FREEDOM AND THE RULE OF LAW

Matthew H. Kramer[*]

My previous work on freedom has elaborated an account of negative liberty.[1] That account differs not only from rival conceptions of negative liberty, but also from various expositions of other types of freedom. An adequate understanding of the relationship between negative liberty and the rule of law must involve an understanding of those other types of freedom. Having explored those alternative varieties of freedom as well as negative liberty itself, we shall then be in a position to judge some recent claims about intrinsic connections between the rule of law and the ideal of liberty.

---

* Professor of Legal & Political Philosophy, Cambridge University; Fellow of Churchill College, Cambridge. An earlier version of this Essay was presented as the Meador Lecture on Freedom at the University of Alabama School of Law on March 26, 2009. I am very grateful for the generous hospitality that I received in Tuscaloosa. I especially wish to thank William Brewbaker, Jenelle Marsh, Brenda McPherson, Kenneth Randall, Kenneth Rosen, and Frederick Vars. I presented a somewhat later version of the Essay to a seminar in the Law Faculty of Hebrew University at Jerusalem in April 2009. I am much obliged to all the participants in that seminar for their salutary comments, with particular thanks to David Enoch and Yuval Shany. A penultimate draft of the Essay was presented at a seminar in the Law Faculty of the University of Girona in June 2009. I owe a debt of gratitude to all the participants in the Girona seminar—especially to Jordi Ferrer Beltrán, Andrea Dolcetti, Luis Duarte d'Almeida, and David Martinez Zorrilla for their stimulating questions. I am also grateful for the warm hospitality in Girona.

1. Throughout this Essay, I use the terms "freedom" and "liberty" interchangeably.

I. FREEDOM AS NEGATIVE LIBERTY

Let us begin with two postulates that encapsulate the necessary and sufficient conditions for the existence of particular instances of freedom and unfreedom respectively:

F Postulate A person is free to □ if and only if he is able to □.[2]

U Postulate A person is unfree to □ if and only if both of the following conditions obtain: (1) he would be able to □ in the absence of the second of these conditions; and (2) irrespective of whether he actually endeavors to □, he is directly or indirectly prevented from □-ing by some action(s) or some disposition(s)-to-perform-some-action(s) on the part of some other person(s).

In each of these formulations, the Greek letter "□" (which stands for any germane verb or set of verbs plus any accompanying words) can denote one's performance of some action or one's existence in some condition or one's undergoing of some process.

The F Postulate distills the nature of negative liberty as it exists in particular instantiations. However, the U Postulate does not comprehend all the situations in which particular instances of negative liberty are absent. That is, the two postulates are not jointly exhaustive in their coverage. Apart from being free to □ or being unfree to □, somebody can be simply not free to □. In other words, "is not free" and "is unfree" are not equivalent; the latter predicate entails the former, but not vice versa. (What are equivalent are the predicates "is not free" and "is unable.") Likewise, the predicates "is free" and "is not unfree" are not equivalent. The former entails the latter, but not vice versa.

For example, although I am not able to run a mile under three minutes and am therefore not free to run a mile under three minutes, it is not the case that I am *unfree* to run a mile in such a short span of time. My lack of freedom to run a mile so rapidly is a mere inability rather than an instance of unfreedom. It is a mere inability because it is not due to any action(s) or disposition(s)-to-perform-some-action(s) on the part of anyone else. Instead, it is a purely natural limitation.

Hence, the concept of freedom as explicated here is trivalent rather than bivalent. Instead of separating people's abilities and inabilities dichotomously into freedoms and unfreedoms, it separates them trichotomously into freedoms, unfreedoms, and mere inabilities. The mere inabilities are infinitely expansive in their scope, for most of the countless ways in which

2. Alternative formulations of this postulate are "A person is free to □ if and only if it is possible for him to □" and "A person is free to □ if and only if he is unprevented from □-ing."

any person falls short of omnipotence are due to natural limitations rather than to the conduct of other people.

Why should a trivalent conception of freedom be favored over a bivalent conception? To glimpse the answer to this question, we have to take account of another feature of the F and U Postulates. Those postulates deal with particular instances of freedom and unfreedom, rather than with anyone's overall quantity of liberty. A particular freedom is an ability to engage in a certain mode of conduct or to be in a certain condition or to alter one's situation in a certain way. Any particular freedom has a content that differentiates it from other particular freedoms. A person's overall level of liberty is a complicated aggregate of his myriad particular freedoms and also of his myriad particular unfreedoms. We need not concern ourselves here with the details of the complex calculations by which the freedoms and unfreedoms are aggregated.[3] Rather, the key point for my present purposes is that, although the F and U Postulates are concerned only with particular liberties and unfreedoms, they have been formulated with an eye toward the ultimate aggregation of those liberties and unfreedoms. That is, my understanding of particular freedoms and unfreedoms has been shaped by my aim to establish that the overall liberty of each person is a measurable property. For the realization of that aim, a trivalent conception of particular freedoms and unfreedoms is essential.

