camps could *fear* freedom, anticipating that the free life would not have the moral density experienced in surroundings where daily life was fraught by decisions concerning how best to live a life of moral integrity. It can be a hard decision that one should look one's captors in the eye. And to do so continually can be a hard and risky policy. It is no surprise that those who left the camps, especially those who took up a comfortable life in the USA, Western Europe or Israel, were prone to deplore the superficiality of the culture they embraced, contrasting it unfavourably with the horrors they had escaped in respect of the opportunities it afforded for a life of deep moral seriousness.

What is missing from life in the Gulag is the freedom to live one's life in accordance with goals of one's own choosing.³⁸ Mill's notion of a plan of life is central here, so long as we do not read his prescription in too literal a fashion. Encouraged by talk of agents as authors of their own life, constructors of their own life-narrative, one may construe this ideal in implausibly dramatic terms. Politicians, writing their autobiographies, encourage us to do so when they portray the happenstance of a successful climb up the greasy pole as the successful implementation of youthful designs executed on the back of an envelope. We can write the story for them. Success at school is to be followed by an Oxford Scholarship. Stunning reviews for her role of Portia in a garden

production of Merchant of Venice will accustom her for future glory as President of the Union. After a few years in the city or at the bar, having earned a fortune, she will stand for Parliament in a by-election. Swift promotion will see her as Prime Minister at the door of 10 Downing Street – and out come the family photographs of her posing with policeman and proud parents in the same doorway, thirty years before.

This should *not* be our model of an autonomous life. Mostly, autonomous agents will see their lives as a muddle, but their *own* muddle, a series of advances and withdrawals meeting with moderate success and some (perhaps frequent) failure. Far from being a blueprint resolutely followed, the autonomous life will be identified retrospectively as the agent claims *responsibility* for the courses she has followed and the streams down which she has drifted.

We must not make the autonomous life too heroic an aspiration. The modest measure of autonomy I have described requires a societal framework where pathways are available for exploration even if the traveller is likely to take a wrong turn or get lost. Negatively, gates must be open; positively, capacities must be developed as agents are empowered to select amongst realistic or challenging options. We know well the sort of blocks to autonomy that our fellows can meet. Parents may project their own ambitions on to a docile child and go to their grave unsuspecting that their doctor son hates his patients and his profession. Schools may go about their business educating their charges to be the workforce of the mine or mill, long after the mills and mines have closed, unsuspecting of the talents they ignore and so fail to foster. The conformist traditions of a well-disciplined community may induce social paranoia in otherwise generous and outgoing souls. And states, following the middle road to electoral success and hence pandering to perceived majorities, may suffocate what Mill called experiments in living. The widespread achievement of a sufficient measure of even that modest variety of autonomy I have described requires a tolerant public ethos as well as strong liberal institutions. It should not be authority's grudging tribute to mankind's natural bloody-mindedness.

'A poor life, but mine own' characterizes the sort of autonomy a society can realistically aspire to on behalf of its members. It need

not educate them to be career planners of business school proportions. Does this do justice to the generous liberal ideal? Is this a morally worthy goal?

It must be confessed that it falls short of one well-known model – that of the life organized around an individual ideal.³⁹ Ideals of the sort I have in mind may be thought to give meaning to the lives of their proponents and hence, though they do not prescribe universal ends, they do have a moral tinge to them. Any account of the phenomenon of ethics which ignored them would be incomplete. Thus we might admire a life devoted to public service or religious devotion. We may recognize as worthy practices of asceticism and stoical self-discipline. A life devoted to art, as practitioner or as connoisseur, may command a similar respect in many quarters. And we should not ignore the value of loyal domesticity. Such ideals fade into pursuits which may be equally demanding but are barely ethical except perhaps for their display of executive virtues – intelligence, foresight, resolution, indeed many items on Mill's list of distinctive human endowments. Thus one may be fully committed to a career or a club, or both together in the case of political advancement. We see the shadow of asceticism in the pursuit of good health, organic vegetables, personal trainers and the like. We are well used to the idea of lifestyle choices, having glossy embodiments of them paraded daily in newspapers and magazines.

Respect for autonomy demands acceptance of others' devotion to a range of moral ideals to which one may not subscribe – and to which one may be hostile. (I shall discuss the issue of toleration later.) But the pursuit of an autonomous life need not involve such all-consuming aspirations. Self-realization need not be so strenuous an exercise as liberals have portrayed it.⁴⁰ An autonomous life single-mindedly engaged in the pursuit of a great ideal evidently requires appropriate freedoms – but so does that species of autonomy which is displayed in less exalted enthusiasms, stamp-collecting or bird-watching, perhaps, or a range of enthusiasms conducted by Jack-of-all-trades. So, too, does the unsettled and wide-ranging pursuit of fancy, trying this and that as a means of occupying leisure time, a different evening class every winter, none producing true mastery. In each case we find humans balancing, compromising or sacrificing conflicting demands on their active attention and fashioning a life out of the debris.

On my account freedom is justified as instrumental to the worthy activities it permits and as the necessary precondition of an autonomous life. Why is autonomy a good? We shall have more to say on this question when we discuss rights in the next chapter. But as a hint to my way of responding to it, I invite readers to consider whether or not, after due deliberation, they desire it and believe, in consequence, that the demands of others for it should be respected. If this question seems too abstract, focus on the denial of autonomy, and consider whether you are averse to that in its characteristic manifestations. If your philosophical temperament inclines to a more ambitious and more soundly anchored way of thinking, you will see autonomy as a *jewel*, as expressive of mankind's rational will, the transcendent capacity to reach beyond the trammels of our natural state towards a spiritual, even Godlike facility of self-creation.

If so, a *Philosophical Health Warning* should be issued. Think of the man who is mistaken. He believes that humans should adopt something akin to the sexual lives of pygmy chimpanzees. He accepts the Freudian story about infantile sexuality and believes that children are a legitimate target of his desires. He accepts that his community excoriates his attitudes and so takes them underground. Gathering appropriate degrees and diplomas, he works his way into positions of responsibility, say, manager of a children's home, and expresses his sexuality by the physical and mental abuse of the children in his care. He then lives a life of appropriate, careful, pleasure. Absent of any considerations about the sources of his sexual appetites, this is an autonomous life – indeed it is unusual in respect of the cleverness and forethought that has been invested in its plan. Is this a model of the good life?

It would be, if the executive virtues were all that is necessary for its success. A denser exhibition of the executive virtues would be hard to find, excepting the prescient politician I described above. Still, we should accept that autonomy, without its Kantian overtones of sound moral judgement, may be the source of the greatest evil. There are two ways forward here: either we can *moralize* the notion of autonomy so that the autonomous agent does no wrong (the Kantian route) or we can accept the possibility of autonomous evil.

We should stick fast to the insight that freedom is a good. In

which case, we should modify our understanding of autonomy or accept that its connection with freedom is contingent. If autonomous action can be evil, freedom cannot be vindicated as the expression of an autonomous will. If we take the Kantian route, we need to say more about autonomous action to disbar the possibility of autonomous wrong-doing. Why not return to our sources in Rousseau, try to work out what moral liberty requires and develop a more robust theory of positive liberty?

Moral freedom

On Rousseau's account, this is the freedom which is attained by those who can control their own desires. It is developed further in Kant's account of autonomous willing which stresses how we bring to bear our resources of rational deliberation in the face of our heteronomous desires, those desires which we are caused to suffer by the nexus of our (internal) human nature and (external) nature. If we follow reason's guidance we shall act freely, willing actions which it must be possible in principle for all to accomplish, laws which all must be able to follow. Kant's account suggests to many a strenuous form of moral athleticism; actions of moral worth are the product of a continuing internal struggle wherein agents wrestle with temptation. 'Do with repugnance what duty commands'⁴¹ is one caricature of this style of morality.

Rousseau, writing before Kant, believed that this stern conception of duty expects too much of us. We are weaker creatures than Kant believes us to be, not least because our moral natures have been corrupted by the degenerate society which is the product of human history. We do not have the personal resources to consistently act well. Perhaps weakness of will, exhibited through our knowledge of what is right and our inability to achieve it, has become a social malaise. We recognize that social remedies are needed to cure what has become a social problem. This is the third ideal of positive liberty canvassed above. The state, making laws in accordance with the general will (of which more in Chapter 7) provides the collective resource we require. In a society where subjects endorse the rules of the sovereign – for Rousseau, a direct democracy – and accept that these should be backed by sanctions,

citizens force themselves to be free by subjecting themselves to a common discipline. They give themselves additional (prudential) reasons to behave well, recognizing their (and others') susceptibility to go astray.