Given that this Essay will not recapitulate my previous enquiries into the intricacies of measuring people's levels of overall liberty, the unique suitability of a trivalent conception of freedoms and unfreedoms cannot be fully substantiated here. Nonetheless, the gist of the matter resides in the fact that the calculation of the level of anyone's overall liberty proceeds through a complicated fraction. If mere inabilities were not distinguished from freedoms and unfreedoms respectively, then the numerator or the denominator of the aforementioned fraction would be infinitely large. After all, as has been stated, anyone's natural inabilities are infinitely expansive in their physical extension. For example, each person is not only unable to fly around the Milky Way Galaxy once, but is also unable to fly around it twice or thrice or any other number of times. Mere inabilities are limitless. Thus, if those inabilities were to be classified as liberties, both the numerator and the denominator of the fraction for measuring each person's overall liberty would be infinitely large. If mere inabilities were instead to be classified as unfreedoms, the denominator of that fraction would be infinitely large. In either case, then, the project of measuring anyone's overall freedom would be fatally undermined in principle, as

3. My main discussion of this matter is in the fifth chapter of MATTHEW H. KRAMER, THE QUALITY OF FREEDOM 358–473 (2003). As is made clear there, and as will be stated later in this Essay, the basic units in the requisite calculations are not freedoms and unfreedoms; rather, they are combinations of freedoms and combinations of unfreedoms.

well as in practice. To avoid such an upshot, we need to distinguish mere inabilities both from freedoms and from unfreedoms. The requisite distinctions are in effect drawn by the F Postulate and the U Postulate together.

A. Negative versus Positive Liberty

Especially since the writings of Isaiah Berlin in the 1950s and 1960s, the most famous contrast pertaining to freedom lies between negative liberty and positive liberty.[4] As is evident from what has been said so far, negative liberty consists in opportunities. To be negatively free to □ is to be able to □, and is thus to be unprevented from □-ing. If somebody is negatively free to □, then neither internal incapacities nor external impediments have made his □-ing impossible. Hence, to be negatively free to □ is to have opportunities to □, whether or not one avails oneself of those opportunities.

Positive liberty is very different. Instead of consisting in opportunities, it consists in the performance of certain courses of conduct or the attainment of certain objectives or the purification of one's motivations and outlook. Being presented with various opportunities is not sufficient for positive freedom; in addition, a person must take advantage of some of those opportunities in certain ways. Whereas negative liberty is a matter of unpreventedness, positive liberty is a matter of accomplishments.

As is suggested by the vagueness of these descriptions, numerous divergent accounts of positive liberty have been propounded from the time of Plato onward.[5] Some theorists maintain that a person becomes truly free only when she has persistently exercised certain faculties such as her capacity to reason and deliberate. Others contend that people are truly free only when they interact regularly in democratic institutions with their fellow citizens. Still other proponents of positive liberty submit that a person attains freedom only if he rids himself of certain ignoble desires or only if he subjects his sundry desires and inclinations to rational scrutiny and refinement. Many other varieties of positive-liberty theories have likewise emerged over the centuries.

Although I have elsewhere sustainedly criticized various doctrines of positive freedom,[6] nobody should think that the very use of the term "freedom" or "liberty" by the advocates of those doctrines is itself mistaken. Their errors are errors of substantive political philosophy, rather than linguistic lapses.[7] For example, it is not an abuse of language to declare

4. *See* FREEDOM: A PHILOSOPHICAL ANTHOLOGY 1–80 (Ian Carter et al. eds., 2007).

5. *See, e.g.*, KRAMER, *supra* note 3, at 87–88. For an extensive collection of articles on positive liberty, see also FREEDOM: A PHILOSOPHICAL ANTHOLOGY, *supra* note 4.

6. KRAMER, *supra* note 3, at 95–100, 118–19.

7. *Id.* at 2, 94–95.

that a person who achieves a high degree of autonomy has thereby become free in the sense of having liberated himself from the sway of the influences that might have kept him in a heteronomous condition. Such a characterization is not optimally clear and precise, but is far from ridiculous or unintelligible. Similarly, it is hardly ridiculous or solecistic to assert that people who together shape their destiny through institutions of democratic decision-making are thereby keeping themselves free by avoiding subjection to mandates which they have not themselves collectively fashioned. Though the conception of freedom that is operative in such a claim is plainly not equivalent to the negative-liberty conception, the classification of the democratic state of affairs as "freedom" is by no means an outlandish linguistic slip.

Still, although any accusations of linguistic errors would be misguided, doctrines of positive liberty are themselves misconceived in a number of respects. Notwithstanding that my chief purpose in this subsection has been to distinguish positive-liberty theories from negative-liberty theories—rather than to argue for the superiority of the latter over the former—we should pause briefly to consider one of the several respects in which the notion of positive freedom is dubious. A key problem for any doctrine of positive liberty is that it generates untenable ascriptions of freedoms and unfreedoms. For example, suppose that one such doctrine (which can be labeled here as the "Aesthetic Thesis") proclaims that each person becomes truly free only by developing his or her aesthetic abilities to the maximal degree. Suppose further that Kevin is a gifted pianist whose tendency to become distracted by non-aesthetic pursuits will thwart his development of his musical talents unless he is chained to his immobile instrument for several hours every day. Now, according to the Aesthetic Thesis, any opportunities that do not facilitate the maximal development of a person's aesthetic abilities are not freedoms at all. Hence, the countless opportunities closed off to Kevin by his being shackled to his piano are not freedoms of which he has been deprived; they are not freedoms, period. Instead, according to the Aesthetic Thesis, they are obstacles to the realization of his true freedom—obstacles which his chains have enabled him to overcome. His shackles will have helped to bring about his freedom without causing him to lose even the slightest instance of liberty. Because the severe curbs on his mobility involve no sacrifices of any particular freedoms, he has not been rendered unfree by those curbs in any respect. So the supporters of the Aesthetic Thesis must contend.

While the scenario of Kevin and his piano is contrivedly vivid, it well illustrates the far-fetched conclusions that are generated by any positive-liberty credo. Every such credo, which affirms that true freedom resides in a person's exertion of certain faculties or her performance of certain actions or her following of certain procedures, will commit its advocates to the view that any opportunities inconsistent with the relevant exertions

or performances or procedures can be removed wholesale with no loss of any particular freedoms. Instead of characterizing the removal of those opportunities as the elimination of some of a person's liberties for the sake of increasing her overall liberty, the positive-freedom theorists are obliged to maintain that no liberties have been removed at all. Their position in that respect is not self-contradictory or unintelligible, but it is indefensibly sinister. It should be rejected, as a substantive matter of political philosophy. Albeit some of the objectives favored by positive-freedom theorists may well be worthy of pursuit, we should not pretend that no sacrifice of liberties is involved when various opportunities are closed off in furtherance of those objectives.

B. Negative versus Republican Liberty

During the past couple of decades, the longstanding controversies between negative and positive conceptions of liberty have become somewhat overshadowed by controversies between negative-liberty theorists and civic-republican theorists.[8] The latter theorists generally subscribe to the negative conception of freedom in opposition to positive-liberty doctrines, but they hold that the negative conception has been construed too narrowly by most of its exponents. In two chief respects, they take themselves to have gone salutarily beyond those exponents.

First, civic republicans are keenly alert to the role of public virtue and public service in bolstering institutions that provide high levels of freedom for individuals. They maintain that, in the absence of active civic participation on the part of all or most of the adult citizens in a country, the reigning government and its elite supporters will very likely amass autocratic powers that will extinguish many of the precious liberties which the citizens have theretofore enjoyed. Individuals who wish to retain their freedoms must frequently put aside their private affairs to participate collaboratively in holding governmental leaders to account. Republican theorists believe that their attentiveness to the crucial role of civic virtue in securing the enjoyment of freedoms is at variance with the perceived emphasis of modern negative-liberty theorists on the sanctity of the private spheres of individuals. Whereas the latter theorists are said to be primarily concerned with drawing clear limits past which any government cannot legitimately intrude into people's lives, republicans are principally concerned to stimulate people to engage robustly with the institutions that govern them.

The contrast just outlined between civic republicanism and modern negative-liberty theories has been advanced with considerable erudition by

8. *See* FREEDOM: A PHILOSOPHICAL ANTHOLOGY, *supra* note 4, at 81–122 (2007).

Quentin Skinner in his essays on liberty during the 1980s and early 1990s.[9] Nevertheless, as I have argued elsewhere at length,[10] the contrast is largely misconceived. After all, the positing of an instrumental connection between extensive popular political participation and the safeguarding of individuals' liberties is perfectly consistent with negative-liberty theories. Of course, what would be inconsistent with those theories is any claim that the extensive popular political participation is itself true freedom. Such a claim, envisaging a relationship of equivalence between civic involvement and liberty, would be expressive of one prominent positive-liberty doctrine. It would therefore clash in most respects with negative-liberty theories. However, as Skinner himself emphasizes, the civic-republican writers have *not* in fact embraced any doctrines of positive liberty. When they have highlighted the instrumental links between the political engagedness of citizens and the security of individuals' freedoms, they have been propounding a thesis about negative liberty rather than about positive liberty. Accordingly, they have not been affirming any propositions that are inconsistent with those affirmed by negative-liberty theorists. Indeed, their thesis about the aforementioned instrumental links is a commonplace among most modern political thinkers, including the exponents of negative liberty. Civic-republican theorists undoubtedly articulate that thesis adeptly, but they do not thereby establish any substantive difference between themselves and the negative-liberty philosophers.