We can see this sort of reasoning at work in the case of laws which prohibit theft. Grant that I believe it is wrong to steal, right to respect the private property of others. But I also believe that I, along with many others would be severely tempted to steal if I were hard pressed and could escape with impunity. On these assumptions, I should have no objection to such a law, indeed may welcome it as improving the likelihood that I shall act well. Furthermore, I recognize, as a property holder, that my freedom is enhanced by the restrictions which such a law places on others. It makes them less likely to interfere with the use I may make of the property I own. My freedom is protected by laws which guard a domain where my own decisions and choices are decisive. Self-interested agents will look for a beneficial trade-off between the surrender of their own powers to take or use the property of others and the augmentation of their own powers of self-protection which the authority of the state can effect. Moral agents will see no loss. Of course they welcome the limitation of the powers of others who would inhibit their freedom but the surrender of their own powers to do wrong is something they equally endorse.

This story, of autonomous agents, willingly and rationally subjecting themselves to the coercive powers of the state, will be explored in Chapter 6, where we examine the grounds of political obligation. For the moment, the lesson to be taken is that laws which keep us and our fellow citizens on what we recognize to be the straight and narrow path of duty do not infringe our liberty.

As Berlin saw clearly, this is a dangerous argument, and the danger comes from two different quarters. First, there is the obvious threat that *others* may determine what our duty requires and then regiment us to perform it. This danger is avoided so long as we insist that the moral liberty which is achieved by state coercion be the product of political liberty, of democratic institutions. The second threat is that democratic majorities may get it wrong, proscribing under penalty of imprisonment and like measures of punishment activities which are innocent. Since the decisions of democratic bodies do not of themselves constitute verdicts on

what is or is not morally acceptable, this is a permanent possibility. The pursuit of moral liberty may land us in political chains.

There are a number of complementary answers to this problem. The first is that we should buttress our specification of the institutions which promote political liberty with some condition that sets limits on the competence of the democratic decision procedures. Mill's harm principle sets out to do this, as do declarations of human rights which are embedded in the constitution of the state or which operate as supra-national conventions. The second, an explicit implication of Mill's principle, is a public recognition that the wrongs which may be prohibited consistently with liberty do not include wrongs which citizens may do to themselves alone – this is the issue of paternalism. Both of these questions will be taken up in what follows. The third issue is difficult and concerns the problem of toleration.

Toleration

If there can be such a thing as a liberal virtue, it is toleration. But, as one commentator has said 'it seems to be at once necessary and impossible'.⁴² Toleration is necessary because folk who live together may find that there are deep differences between their moral beliefs which cannot be settled by argument from agreed premisses. It is impossible because the circumstances of deep conflict which call for the exercise of toleration are all too often described in terms of the obtuseness and stubbornness of the conflicting parties. These differences, historically, have been of a kind that causes savage conflict. The point of disagreement may seem trivial to a neutral observer – is the bread and wine consumed at the Eucharist the real body and blood of Christ transubstantiated in the ritual or is it a representation? (I use this example because I heard it used *recently* by an extreme Protestant bigot to establish the metaphysical foundations of his duty to provoke and assault Roman Catholics, kicking them for preference, especially after soccer matches!) From disputes as arcane (to non-believers) as this, moral disagreements swiftly follow. Moral disagreements are *always* serious – I would say, by definition.

I want to approach the problem of toleration obliquely by

looking briefly at what I believe is a cognate problem – that of weakness of will. There are severe (and ancient) philosophical problems created by the phenomenon of weakness of will. How can people *know* what is the best thing to do and then do something else? The problem of toleration has a similar structure: How can people know what is the wrong thing for someone else to do and not stop it? Philosophers divide in respect of the problem of weakness of will. Some dissolve the difficulty by insisting that there are no such cases. If you *really* knew what was the right thing to do, you would do it. If you don't do it, you don't really know. Or you really know, but somehow your knowledge is not engaged in the decision you take. Your knowledge is overwhelmed by the power of your emotions, by your passionate commitments. Or there is some other story (e.g. you were drunk at the time) to explain why your knowledge of what is best didn't motivate you – and philosophers are imaginative in coming up with the sort of stories necessary to defend their theses.⁴³ Opponents insist that it is still possible, once we have discounted those cases where plausible stories may be told, that a moral agent may recognize the right thing to do – and then do something else.

Exactly the same structure of dispute can be unearthed with respect to toleration. Toleration is appropriate when we cannot expect to persuade someone with different views of the rights and wrongs of an issue. No matter how strong our beliefs or convictions, no matter how deep our feelings of certainty, no matter how articulate or eloquent our pleadings or how forceful our arguments, when we try to convince others we hit a brick wall. They are wrong – but we don't seem to be able to do anything about it. They're truly, madly, deeply, wrong but, as with the best of friends who fall in love with absolutely the wrong person, we can't get them to see their error. In which case why don't we just stop them doing wrong? The doctrine of toleration insists that there are cases where, for all our belief that others are acting wrongly, it would be wrong for us to stop them. But what, other than a belief that others are doing wrong, can *ever* be legitimate grounds for our stopping them?

Historically, doctrines of toleration developed as a response to the wars of religion in seventeenth-century Europe. It was discovered, the hard way, that whilst threats of death, torture,

imprisonment and the rest may serve for a time to get people to behave in ways they would otherwise resist, no amount of coercion can command others' beliefs. The very model of a ludicrous public policy is that of 'forced conversion'; read Browning's poem 'Holy Cross Day', the most sardonic poem in English, for an account of the sentiments of Jews forced to attend an annual Christian sermon in Rome and watch a dozen of their company converted publicly to the true faith. (The Jews regularly surrendered up their thieves and vagabonds to this silly ritual, on Browning's account.)

We know that disputes of this order of seriousness generally have their origins in religion. Or religion and ethnicity. Or religion and sexuality. The modern form in which such problems arise is often cast as the problem of multicultural citizenship.⁴⁴ To my knowledge, neither individuals nor tribes fight about the permissibility of murder, though the religious doctrines to which they subscribe may permit or require the death of unbelievers.

Toleration, as I have described it, requires one not to interfere in conduct which one believes to be morally wrong. Why do we not leap to the conclusion, in cases where we do not think that we should interfere with the conduct of others, that we don't really believe it to be wrong? This thought, I believe, captures the liberal instinct. Let us look at some standard cases.

Think of a state with majority and minority religions, or more generally, one with religious divisions and where the power to legislate is in the hands of one religious community alone. Should the state tolerate those who do wrong in the minds of the legislators by breaking the dietary laws their religion prescribes? At least one dimension to this issue, which can go proxy for many other differences of religiously sanctioned morality, is whether the question is a truly moral one at all. Briefly, it may be argued that morality has a universal dimension which is belied by one who conceives its source to be an authoritative religious text. Of course, the believer will affirm the universal authority of the prescriptions – one can't expect such problems to be so swiftly settled – but the direction of the liberal argument can be easily grasped. The question of toleration does not arise, it is suggested, since the activities up for proscription are not truly wrong.

Consider similarly proscriptions on the travel or opportunities to earn a living of some ethnic group. Again the problem does not

arise for one who believes that one does no wrong who sits at the front of buses or on park benches designated for others. Exactly the same issue arises with respect to areas of sexual conduct. Homosexuals, for example, will protest that it is an error (and worse) to regard permissive legislation as tolerance since they do no wrong.

In other areas of conduct, again, it may be mistaken to speak of tolerance, with the clear implication that the permitted behaviour is wrong. The point here may not be that one can confidently deny the immorality of the actions some would prescribe, but that the moral issues are not clear. If one can see two sides to a question, as may happen where one accepts that the moot behaviour is often wrong but may sometimes be justified, we may have instances of doubt inhibiting firm moral judgement. For many people, the rights and wrongs of abortion are clouded in just this fashion. If one does not believe firmly that such activities are wrong across the board, one's hesitancy may lead one to deny that toleration is at issue. This is especially true where the complexities of the circumstances afford a privileged perspective on the immediate circumstances to the agent who proposes to behave in the controversial manner. In judging that it is best to leave the decision on how to act up to the agents concerned, since they are in the best position to work out the implications of what they are doing, again one is claiming that tolerance is not an issue here.