A second respect in which civic republicanism supposedly goes beyond negative-liberty doctrines has been elaborated since the mid-1990s by Skinner and Philip Pettit (as well as by others whom they have influenced).[11] According to these contemporary civic-republican writers, their very conception of freedom is more capacious than the standard conception within the negative-liberty tradition. Instead of concentrating on freedom as the absence of the actual application of force, republicans concentrate on freedom as the absence of domination. Domination occurs through the actual application of force—by a government or by some other powerful party—but it also occurs through the maintenance of background conditions of intimidatory control that render any actual application of force unnecessary. Skinner and Pettit assert that, unless a conception of freedom takes account of the full range of ways in which people can be hemmed in

9. For citations to relevant writings by Skinner, see KRAMER, *supra* note 3, at 14 n.1.

10. *See id*. at 105–24. *See also* Alan Patten, *The Republican Critique of Liberalism*, 26 BRIT. J. POL. SCI. 25 (1996).

11. The seminal texts are PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT (1997) [hereinafter PETTIT, REPUBLICANISM]; and QUENTIN SKINNER, LIBERTY BEFORE LIBERALISM (1998) [hereinafter SKINNER, LIBERTY]. For their most recent reflections on the topic, see Philip Pettit, *Republican Freedom: Three Axioms, Four Theorems*, *in* REPUBLICANISM AND POLITICAL THEORY 102–30 (Cécile Laborde & John Maynor eds., 2008); and Quentin Skinner, *Freedom as the Absence of Arbitrary Power*, *in* REPUBLICANISM AND POLITICAL THEORY, *supra*, at 83–101.

by domination, it will obscure more than it illuminates. It will fail to reveal all the debilitatingly confining effects of social and economic conditions that subordinate some people to others.

As Ian Carter and I have separately argued,[12] all the insights of civic republicans are easily accommodated by a proper exposition of the notion of negative liberty. Perhaps some negative-liberty theorists in the past have believed that the only type of constraint on anyone's freedom is the actual application of force by others, but such a view does not pass muster among contemporary negative-liberty philosophers. Such philosophers recognize and indeed insist that the constraints on people's liberty include all the background conditions of domination identified by civic-republican writers.

A key point in support of what has just been said is that the units over which the modern negative-liberty theorists aggregate when they measure anyone's freedom are combinations of conjunctively exercisable options.[13] A combination of conjunctively exercisable options is a set of liberties that can all be exercised together simultaneously or sequentially. When a person is subject to domination by some other party, many of the combinations of conjunctively exercisable freedoms that would have been available to her are not available. For example, her liberty to act at odds with the directives of the dominant party will not be conjunctively exercisable with her liberty to do anything which the dominant party's punitive response to her disobedience would prevent her from doing. Because a relationship of domination removes many combinations of conjunctively exercisable freedoms that would otherwise have been available to the person(s) subordinated in that relationship, it *pro tanto* reduces the overall liberty of the person(s) in question. This insight into the freedom-constricting effects of domination has been expounded rigorously by contemporary negative-liberty theorists; an awareness of those effects is hardly unique to the civic-republican tradition.

Still, although the virtues of civic republicanism are also characteristic of modern negative-liberty theories, the republican conception of liberty and the negative conception are not identical. As I have argued elsewhere,[14] the republican conception of freedom championed by Skinner and Pettit is plagued by a number of shortcomings that do not similarly afflict the negative conception. For one thing, Skinner appears to take the view that a person is unfree to only if she knows that she has been prevented

12. IAN CARTER, A MEASURE OF FREEDOM, 237–45 (1999); Ian Carter, *How are Power and Unfreedom Related?*, *in* REPUBLICANISM AND POLITICAL THEORY, *supra* note 11, at 58–82; KRAMER, THE QUALITY OF FREEDOM, *supra* note 3, at 125–48; Matthew H. Kramer, *Liberty and Domination*, *in* REPUBLICANISM AND POLITICAL THEORY, *supra* note 11, at 31–57.

13. The aggregation also covers anyone's combinations of consistent unfreedoms. I can omit that element in the present discussion.

14. KRAMER, *supra* note 3, at 132–43.

from □-ing.[15] No such untenable restriction figures in the negative account of liberty. Pettit imposes another such restriction when he declares that unfreedom is caused only by conduct that is *intended* to produce such an effect.[16] No similar insistence on intentionality or deliberateness is included in my U Postulate, since the reasons invoked by Pettit in support of such an insistence are in fact supportive of a focus on any human conduct that gives rise to constraints (whether the constraints are imposed deliberately or unwittingly, and whether they are imposed wrongly or innocently).

Even more important, the civic-republican approach mishandles any situation—however rare—in which someone strong enough to mistreat and exploit others is resolutely disinclined to do so.[17] In any such set of circumstances, where the probability of serious encroachments by the dominant person upon the overall liberty of his contemporaries is practically nil, the redoubtable might of that person does not lessen anyone else's overall liberty significantly.[18] Because of his reclusive diffidence and his consequently firm unwillingness to take advantage of his superiority, the dominant person does not oblige other people to adjust their behavior to his desires. Uncommon though such a situation may be, it is plainly possible. Civic republicans, who contend that anyone's sheer possession of the capacity to dominate is sufficient to deprive his or her contemporaries of their freedom,[19] are committed to the view that the diffident recluse in the envisaged situation has severely curtailed the freedom enjoyed by the people in his vicinity. Such an analysis of the situation is distortive rather than illuminating.

C. Physical versus Deontic Liberty

Both in the F Postulate and in the U Postulate, the chief concepts are modal rather than deontic. That is, they concern what *can* or *cannot* occur, rather than what *should* or *should not* occur. They concern what each person is *able* or *unable* to do, rather than what each person is *permitted* or *forbidden* to do. They thus pertain to physical freedoms and unfreedoms, rather than to deontic freedoms and unfreedoms. Someone is physically free to □ if and only if he is physically unprevented from □-ing, and he is physically unfree to □ if and only if he is physically prevented from □-ing as a result of some actions or dispositions-to-perform-actions on the

15. SKINNER, LIBERTY, *supra* note 11, at 84.
16. PETTIT, REPUBLICANISM, *supra* note 11, at 26, 52–53.
17. *See* KRAMER, *supra* note 3, at 140–43.
18. Note that the might of the person need not derive from his own bodily strength. For example, his lineage or talents can make him someone to whom many other people would eagerly attach themselves as loyal subordinates if he were to allow them to do so.
19. *See* PETTIT, REPUBLICANISM, *supra* note 11, at 23, 52, 54–55.

part of some other person(s). Here "physically" is not to be understood in contrast with "mentally" or "psychologically"; rather, the relevant contrast is between "physically" and "normatively."

Deontic freedom, contrariwise, consists not in physical unpreventedness but instead in permittedness or unforbiddenness. If somebody is deontically free to □, then he is allowed to □ by any applicable authoritative norms such as legal mandates or moral principles or institutional rules. Conversely, if somebody is deontically *un*free to □, then he is prohibited from □-ing by one or more of those authoritative norms. When we ask whether somebody is deontically free to □, we are not asking whether he is *capable* of □-ing; we are asking whether he is *entitled* to □.

Physical liberty and deontic liberty differ in a number of respects that derive in various ways from the basic modal/deontic difference just recounted.[20] For one thing, the predicates "is deontically free" and "is deontically unfree" are contradictories rather than merely contraries, and thus the predicates "is deontically unfree" and "is not free deontically" are equivalent.[21] In other words, the concept of deontic freedom is bivalent rather than trivalent. Someone is deontically free to □ if and only if she is not deontically unfree to □. In regard to such freedom, there is no category that corresponds to the category of mere inabilities.

Perhaps the most obvious dissimilarity between the concept of physical freedom and the concept of deontic freedom is their extensional nonequivalence. That is, a person will often be deontically free to □ without being physically free to □, and vice versa. For example, although I am both legally and morally permitted to run a mile under four minutes, I am not physically able to do so; my deontic liberty to run at that speed is not accompanied by a corresponding physical liberty. Conversely, although I am physically able to assault unprovokedly the person standing directly ahead of me in a queue, I am neither legally nor morally permitted to do so. My physical freedom to commit the assault is not accompanied by a corresponding deontic freedom. Permissibility and ability can coincide and very frequently do coincide, but they likewise frequently diverge.

A more subtle dissimilarity between physical liberty and deontic liberty pertains to the isolability of actions.[22] The removal of someone's physical freedom to □ will often require the removal of his physical freedoms to do things that are crucially prerequisite to his □-ing, whereas the removal of his deontic freedom to □ (through the enactment of a legal ban on □-ing, for example) never requires the removal of any of his deontic freedoms to

20. *See* KRAMER, *supra* note 3, at 60–75.

21. I am prescinding here from statements that involve radical reference failures or other presuppositional failures. For some remarks on such failures, see MATTHEW H. KRAMER, OBJECTIVITY AND THE RULE OF LAW 69–70, 72–73 (2007).