Finally, and cases of this sort are akin to those where paternalism is an issue, there may be issues where the rights and wrongs of the matter just are a matter of personal decision. It is not a matter now of modesty, of leaving a decision to the person who can best decide the question. Rather the point is that the individual agent who is faced with the choice is the *only* person who can settle the matter. It is not easy to find examples which are not tainted by extraneous considerations (or marked by the tracks of some other philosophical agenda), but perhaps suicide and voluntary euthanasia are like that. Although in some cultures marriages are arranged, the liberal is likely to believe no wrong is done by the obstinate child who will not accept her parents' directions, since at bottom the right marriage partner is the one who is accepted or selected by the aspirant bride. If we distinguish, in the manner of Strawson, social morality and the individual ideal, we may be

prepared to admit conflicting judgements with respect to conduct which may be endorsed and criticized from the perspective of different ideals. This may be an important site for identifying both the legitimacy of some degree of moral relativism and a corresponding requirement of a measure of toleration.

Does this leave any cases of clear, generally acknowledged, wrong-doing which agents should be permitted to perpetrate? I am inclined to think, putting aside questions of moral duty to oneself and the issue of paternalism, that the only cases will be those where, as Mill insisted, proscription is too costly, where regimes which impose sanctions would be too intrusive. This is evidently true where the coercive regime is that of the state, less obviously so where the interference envisaged are social mechanisms of disapproval, disrespect or ostracism.

To conclude, we can see that modern nation-states exhibit striking differences of view concerning the acceptability or immorality of a range of practices. This is the reality of multiculturalism in all its dimensions. In the face of these differences and our knowledge of how easily they generate severe and historically long-lasting conflicts, modern democratic citizens should be modest in their claims to the sort of moral knowledge that may underpin the persecution of one community of persons by another. We should not be relativists about ethics of the stripe that insists that right and wrong generally is simply a function of the given practices of the communities of which different citizens find themselves members. This exacerbates rather than solves the problem of conflict wherever the parochial 'morality' makes claim to universal applicability. Far better that we be fallibilists when we recognize the fact of deep differences. Personal or societal humility in the face of a range of divergent prescriptions on how to live best is the strongest constraint on democratic majorities.

Free states and free citizens

Thus far, I have examined a number of different theories or analyses of the nature of freedom and discussed several different accounts of what gives freedom its value or explains its appeal. In the rest of this chapter, I shall draw these strands together in a

complex account of the institutional framework which freedom requires. I shall organize this material around the insights of Rousseau. His account assembles the core materials of the theory I advocate, though we shall range beyond these sources in our exposition.

In the state of nature, Rousseau tells us, our freedom derives from our free will, our capacity to resist the desires which press us, together with our status as independent creatures, neither subject to the demands of others nor dependent on them to get what we want. We shall, as contractors, be satisfied with nothing less than that social state which best approximates to this natural condition. Natural freedom is lost, but the thought of it gives us a moral benchmark by which we can appraise (and, inevitably, on Rousseau's pessimistic account, criticize) the institutions of contemporary society. In society, a measure of freedom can be recovered along three dimensions: moral freedom we have already discussed, democratic freedom and civil freedom remain to be examined. I shall outline these in turn, departing from their source in Rousseau's work without scruple. We shall be systematizing many of the insights concerning freedom which have been unearthed in our previous discussions.

Democratic freedom

Since I shall have more to say about democracy later, I shall limit my discussion of it here. The essence of the case for democracy as a dimension of freedom is simple: democracy affords its citizens the opportunity to participate in making the decisions which, as laws, will govern their conduct. For Kant, autonomous action consists in living in accordance with the laws which one has determined for oneself as possible for each agent to follow. Democracy represents a rough political analogue of this model: freedom consists in living in accordance with laws one has created (alongside other voters) as applicable to all citizens, oneself included.

Berlin, as we have seen, argued that democracy is a very different ideal to liberty – majority decisions can threaten liberty, as J.S. Mill argued. It is a mistake to view this consideration, plausible though it may be, as decisive.⁴⁵

The most obvious reason for rejecting it has the force of a *tu quoque* objection. Any system other than democracy will deny citizens the opportunity to engage in an activity that many regard as valuable. We know that many citizens are apathetic to the opportunity of voting, but in a mature democracy many others are keen to participate. They join political parties, paying an annual subscription where necessary, they go along to meetings of their local active group, they distribute leaflets and canvass support during elections. This may or may not be in pursuit of an ambition to hold office in a representative system. Either way, this is a respectable use of one's leisure time. Others may opt for a less onerous measure of political activity – voting at elections or referenda may suffice. Some may have no interest at all in political affairs, but for those who have, voting, minimally, and the life of a professional politician, maximally, represent opportunities best made available in a democratic system. The strictest negative theorist recognizes that laws which prevent the expression of political opinions are limitations on liberty, as are laws which forbid religious worship or group meetings. It is hard to see why one cannot draw the same conclusion in respect of constitutional arrangements which deny citizens the opportunity of acting in ways characteristic of the democratic participant. Just as soon as we focus on the kind of things politically motivated citizens wish to do, we see that Berlin's two questions find the same answer: political arrangements should permit the exercise of political power by citizens who desire to take an active part in the control of their state. They are free for two reasons: they engage in the activities which are decisive in respect of how they are governed, which opportunities are granted and secured by law.

It has often been pointed out that the analogy between self-control and the exercise of political power by participant voters is weak in a modern democracy. Rousseau accepted that the degree of political power exercised by participating citizens is in inverse proportion to the size of the participant community. Modern commentators have gleefully noted that this power may be effectively nil.⁴⁶ No single vote has been decisive in a British parliamentary election this century.

Citizens who vote in large-scale elections may be wiser than these observers. Even in the most attenuated representative

systems some chance of a little power is available for those who pursue it – someone has to be President or Prime Minister, after all – but for most voters something other than a deluded ambition for power motivates their visit to the polling booth. Voting offers participant citizens the opportunity to endorse both the system for taking political decisions and the decisions which are the outcome of the operation of that system. If the democracy is representative in form, where enough other people wish to do so, they are free to change the representatives and the government which they compose. Equally, the opportunity to abstain or spoil a paper offers one the opportunity to protest the system and its works. In the same way, however much a rigmarole the application of the Categorical Imperative may be for Kant's moral agent, its exercise is an insistence that putative moral principles must be subjected to her own rational legitimation and cannot be the imposition of some external authority. In the political sphere, as in the moral, there is no shortage of claimants to this sort of authority. Democratic activity gives us the chance to assert that we are free of them. Democracy may be necessary to freedom, but it carries its own distinctive threats. Can these threats be disarmed?

Civil liberty

So it is important that we tackle directly the question that concerned John Stuart Mill so strongly – to the point where he published *On Liberty*: What are the limits that may be placed upon citizens who would interfere with the activities of their fellows, most perspicuously by their legislative activities, but most powerfully perhaps by the social pressures which lead to conformity? The account of liberty that I have given seems to place citizens at the mercy of majorities which operate with a limited or controversial conception of the public good and which are activist in its pursuit.

It is really important here to sort out the philosophical issues from the practical problem. So far as the philosophical issues are concerned, I am on the side of Rousseau. Citizens who value liberty and express this through their participation in democratic institutions which liberty requires will, in all consistency, be

reluctant to interfere in the lives of their fellows, whether by law or less formal mechanisms. Their deep concern to establish institutions which empower everyone will make them cautious about introducing measures which constrain individual choice. Accepting the necessity of democratic institutions and their associated freedoms, valuing strongly the opportunities these afford for citizens to embody their various conceptions of the good life in constitutional and prescriptive laws, they will be hesitant to constrain their own pursuit of these values. What makes it necessary for them to countenance restrictions on their own law-making powers?

Nothing less than the thought that the values and sentiments which they endorse may be insufficient to accomplish the ends they seek. To the rational man, it is a miserable thought that others may defy the canons of rationality. Second-best rules may be called for which mimic the rules of reason in the ends they produce. So we ask claimants who cannot agree on the most reasonable rule of precedence to toss a coin – and produce some semblance of fairness. The political philosopher, likewise, has to accommodate embarrassing facts which suggest that the highest standards of reflective conduct may not be endorsed by the community to which her arguments are addressed. Again this calls for an articulation of the second-best solution. Just as we are prepared to approve external constraints on our own decision-making, recognizing our vulnerability to temptation, so, too, must we be prepared to adopt institutions which guard against the worst of human folly. This is the place of the harm principle and other limitations on the societal weaknesses which democracies may reflect and amplify.

Mill's harm principle

In practice, liberty requires that law-making institutions, together with a society's informal but effective coercive powers, respect some limits of principle. The 'one very simple principle' which John Stuart Mill recommended reads as follows:

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

their number, is self-protection. That 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. His own good, either physical or moral, is not a sufficient warrant.⁴⁷

An alternative principle requires institutions to respect the *rights* of their citizens. This block on institutional powers may be embedded in constitutions, as that of the United States, and the guardianship of this check on the executive and various legislative powers – from the President and Congress to mayors and town meetings – is vested in an independent judiciary with powers to review and strike down offending acts. I shall examine this proposal later.

Let us return to Mill's harm principle. We can see how it works; it expresses a *necessary* condition on the legitimacy of proposed interference, i.e. it details a test that proposals must satisfy. The burden of proof is thus placed on those who would limit our liberty; they must show that the putatively illegitimate conduct causes harm to others. It is a necessary but not sufficient condition on the justification of interference, Mill insists. He envisages plenty of cases where actions of a given type may cause harm to others, yet interference would be unwise. The costs of policing a general law against breaking promises, for example, would be excessive. Or perhaps the harmful conduct is of a type that promises incidental benefit. Business practices which make competitors bankrupt may be necessary elements of a system that is beneficial overall.

Mill's condition has been widely criticized from the moment of first publication. We shall examine some of the leading criticisms in due course. He made one indisputable error however, notably his claim that the principle is a 'very simple' one. Simple it is not. In the first place, we need a more careful analysis of harm than Mill himself provides. Recent literature supports two very different proposals. Judith Jarvis Thomson⁴⁸ defends a narrow conception of harm which identifies as core cases bodily and psychological impairment and physical disfigurement. Distress – feelings of pain and nausea, for example – is not harm, though it can cause harm, psychological harm, notably. On this account, Jim is not harmed if

his car is stolen or the money under his mattress is burnt. By contrast, Joel Feinberg analyses harm in a much more capacious fashion.⁴⁹ Harm, as the term is employed in the harm principle, is a setback or invasion of a person's interest and the most characteristic interests are what he calls 'welfare interests', construed as 'the basic requisites of a man's well-being'.⁵⁰ There is perhaps no real dispute here; Feinberg's notion of harm is constructed with the defence of a harm principle in view, Thomson's is not. The implication is clear, though; if the harm principle is to operate as a *sharp* constraint on legitimate government interference, the concept of harm which is employed should permit disputes to be settled concerning whether action is harmless or not. Feinberg shows that this task is not easy. As ever, common sense needs sensitive articulation and careful defence. Let us assume this task of clarification can be accomplished – and move on.

Perhaps the most serious objection to the application of the principle to the purpose it is required to serve concerns the ubiquity of harm. Any act, it is observed, does or may cause harm to others.⁵¹ This claim is either wrong or misguided. Since there are plenty of harmless actions (including, hopefully, my typing this sentence) the burden of the objection falls on the thought that any act *may* cause harm to others. If this were true, in the spirit of the objection, then the harm principle would fail to achieve its purpose of demarcating, on the one hand, a legitimate area of social interference and, on the other, a domain of personal decision beyond the legitimate reach of coercive agencies. All activities would be in principle liable to intervention and regulation.

What does the objector have in mind? Presumably, we are invited to take an example of an ostensibly harmless action and then show that circumstances may be described in which an action of that type causes indisputable harm. Thus, as a rule no harm is done by one's throwing a stone in a pond, but is easy to imagine cases where clear harm follows. The stone hits a diver who is just emerging from the water or it causes the water to rise to the critical level where the next flood will cause it to break its bank and flood the village or . . . The possibilities are endless. And so they are for any candidate harmless action. We are invited to conclude that actions of the type described are all possible objects of legislation.

The argument, as put, embodies a serious type-token confusion.

(We talk about *types* in generalizations, thus 'The corncrake is a noisy creature, rarely seen nowadays though common last century' describes a type of bird. 'Theft goes rarely undiscovered' describes a type of activity. We speak of *tokens* when we speak of particulars, say e.g. 'The corncrake in the hay-field has raised three chicks' or 'The theft of my car was distressing'.) Actions are proscribed, by law or positive moralities which have coercive power, as types, not as tokens. Laws, and by implication, conditions which constrain their legitimacy such as the harm principle, address types of action rather than tokens, and so the issue to be considered by any court Sally has to face will be: Was her action of such a type as is proscribed by law? In the sort of cases described above, where harm *is* caused, the questions to be asked by the legislative and judicial institutions which review the details are, in the legislative context: Should we prohibit stone-throwing into ponds or should we rely on catch-all legislation covering negligence and putting others at risk? In the judicial context, it would be surprising if questions were raised concerning anything other than direct infliction of injury (perhaps the pond is a training area for divers) or, again, negligence. In all cases, questions about the agent's knowledge of the likely effects and her consequent intentions will be relevant.

So we shouldn't see the harm principle as the bluntest of blunt instruments. We should see it as operating, in the clearest case, as a constraint on the sort of action descriptions which can feature in legal or quasi-legal proscriptions. 'Assault and battery' is an obvious example of an action-type, tokens of which necessarily cause harm. 'Throwing stones into ponds' does not have this property. Obviously there are all kinds of action where the issue concerns the likely incidence or probability of token actions causing harm – too high, I assume, in the case of driving while drunk or at 50m.p.h. in a built-up area. Where probabilities or threshold effects are relevant, we encounter a grey area which no philosophical judgement can illuminate. Legislators and the sort of opinion-formers who guide the application of unofficial sanctions will have to debate and negotiate a trade-off between liberty and the prevention of some incidence of harm. The liberal, by instinct, counsels against panic measures. The timid press anxiety into legislative service. Both do right when they focus on the facts of the matter

concerning harm and the risk of harm – and this is what the harm principle requires.⁵²

One final objection to the harm principle hypothesizes the possibility of harmless actions in respect of which there can be no doubt that proscriptions and sanctions are appropriate. Gordon Graham discusses a series of examples which he believes show that the harm principle cannot work as the sole necessary condition.⁵³ My variation on his theme is the case of the Dirty Dentist – a familiar figure from the Sunday tabloids of my adolescence, devoured in those days as the most explicit media of sex education. The Dirty Dentist used to fondle the genitalia of patients whilst they were under general anaesthetic for a filling, there being no requirement that a nurse or assistant be in the room during the treatment. On recovery, we presume, they were all ignorant of the Dentist's assault. Were the patients harmed by their service to the dentist? Does the Peeping Tom harm the blithe and blissful objects of his smutty attentions? Graham thinks not – but is in no doubt that these activities should be prohibited. In which case we have to find grounds other than the harm principle for doing so. In which case, the principle is neither a necessary nor sufficient condition on the legitimacy of interference. Graham's solution is to advocate a principle of individual rights. When the dentist fondles his patients, he invades their rights – to bodily integrity or privacy. That is the substance of the case for making his conduct illegal, not the false claim that he harms them.

I see three ways forward here. First, one might substitute the Rights Condition for the harm principle as necessary to justify intervention. To be legitimate, legislation which interferes with citizens' agency must prevent them violating the rights of others. Second, one might supplement the harm principle, insisting that justifiable legislation *either* prevent harm to others *or* protect individuals' rights. (This is Graham's proposal.) Third, the harm principle may be defended – in which case some argument will need to be devised which establishes that harm is caused after all in the cases discussed. My preferred solution would be the last, but the argument will have to take a devious route. In brief, and to anticipate the conclusions of Chapter 4, I believe the ascription of rights requires that we describe the interests of individuals which rights claims typically protect. But since the violation of rights claims *ex*

hypothesi invades specifiable interests, and since the invasion or setback of an interest constitutes harm, rights violations will generally be harmful – in the relaxed sense that actions of this type will tend to cause harm. The hard task in cases like those of the Dirty Dentist or Peeping Tom will be that of vindicating the right which is violated. Most readers, I suspect, will believe that this can be accomplished, but philosophers should not take for granted the success of the enterprise. There is work to be done, but when it is done I think two jobs will have been done at the same time. Not only shall we have justified the right which underpins the legitimacy of the proposed interference, we shall have described clearly and fully the harm such interference prevents.