22. *See* KRAMER, *supra* note 3, at 63–64.

do things that are crucially prerequisite to his □-ing. If somebody remains physically free to take steps that would immediately antecede his □-ing, then the prevention of his □-ing will typically depend on monitoring and rapid interventions by other people. In connection with some activities, such monitoring and interventions will be feasible; in connection with many other activities, however, those last-minute preventative intrusions will not be realistically possible. An intervention at an earlier stage is sometimes essential if a person's physical freedom to □ is genuinely to be eliminated. Nothing similar is ever essential for the removal of someone's *deontic* liberty to □. Precisely because the elimination of any person's deontic freedom to □ concerns what is impermissible rather than what is impossible, that elimination is perfectly consistent with a situation in which the person is deontically free to do virtually everything that is physically indispensable for his □-ing.

A further difference between physical liberty and deontic liberty is centered on the avoidability of actions. As I have contended elsewhere,[23] a person whose mind has not been completely taken over by someone else or by certain severe mental illnesses will retain the physical freedom to eschew any particular action. At the very least, such a person will always have the option of surrendering in a wholly passive manner to the operations of external forces. Accordingly, there is no such thing as a physically unavoidable action. When we cross from the realm of the physical to the realm of the deontic, however, we encounter a very different situation. Anybody can be deontically unfree to forgo certain types or instances of conduct. For example, a person whose income is subject to taxation will typically be legally unfree—and probably also morally unfree—to abstain from writing his name on any income-tax forms that require his signature. Though he is physically free to refrain from signing those forms in a timely fashion, he is not deontically free to refrain. He is legally obligated, and probably also morally obligated, to sign the relevant documents. In his case, as in multitudinous other cases, legal or moral requirements can make the performance of certain actions mandatory. In that respect, legal or moral mandatoriness differs from the material impediments that limit somebody's physical freedom.

Of course, these several divergences between physical liberty and deontic liberty should not induce us to overlook the many affinities between them. Liberty of each type consists in an absence of constraints. Though physical constraints differ from deontic constraints in the sundry ways that have just been recounted, unconstrainedness is the essence of deontic freedom just as it is of physical freedom. Freedom of either type is negative rather than positive.

---

23. *See id*. at 17–32.

II. FREEDOM AND THE RULE OF LAW

With the negative/positive and negative/republican and physical/deontic distinctions in hand, we are now in a position to assess a recent effort by Nigel Simmonds to establish that a certain moral desideratum—the desideratum of liberty—is intrinsically and distinctively served by the rule of law.[24] Simmonds has sought in some of his earlier work to trace inherent connections between the rule of law and freedom,[25] and I have elsewhere rebutted his assertions along those lines.[26] We shall here investigate whether his recent attempt to trace such connections is any more successful than his earlier attempts. Given that the purported demonstration of an intrinsic link between the rule of law and liberty is a central element of Simmonds's endeavor to displace legal positivism with his own natural-law theory, my enquiry into his account of freedom is of major jurisprudential significance.

A. Some Preliminary Exposition

In the following passage, Simmonds begins to expound his conception of liberty:

> [R]egimes may observe the rule of law and yet narrowly restrict the repertoire of actions lawfully available to the citizen. However, the concept of liberty is not a simple idea that can helpfully be equated with the availability of a range of choices. It is conceivable that a free man might have fewer options available to him than a slave; and this is so whether we judge the availability of options by reference to the number of normative prohibitions bearing upon the agent, or the number of factual restrictions. The connection between slavery and a restricted set of options is therefore purely contingent, yet we do not think that slavery is only contingently connected with freedom: we think of slavery as the very embodiment of unfreedom. Even when the slave has an extensive range of options available to him, we think of him as unfree. This is presumably because of the conditions under which he enjoys that ex-

24. For Simmonds's argument, see his LAW AS A MORAL IDEA 99–104, 141–42 (2007).

25. N.E. SIMMONDS, CENTRAL ISSUES IN JURISPRUDENCE 123 (1986); N.E. SIMMONDS, CENTRAL ISSUES IN JURISPRUDENCE 238–47 (2d ed. 2002).

26. MATTHEW H. KRAMER, IN DEFENSE OF LEGAL POSITIVISM 55–58 (1999); MATTHEW H. KRAMER, WHERE LAW AND MORALITY MEET 196–200, 211–15 (2004). I have also taken exception to many other aspects of Simmonds's anti-positivist theorizing. *See* KRAMER, *supra* note 21, at 105–09; Matthew H. Kramer, *The Big Bad Wolf: Legal Positivism and Its Detractors*, 49 AM. J. JURIS. 1 (2004); Matthew H. Kramer, *Incentives, Interests, and Inclinations: Legal Positivism Redefended*, 51 AM. J. JURIS. 165 (2006); Matthew H. Kramer, *Once More into the Fray: Challenges for Legal Positivism*, 58 U. TORONTO L.J. 1 (2008).