Supplementary principles

If the theorist who accepts some version of the harm principle cannot accept all cases of rights violation as species of harm, the principle will need supplementation in the way we have seen. Are there any other principles which have been found appropriate to justify the range of governmental and unofficial interference?⁵⁴ If there are, these will operate as just-about-sufficient conditions, discounting the cost of legislation and enforcement. As described they may or may not include the class of harmful actions, so they may operate, if successfully defended, as a supplement to the harm principle, working as conditions which are disjunctively necessary, i.e. a full account of the necessary conditions for interference to be legitimate will specify as proper cases that either harm is caused or . . . , as the conditions are introduced. Three well-known candidates include moralism, an offence principle and paternalism.

Legal moralism

The legal moralist claims that interference is justified if it prevents immoral or wrongful acts. If this principle were acceptable, we should note straight away that it would incorporate the harm principle as I have explained it, since the harms which may be legitimately prohibited are those types of harm which it would be morally wrong to inflict on others. Clearly, in order to evaluate

such a principle as a supplement (or alternative) to the harm principle, we need to find a class of actions which are morally wrong yet do not involve harm or the risk of harm to others. It is notoriously hard to find any such class which can be demarcated with confidence.

Two sorts of case have been described. The first concerns actions the wrongfulness of which derives from self-harm or the agent's failure to comply with some duty that she holds to herself. I shall discuss this later under the heading of paternalism. The second sort has most often involved sexual behaviour, solitary or consensual, which is somehow not respectable. Unmarried or extra-marital sex, sex with contraceptives, homosexual relationships, sex with prostitutes, sado-masochism: the list of types of sexual behaviour which have been deemed immoral, and impermissible by implication, is as endless as the varieties of expressing human sexuality seem to be. If the behaviour is fully informed and consensual, I take it that it is either harmless or a type of harm to self. The thought that some sex is rational, all else irrational, strikes me as ludicrous, unless the rationality is strictly means-end and the end specified is such as the propagation of believers in the true faith or heirs to the throne – as good examples as any of rationality in the service of dangerous or cruel masters.

The only philosophical point at the bottom of all such suspicious prohibitions is the claim that communities are right to prohibit deviant (but, *ex hypothesi*, harmless) behaviour on the grounds that conformity to standard practice is either necessary for the survival of the community or integral to the very idea of community itself. Thank God (he says, letting slip his liberal credentials), both arguments can be strongly challenged.

The positive (actual) morality of any community comes all of a piece, Devlin tells us.⁵⁵ A 'seamless web', as his most prominent critic put it, though Devlin gently demurred. It is a structure of belief and practice which must remain intact if any society is to succeed in its collective goals. If particular moral beliefs are challenged or specific practices undermined, the community can respond by refuting the challenge or supporting the practice or, if the challenge is successful, it can disintegrate. The stakes are high. So high as to justify legislation which supports the practices of common morality. Principles governing the acceptability of

sexual behaviour will be among the components of this web – in which case it will be otiose to ask what harm is or would be done by any particular practice. It is enough to know that it is deemed immoral.

Devlin's position was effectively refuted by H.L.A. Hart,⁵⁶ at least to my satisfaction. In the first place, he pointed out that Devlin's argument may be taken as an *a priori* claim that a society is constituted by its morality. If the morality of a society changes, so, *a fortiori*, does that society. We now have a different society. But that definitional claim is insufficient to ground the claim that a society may protect itself against *change* by the use of legal and social sanctions. The newborn society, constituted by its altered positive morality, may be an improvement on its predecessor. Unless Devlin's argument is underpinned by an (indefensible) claim that all change is for the worse, the demise of the old and the birth of the new may be cause for celebration rather than regret.

If, on the other hand, Devlin's claim is substantial rather than definitional, again it is open to challenge. At first inspection, it looks like an application rather than a refutation of the harm principle. It works as a high-level empirical claim, a generalization to the effect that the consequences of challenges to established moral practices are invariably harmful. If this is true, it is something the harm theorist can willingly take into account. Indeed it would comprise just the sort of information that must be taken into account when assessing the harmfulness of practices. So the next question is obvious. Do all changes in moral beliefs and practices cause harm to the point where immorality in general may be proscribed? No sooner is the question put than we can see how silly it is. Everyone is at liberty to select a firmly held, deeply entrenched moral belief which was integral to the operation of a specific society, yet which was clearly wrong (as well as damaging, both to individuals and the society as a whole). 'Some humans are natural slaves' is a good example. Hence the thesis, taken in full generality, falls. The specific proposals for change which were the occasion of Devlin's lecture – reform of the law concerning homosexuality and prostitution, as recommended by the Wolfenden Committee of 1957⁵⁷ – clearly require inspection in point of the respective merits of the status quo and the suggested reforms. And as Hart pointed out, we have to be willing to take evidence. We

can't defend restrictions on homosexual practices by citing Justinian's belief that homosexuality is the cause of earthquakes. And when we review the evidence, it will not be relevant to quote opinion polls recounting the population's beliefs in respect of the immorality of the conduct to be permitted. The apt questions concern whether the practice which is up for assessment causes harm.

The practical problem is perennial – Devlin's views were published as a contribution to the debate provoked by the proposals of the Wolfenden Committee and the courts themselves throw up cases for decision with undiminished regularity. In 1986, the United States Supreme Court upheld the law of the state of Georgia which criminalized sodomy.⁵⁸ In a recent UK case, the House of Lords upheld the convictions for causing bodily harm of men engaged in consensual sadistic practices. But the Hart–Devlin debate had been, to my mind, a rare example of a philosophical question decisively settled. I should have known better. Devlin's thesis has re-emerged recently in more fashionable dress – that of the communitarian.

One strand of modern communitarianism has been the claim that the identity of the moral agent is constituted by social institutions of the community of which she is a member.⁵⁹ The contours of the good life are drawn by the specific pattern of proscriptions and prescriptions which are embedded in such institutional frameworks and the virtues and dispositions of character that are inculcated in citizens. A member cannot disengage from her community without a serious loss of self; she cannot step back from the principles which mark her community as an historically conditioned entity and appraise them from some other-worldly stance. For the most part, our citizen is stuck with what she believes to be right since the cost of independence of spirit is too great for humans to bear. It follows that each community will be optimally regulated by that set of rules and attitudes which members endorse as distinctive of their way of living well. Some of these rules – perhaps the most important to the ongoing life of the community thus constituted – will be embodied in legislation. Other rules, perhaps equally important but not judged suitable for legislative enactment, supposing that this carries with it the burdens of the criminal law (police, courts and prisons), will be enforced by

unofficial communal instruments. The implication of this position (which, as Hart saw, elevates positive morality to the status of optimal critical morality) is that a society may give practical legislative effect to whatever rules of conduct identify its distinctiveness, not on the basis that this distinctiveness is worth preserving – from what stance could this be adjudicated? – but rather on the grounds that its members can endorse no other.

Far be it from me to deny that humans can think in this fashion about how their communities should be regulated. It is enough for the purposes of this argument to note one odd feature of the scenario. It supposes that citizens are so integrated⁶⁰ into the lives of their communities that they cannot but endorse the moral rules which define its collective (and their individual) identity. It therefore assumes an ethical homogeneity that is not to be found in modern nation-states. Patently, some citizens' identities are not defined by the moral rules underpinning the legislation which they are campaigning to reform. Telling people they must obey a law is one thing – the telling may carry authority. Telling people wherein their moral identity consists, against their explicit disavowal, is quite another. In some communities, we are voluntary recruits; in others, the family and the nation-state notably, we find ourselves members willy-nilly. But no community has the ethical authority to conscript us as moral team players in the face of our explicit dissent. Dissenters and bloody-minded protesters can get things wrong. The principles they advocate may be as evil or dotty as any. But if we believe so, such descriptions will serve; we don't need to locate their error in a mistaken sense of their moral identity which is witnessed in the mere fact that their principles differ from ours.

In 'Liberal Community', Dworkin parodies the communitarian challenge in his claim that those who subsume sexual behaviour as a collective interest of the political community must suppose 'that the political community also has a communal sex life . . . that the sexual activities of individual citizens somehow combine into a national sex life in the way in which the performances of individual musicians combine into an orchestral performance . . .'.⁶¹ Maybe ridicule is as good a weapon as any against those who believe they have a legitimate interest in their neighbours' sex lives (as against being good old gossipy Nosey-Parkers). Still, there are difficult cases. I will mention one.

In the wake of a massacre of schoolchildren in Scotland, legislation was introduced against the possession of hand-guns in the UK. To many, the most impressive reason in favour of such legislation was that it marked a moral stand against an encroaching ethos of permissible private use of deadly weapons. Of course, that ethos is explicit in the defence of the culture of personal weapons in the USA and is exported in the films and TV programmes which display (and sometimes glorify) their casual use. What there is of such an ethos in the UK takes the form of an admiration for military exploits. Soldiers of the SAS protecting Queen and Country are a more recognizable model in Britain than the homesteader guarding the family ranch against rustlers and Red Indians. Politicians as well as private citizens were impatient of the pleas of members of private gun clubs that their hobby could be so regulated as to effectively limit the risk of sporting weapons being ill-used. Legislation which amounted to an absolute prohibition was claimed to be the only counter to an encroaching gun culture.

I confess I am disturbed by the thought that this amounts to legislation which is driven by moral sentiments quite independently of the question of whether the forms of hand-gun use to be banned are harmful. That much seemed to be explicit in the terms in which some of the debates were conducted. 'Cowboy morality must stop somewhere in the Atlantic.' 'The ideals of the pioneer and the frontiersman which seem entrenched in the American suburbs must be kept out.' This looks like morals legislation to me. The rhetoric reads as a defence of traditional community hostility to the use of personal firearms being shored up in the face of insidious threats. If so, the liberal who advocates the test of harm should not be sympathetic to it.

I find I am as susceptible to this rhetoric as most of my compatriots have been – but am equivocal as to the reasons for it. After all, the same exotic and alien morality is celebrated by the more colourful variety of Country and Western fans who wear cowboy uniforms, adopt curious nom-de-plumes (Hobo Harry, the Hombre from Huddersfield) and hold fast-draw competitions. Children can buy pistols and even imitation automatic weapons – to be filled with water. Everyone can see John Ford's Westerns on the television set. Few complain about these innocent pastimes as the incursion of an alien morality and demand prohibition. The difference

seems to be that legislation to ban hand-guns has some connection with the distribution and use of dangerous weapons and some possible incidence of their harmful use. It cannot represent, *simpliciter*, a communal response to an alien ethos. But I leave readers to think through these issues for themselves.

Offence

If we were to judge straight off that one is harmed who is offended, offensive conduct could be considered for prohibition along the lines suggested by the harm principle. How harmful is the offending behaviour? Does it harm few, many or most people? Remembering that the harm principle is not proposed as a sufficient condition on legitimate interference, we should consider if the harm which is consequent upon the offence is offset by any countervailing benefit, or if the costs of interference would in any case be too high. If there is a difficulty in determining particular cases or in evaluating proposals for interference, the difficulty will be cognitive rather than philosophical. It may be that the evidence germane to these practical questions is hard to assess.

There is a philosophical problem here (for the proponent of a harm principle) only if one believes that the offensiveness of behaviour is a ground for restrictions independently of the harm that it may cause. To examine this we need to take examples of conduct which it is agreed is offensive and either harmless or harmful in some attenuated fashion that would not generally serve as a good reason for restricting liberty. Feinberg accepts that Louis B. Schwartz has found an example.⁶² Consider a law whereby 'a rich homosexual may not not use a billboard on Times Square to promulgate to the general populace the techniques and pleasures of sodomy'. I cannot believe that the harm done by such a billboard is of a trivial kind, though the description of it may require a delicate and imaginative exercise. The nuisance of the distraction, the embarrassment of the unavoidable encounter with feelings of shame and perhaps guilt, the shock of unanticipated self-exposure – all these on the way to work – may be reckoned harmful enough and assumed to be sufficiently universal to justify prohibition. The burden of proof of harm which is placed on those who would

intervene is not onerous in such a case. When questions concerning the censorship of pornographic films, TV programmes, books or plays are raised, readers may recognize the relevance of voluntary subscription. Those questions are not raised here.

As Feinberg insists, we should be *reluctant* to admit offence as a defensible reason for interfering with the conduct of others, supplementary to the harm principle. And we should be careful of applying the harm principle indiscriminately for its prevention. I suggest that we think two ways on this issue. In the first place, offence is important to us. It is perhaps the most familiar way in which we are wronged. Many philosophers have developed the Kantian blunderbusses of respect for persons and recognition of others' autonomy – treat others as ends and not as means, merely – into sophisticated instruments of normative ethics. They capture core features of an individualistic ethics which is the legacy of Protestantism and the moral philosophy of the seventeenth and eighteenth centuries. And these ethical notions in turn capture a modern concern with the dignity of the individual, a dignity just about all moral agents educated in this tradition will assert freely. The arena in which these calls for respect are most readily made and most frequently affronted is that of commonplace personal interaction. Here, respect is a matter of courtesy and politeness; disrespect is easily recognized. The barman who retorts to the rude customer: 'What do you think I am – a f***ing vending machine?', perhaps breaks a rule of good business, but expresses clearly and directly a universal concern not to be treated as a means merely. Jack is, or demands to be, as good as his master nowadays and hierarchical honour codes have been flattened out. You're due courtesy even in the pawnbroker's shop, my father used to insist. So everyone, quite rightly, is sensitive to affront, bristles in the face of patronization, is quick to protect her dignity. So life becomes difficult where conceptions of what is and what is not respectable conduct change rapidly. Who will be offended by what in which circumstances in the way of bad language? Offence is easily given and readily taken. Rudeness is a moral wrong; it is not the sort of breach of etiquette committed by the ignoramus who picks up the wrong knife, though as the example of bad language shows, the boundary between the immoral and the infelicitous can be tricky and quickly shifting. But if we wish to live a comfortable

life in a gracious society we had all better be connoisseurs of such distinctions. Of course, prevention of the sort of offence I have been discussing is not easily legislated for, and generally is better not, but this is a matter of practicalities. It is not because offence is a trivial or unimportant wrong.

On the other hand, offensiveness may serve important ethical and political purposes. In a moving defence of the rights of Salman Rushdie, when still under *fatwa* for the publication of *The Satanic Verses*, Jeremy Waldron insists that 'the great themes of religion matter too much to be closeted by the sensitivity of those who are to be counted as the pious'.⁶³ Who is a proper party to the debate as well as what counts as good manners may in themselves be points at issue. I'll quote Waldron at length; the issue merits his eloquence:

The religions of the world make their claims, tell their stories, and consecrate their symbols, and all that goes out into the world too, as public property, as part of the cultural and psychological furniture which we cannot respectfully tiptoe around in our endeavour to make sense of our being. . . . Things that seem sacred to some will in the hands of others be played with, joked about, taken seriously, taken lightly, sworn at, fantasized upon, juggled, dreamed about backward, sung about, and mixed up with all sorts of stuff. This is what happens in *The Satanic Verses*. . . . Like all modern literature, it is a way of making sense of human experience.⁶⁴

Three cheers for this. In a multicultural society, as in a multicultural world, offensiveness cannot be avoided. We are stuck between the rock of respect and appropriate courtesy and the hard place of polemical ridicule. We strive to protect our dignity as persons and then lampoon in literature and cartoons those whose values we challenge. We don't thereby violate our own ground-rules of debate. Where the ground-rules themselves are the question at issue, offence is ineliminable.

Paternalism again

This covers the second ideal of positive liberty canvassed earlier, embracing the idea that agents are liberated when the control of others is substituted for the self-control they cannot manage. Mill's harm principle explicitly excludes activities whereby individuals harm themselves from the range of acceptable social interference. He states that the agent's

own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because in the opinion of others, to do so would be wise, or even right.⁶⁵

Later in *On Liberty*, following Mill's introduction of a distinction between self- and other-regarding actions, cases in which the only harm that the agent causes is to himself are firmly placed in the category of the self-regarding, and the interference of others, whether by means of law or other coercive social agencies, is severely proscribed. This restriction is not universal. Uncontroversially, Mill insists that he is not speaking of children. More generally, those 'who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury'. Notoriously, this disclaimer includes barbarians stuck in 'those backward states of society in which the race itself may be considered in its nonage'.⁶⁶ An example or two of appropriate paternalism towards uncivilized members of barbaric societies would help explain the point, but I am flummoxed. Just what practices of ignorant self-harm does he want to stop? Consensual *suttee* as practised in India is a possible candidate. Bear in mind, as some critics have not, that he is not anticipating the dubious claim of twentieth-century tyrants that freedom of speech, for example, limits the growth of gross national product.