> tensive range of options, for they are fully dependent upon the will of the master.[27]

Simmonds does not cite any writings from the huge philosophical literature on freedom, and he does nothing to elucidate the notion of slavery that plays such a salient role in his remarks. He relies quite heavily on unexplicated intuitions. Hence, the reconstruction of his conception of liberty has to be slightly conjectural. Nonetheless, the gist of his account can be worked out with reference to the distinctions drawn in the preceding portions of this Essay.

1. The Negative/Positive Distinction

Although Simmonds invokes the concept of a free man, and although that concept is often associated with theories of positive liberty, his conception of freedom appears to be predominantly negative. He believes that an account of freedom as opportunities or as combinations of opportunities is inadequate, but he does not suggest that such an account should be replaced by a positive-liberty focus on achievements. Instead, as becomes even clearer in the following passage (which appears immediately after the passage quoted above), he is contending that questions about the sheer range of the opportunities open to this or that person should be conjoined with questions about the dependence of those opportunities on the wills of other people:

> There are, as it were, two different dimensions to freedom: one concerning the range of options available to us without interference, and the other concerning the degree to which that range of options is itself dependent upon the will of another. In claiming that the rule of law is intrinsically linked to liberty, we rely upon the same concept of liberty that is invoked in treating slavery as intrinsically violative of liberty.[28]

Simmonds nowhere explains the relationship between his two dimensions of liberty, and he therefore omits to reveal how those dimensions are to be combined in a philosophical analysis. However, he appears to presume that they amount to individually necessary and jointly sufficient conditions for the existence of various freedoms. In other words, someone is free to □ if and only if (1) she has an opportunity to □ and (2) the continued existence of that opportunity is not dependent on the will of anyone else. This understanding of freedom is a variant—a highly problematic variant,

27. SIMMONDS, *supra* note 24, at 101.
28. *Id.*

as we shall see—of the negative-liberty theorists' understanding. It is not a doctrine of positive liberty.

2. The Negative/Republican Distinction

As has been remarked, Simmonds does not cite anything in the philosophical literature on freedom; hence, we have to speculate about the inspiration for his ascription of central importance to the property of dependence on the wills of others. Perhaps he has been most heavily influenced by the works of Friedrich Hayek—though his sole reference to Hayek is in a different context on a different point[29]—but his views may also have been shaped by the civic-republican tradition. Theorists such as Pettit and Skinner repeatedly declare that the correlate of domination is dependence. Skinner, for example, writes as follows when recounting the attitudes of civic republicans toward the discretionary dominance of tyrants:

> [I]f you live under any form of government that allows for the exercise of prerogative or discretionary powers outside the law, you will already be living as a slave. . . . The very fact . . . that your rulers possess such arbitrary powers means that the continued enjoyment of your civil liberty remains at all times dependent on their goodwill. But this is to say that you remain subject or liable to having your rights of action curtailed or withdrawn at any time.[30]

A host of other statements along the same lines bestrew the books and essays in which Skinner and Pettit have characterized civic-republican freedom as the antithesis of domination. Thus, although Simmonds makes no mention of any of their works, his conception of liberty can fairly be classified as republican. Consequently, he is vulnerable to the criticisms of civic republicanism that have been synopsized in Subpart I.B above. Indeed, as will be argued shortly, he takes a fatally problematic position when he insists that a person's freedoms do not exist as such unless their continuation is independent of the wills of other people.

3. The Physical/Deontic Distinction

In the first and longer of my two quotations from Simmonds above,[31] he indicates that his conception of freedom can construe the availability of options either as the absence of physical restrictions or as the absence of

29. *Id.* at 184.
30. SKINNER, LIBERTY, *supra* note 11, at 70.
31. *See* SIMMONDS, *supra* note 24, at 101.

deontic restrictions. He allows that someone who is classifiable as a slave might face fewer physical constraints and normative constraints on her activities than might someone who is classifiable as a free person. Given as much, his conception of slavery is badly in need of elaboration, which it nowhere receives. For example, does Simmonds think that a person is classifiable as a slave whenever she can be exchanged to someone by somebody else for a payment? Does he, consequently, believe that professional baseball players and basketball players are slaves? Does he think that such athletes are unfree to play their sports for their teams, because the continuation of their opportunities to play for those teams is dependent on the wills of the teams' owners and administrators?

Though Simmonds sheds no light on these questions, the final one of them prefigures a broader objection to his analysis that I will raise imminently. For the moment, we can simply note that his conception of freedom encompasses both physical liberty and deontic liberty. My critique of his conception will concentrate chiefly on physical freedom, for his subsequent remarks (to be examined below) are applicable mainly to such freedom.