To focus enquiry, let us list the leading characteristics of paternalistic interference and then give some examples. First, it will be coercive, exacting penalties in case of non-compliance. Hortatory messages of the sort put out by Ministers of Health (Take daily exercise!) may be paternalistic in spirit but they do not count for

the purposes of this discussion since they do not amount to compulsion and control, to echo Mill. If governments could brainwash their citizens into looking after themselves better, that would count as paternalism, as does any policy which is intended to force all citizens to ameliorate their condition. Fluoridization of the water supply, as a strategy to improve *everyone's* (not just children's) teeth, would be an example. Second, the *main purpose* of the interference must be to prevent citizens harming themselves. If the intention of seat-belt legislation is to cut the costs of hospital treatment following road accidents, it is not paternalistic. If the desired effects of restrictions on smoking concern the comfort and good health of non-smokers, again the interference is not paternalistic.

Something like the law of double effect will be operating here, since in cases of this sort, those who are made to wear their seat-belts or limit their smoking reduce to some degree the likelihood of harm to themselves. And mention of the law of double effect should alert liberals to the possibility of hypocrisy. There are whole armies of folk desperate that others improve themselves and unconcerned that the objects of their sympathetic attention may balk at their mission. If, in the pursuit of their goal they can sneak their favoured proposals into the category of legitimate interference by the back-door citation of any small probability of harm to others, they will leap on the evidence to whitewash the coercion they believe to be warranted in any case.

Mill's instincts were sound; if the effects to be prevented can be inhibited by some other means less intrusive on the citizen's freedom, if drivers, for example, could be got to pay a premium on their insurance policies to cover the additional costs their choice of not wearing a seat-belt might impose on others (and if this option could be effectively enforced), one who goes down the route of universal coercion is acting in a paternalistic fashion. All too often, the intentions of would-be interferers is occult. Those who would manipulate our conduct willy-nilly are not likely to restrain their manipulation of the terms of the debate. Although paternalism is a characterization of the intentions or purposes of the interferer, those who oppose paternalism, as Mill did, have to identify it solely in terms of the likely effects of proposed policies, and the readiness of the proposers to consider alternatives. In any policy

debate which raises the spectre of paternalism, motives which are properly recognized as suspicious can rarely be challenged directly. Double-talk abounds, as well as double standards.

Here is a list of practices which have invited do-gooders to intervene on behalf of their benighted fellows: masturbation (doctors used to propose clitoridectomy for women self-abusers, and all manner of restraint for men), dangerous sports (boxing, notably, but never to my knowledge high-altitude mountaineering which until recently carried a one-in-nine chance of death per climber per expedition), gambling, smoking, drinking and drug-taking, eating ox-tail stew or T-bone steaks, driving cars without seat-belts, riding motorcycles without crash-helmets, suicide and consensually assisted euthanasia, incarceration of adults of unsound mind and prone to self-mutilation and injury. I have deliberately mixed up the daft, the controversial and the not-so-controversial, so as to prompt reflection amongst readers.

We know the *form* of the case that has to be made out for paternalistic interference because we find it readily justifiable in respect of children. When we lock the garden gate to prevent our children playing with the traffic, we suppose they are ignorant of the degree and likelihood of the danger. Or, if we have explained this carefully, we believe them prone to misjudgement in their evaluation of the likely costs and benefits. We insist that children attend school and force them to take nasty-tasting medicine. We prevent them harming themselves in the ways that their ignorance or poor judgement permits. As children mature, sensible parents allow them to take more decisions for themselves. Mistakes will be made, but one hopes that these will encourage the adolescent to develop the capacities necessary for prudence – a curiosity about the future effects on themselves of their conduct, the intelligence to investigate what these may be, sound judgement concerning the benefits of risky activities. These skills need to be cultivated through increasing the opportunities for their exercise. Then, hey presto, somewhere between 13 and 21 years of age, depending in most jurisdictions on the activity in question, adults emerge with the capacity to decide for themselves how best to pursue their own interests with whatever risk of harm to themselves.

At adulthood or thereabouts, there is a presumption that individual agents are in the best position to judge these matters – a

presumption we shall examine in due course. We suppose that grown-ups are in possession of all information germane to their decisions, but if this is arcane or technical, governments strive to make it widely available, to the point, as with tobacco smoking, of hitting folks over the head with it on every occasion of consumption. 'Preappointed evidence' was Bentham's term for this useful practice, approvingly cited by Mill.⁶⁷ We also suppose that grown-ups can evaluate the benefits of a risky activity, can achieve a reasonable measure of the worthwhileness for themselves of the sort of life they set about. Here there is less scope for preappointed evidence; the attractions of high-altitude mountaineering are likely to be a mystery to non-participants, not least to those who make some effort to comprehend them by reading the grim accounts of the activity which the mountaineers themselves provide – five weeks of hell-on-earth, then one beautiful sunset.

Is this presumption reasonable? With respect to the provision of information concerning the degree and probability of harm, countries like the UK with compulsory education to the age of 16, supplementing the advice of parents who for the most part wish their children to be safe, have plenty of opportunities for putting over appropriate messages. For the adult, preappointed evidence is ubiquitous as sports stars queue up for TV opportunities to convince us of the benefits of walking to work, and government health warnings are printed on billboards. Interestingly, Mill thought this principle should apply, too, to the dangers of drugs and poisons – as indeed it does, with appropriate doses and information concerning contra-indications being supplied with prescribed drugs. But 'Doctor Knows Best' is a safer policy for the majority of us who are pharmacologically challenged. Mill thought that 'to require in all cases the certificate of a medical practitioner would make it sometimes impossible, always expensive, to obtain the article for legitimate uses'.⁶⁸ Most contemporary readers will regard this as a prescription for a National Health Service, with readily available services free or cheap at the point of delivery, rather than a justification of self-prescription.

Matters are very different concerning the *value* of risky activities. Here, perforce, societies must leave most adults unprepared. Again, the example of mountaineering is instructive. Schools and

families can give children a taste of the experience, but this will be diluted in homeopathic proportions; taking children on mountains is not like a trip to the ballet. Risk, at least for the schools and public authorities who regard their involvement as educational, must be excised as far as possible; no wonder the glories are obtuse to the many who cannot imagine what the free and self-directed pursuit may be like.

Further difficulties concern activities whose point is forever opaque to non-enthusiasts. At least in the case of mountaineering, society has cast the gloss of adventure over the game, and the culture of stoicism and self-knowledge promises a glimmer of imaginative identification, though aspirants will probably find the outcome disappointing. But think of train-spotting, beetle-collecting or playing dominoes!⁶⁹ If one doesn't *do* these things, how can one appreciate their value? Mercifully, the question of paternalism does not arise here since the hobbies I have mentioned do not generally harm their practioners. But what, for example, do we innocents make of the life of the alcoholic or drug-taker? I read William Burroughs's *Junkie*⁷⁰ as an advertisement for the liberated existence of the heroin addict. There is no conventional vice which does not have, or may not find, its literary, or theatrical, or painterly celebrant of self-destruction. If the glory of seeing a steam-driven Britannia class locomotive, charging down the line, is utterly opaque to us, what chance do we have of imagining the transcendent effects of a shot of heroin?

There is a respectable answer to this question. At the point of experimental choice, there can be more or less commitment. A decision to try the heroin may be the cause of one's foregoing future acts of choice.⁷¹ It is unlikely that the sight of *Britannia* herself or the exhilaration of winning a clever game of dominoes will prove addictive. I guess it wouldn't matter if heroin addiction were as harmless as the universal human addiction to fresh air. But, at least in the dismal circumstances in which this addiction is generally pursued, it is hard to think of addiction as a worthy lifestyle choice as opposed to the dreadful consequence of an ignorant or careless mistake. Hard, but not impossible – which alternative signals the difficulty of paternalist intervention. It is a just about universal feature of human society that its worst features (extreme poverty, homelessness, loneliness) have prompted

personal strategies of self-oblivion which can be presented as perfectly rational in the awful circumstances.

It might be thought that paternalism, given the hostility to it which I have intimated, poses a particular difficulty to the account of liberty I have been developing. I argued, following Locke and Rousseau and, in modern times, Joseph Raz and Philip Pettit, that our liberty is not enhanced by the opportunity to do evil with impunity. In fact, concern for our moral liberty may lead us to endorse social constraints on our actions as the most effective means of self-discipline. From this point of view, one might judge that even laws which directly prevent harm to others, laws against theft, for example, have a paternalistic tinge if they are viewed as the outcome of citizens' desire that their resolve be bolstered in the face of temptation. This line of thought will positively encourage paternalistic interference, since it is predicated on a belief in its necessity.

I insist that the problem is not as severe as it appears. In the first place, this element of a theory of liberty must be placed alongside an insistence on a measure of political liberty as promoted by democratic institutions. Paternalistic interferences which are the product of rulers imposing their values on hapless citizens – as parents might regulate the conduct of their children – are not justifiable. The institutions of political decision-making must make it intelligible that citizens are imposing these limitations on themselves, however remote or indirect the mechanisms.

For some, the introduction of democracy onto the scene will make matters worse. Wasn't it the illiberal, tyrannical even, tendency of democratic egalitarianism to make everyone's lives their neighbours' business (and to put this prurient concern into social effect) that Mill noticed from de Tocqueville's writings on America which prompted him to write *On Liberty*?⁷² Don't both democratic institutions and the democratic temper encourage intrusive paternalistic practices? I am prepared to admit that they might. The sensitive liberal ear *burns* daily at the rhetoric of elected politicians who are desperate to keep their fellows on the straight and narrow to their evident benefit.

To some, this seems to be how they interpret the pursuit of the public good that they were elected to serve. No sooner are local councillors elected (on platforms such as reducing unemployment

or protection of the environment) than they enthusiastically set about censoring films, sitting on licensing committees and regulating the opening hours of clubs that young people attend. It never occurs to them that these matters may not be their proper business. Just this morning I heard a government (Home Office) minister on the radio announcing solemnly that a new system of on-line lotteries to be played in pubs represented a serious danger to the moral health of the nation. It *must* be investigated! The combination of alcohol and gambling is reprehensible and dangerous (everywhere, presumably, except the Royal Enclosure at Ascot). At no point in the discussion was the suggestion made that this sort of activity is outside the remit of government authority, that it represents an opportunity for pleasurable individual misbehaviour which should be immune to interference.

On the other hand, that democracies have developed in this intrusive fashion does not entail that they either must or should do so. Philosophical argument cannot of itself prevent the misuse of institutions – and even Mill's harm principle is just that: a *philosophical principle*. It is not a brick wall whereby households can be fenced off from their neighbours and all the coercive instruments of society at large. So we can insist, on the basis of a theory of liberty, that those who love liberty will not treat their fellow citizens as imbeciles whose lives are to be managed so as to prevent them harming themselves. In particular, having assured themselves that grown-ups have where possible all the information they need to make prudent choices, they will be cautious about restricting their fellows' engagement in risky activities since they will be humble about their own capacities to discern what good these activities serve. The democratic citizen who values liberty knows full well the difference between asking, of herself: Is this activity a temptation that I wish the state to assist me in controlling? and asking, in respect to others: Is this an activity that I wish to stop them pursuing? It is one lesson of Rousseau's doctrine of the general will, of which more later, that genuine democratic institutions require their participants to *think* along particular tracks. It is because he believes he addresses an audience who value liberty that he cannot accept that its members will violate each other's rights.

Finally, although we must acknowledge some space for paternal-

istic interference, we must insist that this does not give *carte blanche* to interfere to even the most straight-thinking, sound-valued *state*. Suppose I am correct to believe that I need the help of others if I am not to harm myself in ways I deplore but cannot avoid and I accept that self-discipline, on my part, requires social engagement. If one is alert to the facts of history concerning ambitious state projects of individual amelioration, projects ranging from Prohibition and temperance legislation to the War on Drugs (led in the UK at the moment by a *Drug Czar!*), one will recognize that the state is very good at creating criminals and not very good at changing their behaviour.

As we noticed before, we should worry about the effects of government interference, even where it is legitimated by the harm principle. First, it's likely to be inefficient, as claimed above; second, where it *is* efficient, we should consider the enervating effects of big government on the spirit and liveliness of the citizens.⁷³ Family, friends, self-help groups, churches even, represent better resources for the weak-willed than the agencies of the state. If the state has a role in enabling its citizens to conduct their lives in less self-harming ways, this duty may best be discharged, almost paradoxically, by state support of non-governmental agencies.

Conclusion

There have been times when philosophers radically circumscribed their task. In the middle years of the twentieth century, some claimed, modestly, that the analysis and articulation of concepts was the proper task of philosophers, the limit of legitimate philosophical ambition. In this period, amongst these philosophers, it is fair to say that political philosophy suffered grievously, although the clarity and precision of this work affords an example of best practice in point of style, if not philosophical methodology. Berlin's work on liberty represented a notable advance on the prevailing standards of philosophical correctness. He showed that an important ethical concept is susceptible of (at least) two, and possibly two hundred, different analyses. There is no one coherent way of thinking about liberty; there are at least two – and these amount, each of them, to rich traditions, each tradition dissolving

into disparate components which challenge fellow contenders for the torch of 'the best way of thinking about the value of liberty'. As we have seen, Berlin has been criticized for the exclusiveness of his categories. Talk of 'negative' and 'positive' liberty occludes an underlying schema into which all mentions of liberty may be fitted. MacCallum's point may be taken as a legitimate demand on putative analysis, but Berlin's real purpose was to demonstrate the costly ethical commitments of one analysis against another – where each alternative satisfies the test of conceptual coherence.

If there are many ways of thinking clearly about liberty, as about democracy or justice, the important question concerns which way we are to select as most apt to characterize judgements about the importance of liberty as a political value. Which analysis, amongst the two (or twenty-two) available, best illuminates why so many people think liberty is worth striving for? The account I have been developing is complex – and these are its chief constituents. Basically, agents are free when they are not hindered in their pursuit of what they take to be the good life. Hindrances are to be construed widely. In a political, or more widely social context, they will include laws backed by sanctions as well as the coercive instruments of positive morality. But individuals can also claim to be unfree when governments in particular fail to empower them in sufficient measure to attain levels of accomplishment which are the necessary preconditions of a life which is authentically their own. In insisting that the object of liberty should be the pursuit of the good life, I mean to exclude from the value of liberty opportunities to do evil. I mean to include, not merely the wherewithal to pursue exalted ideals, but also the possibility of fashioning an autonomous track through the conflicting demands of various loyalties, interests and commitments. Political institutions can foster liberty on this capacious understanding in a range of ways. Democracy is necessary since for many a life of active political engagement is an important ingredient of the good, intrinsically a component of self-directed existence, as valuable in its fashion as the religious life or the life of artistic creation or appreciation. Democracy has instrumental importance since it enables the fastidious citizen to construct or embrace coercive measures which impose some discipline on her pursuit of worthwhile goals – where the imposition of such controls is a necessary supplement to her

solitary strivings. Whether such constraints are necessary is a matter of personal moral strength, but even where they are not, coercion is still necessary to fashion a space for unhindered activity secure from the interventions of others.

A sound theory of liberty should recognize the Janus-face of the criminal law in particular. It can serve as a protection, demarcating with the force of sanctions the boundaries which freedom requires if the pursuit of the good life is to be safe within them. Equally, though, and just as obviously, such laws can limit liberty, as they do when the prospect of punishment makes forbidden pursuits too costly to contemplate. If such pursuits are innocent or necessary for a worthwhile life, the law is acting as a limitation on freedom.

We have claimed that democracy is a necessary condition of political freedom, but as the author of coercive laws it is also a threat. And perhaps de Tocqueville was right: democratic legislatures, in their representative form through the operation of the mandate, are prone to operate capriciously in the lives of citizens, legislating to solve social problems without a thought as to whether intervention in specific areas of conduct is their proper task. To deal with this problem of overbusy legislation, as well as to curtail a society's moral instincts for self-repression, limits have to be drawn to the competence of agencies with the capacity to curtail agents' freedom. The most familiar ways of doing this are through the applications of principles which may or may not be given constitutional entrenchment. Mill's harm principle is one such; a principle of protected rights is another. This may be thought an alternative to the harm principle or else as a supplement to it. Other candidate principles have been examined, including principles of legal moralism and offence. I have argued that these are not independent principles. Either they are defective or best taken as appeals to the relevance of specific types of harm. The most difficult cases for the harm principle concern paternalistic interference. Here the concern to prevent agent's harming themselves cuts across the value of autonomy which is the deepest justification of free institutions. Formally, there is something odd about the application of a principle of autonomy to justify coercion. It may be necessary where a measure of coercion establishes the social conditions necessary for an autonomous life to be engaged –

as with children. With adults the situation is altogether different. Governments and citizens individually should be modest in respect of both their ambitions and effectiveness concerning the likelihood of their interference promoting the good of their helpless and obdurate fellow citizens.