B. The Unsustainability of Simmonds's Account of Freedom

As will now be contended, Simmonds's account of freedom is unsustainable. Accordingly, his endeavor to demonstrate the inherently moral character of law by positing an intrinsic connection between law and the ideal of liberty is a non-starter. Moreover, that endeavor itself—quite apart from the irreparably problematic conception of liberty on which it rests—is vitiated further by the way in which it deals with slavery.

1. Unfreedom Everywhere

Immediately after the two paragraphs from Simmonds that have already been quoted, we encounter the key paragraph in which he seeks to show the indissoluble connection between law and freedom:

> When a citizen lives under the rule of law, it is conceivable that the duties imposed upon him or her will be very extensive and onerous, and the interstices between these duties might leave very few options available. Yet, if the rule of law is a reality, the duties will have limits and the limits will not be dependent upon the will of any other person. Might they be dependent upon the will of a sovereign lawmaker? One needs to remember here that laws must be prospective, and must not be subject to constant change. At any

> one time, therefore, the law may conflict with the present will of the sovereign lawmaker.[32]

If we take seriously the conception of freedom to which Simmonds adheres, we shall be led to a conclusion starkly at odds with the conclusion that he hopes to draw. That is, we shall be led to conclude that nobody living under a system of legal governance is ever free in any respect.

According to Simmonds's conception of liberty, a person is not free to □ unless the continuation of her opportunities to □ is independent of the wills of other people.[33] Yet, under the rule of law or under any other mode of governance, the continuation of anyone's opportunities is always dependent on the wills of other people. Most notably, the continued existence of the opportunities open to any person is dependent on the wills of legal–governmental officials, who if they are so inclined can act concertedly to remove any of those opportunities (if necessary, by slaying the person). In any particular context, of course, the officials may be utterly undisposed to act in such a fashion toward some particular individual; but their disinclination to act in that fashion is a product of their wills. At any given time, the fact that some person enjoys any opportunities to □ is due partly to the fact that the officials have not theretofore taken steps to remove or avert the existence of those opportunities. Their not having theretofore taken such steps is due to their not having willed to act thus. Similarly, at any given time, the fact that some person will continue to enjoy opportunities to □ is due partly to the fact that the officials are not currently taking steps to remove those opportunities. Their not taking such steps is due to their not having willed to act thus. Hence, if Simmonds's conception of liberty were correct, we would have to conclude that everyone living within a society governed in conformity to the rule of law is unfree in all or virtually all respects. Precisely because Simmonds's conception generates such a conclusion, it is fallacious.

---

32. *Id.*

33. My next quotation from Simmonds (in Part II.B.2)—like some other passages in SIMMONDS, *supra* note 24, at 142–43—refers to somebody's independence from the wills of multiple other people. Admittedly, however, the quotations from Simmonds adduced heretofore have referred instead to somebody's independence from the will of one other person. Still, for at least three reasons, the distinction between dependence on the will of one other person and dependence on the wills of multiple other people is of no consequence for the arguments in this Essay. First, most situations of enslavement involve multiple oppressors, such as overseers and taskmasters. Second, it would be ludicrous for Simmonds to maintain that somebody kidnapped or subjugated by another person has been deprived of various freedoms but that somebody kidnapped or subjugated by two or more people has not been deprived of various freedoms. Third, often a context of law-application (such as a setting in which a policeman deliberates whether to arrest someone for an instance of misconduct) involves a determinative role for the will of a single official. As is stated below, my remarks on the rule of law apply not only to each legal system as a whole but also to any context of law-application within such a system.

In the passage just quoted,[34] Simmonds obscures the role of the wills of legal–governmental officials in the operations of legal systems, because his reference to that role is tucked into the laconic antecedent of a conditional.[35] The second sentence of that passage begins with the words, "Yet, if the rule of law is a reality . . . ."[36] Those seemingly innocuous words encapsulate the decisive role of the wills of legal–governmental officials in upholding the limits on legal duties that Simmonds mentions. At any given time, the continuation of the rule of law as such—throughout some legal system, or in any particular context within a system—is dependent on the inclinations of legal–governmental officials. Ergo, to say that the limits on people's legal duties are dependent on the reality of the rule of law is in effect to say that those limits are dependent on the wills of legal–governmental officials. According to Simmonds's conception of freedom, then, the interstices carved out by those limits are not domains of freedom. All the opportunities within those interstices are not genuine freedoms, for the continuation of those opportunities is dependent on the continuation of legal–governmental officials' inclinations to abide by the rule of law.

Of course, it may be extremely unlikely that the legal–governmental officials in some particular regime will depart from their current inclinations to abide by the rule of law. In that event, the regime's officials are resolutely undisposed to extinguish the opportunities that are available to people within the interstices carved out by the limits on legal duties. If there are no other factors that are likely to terminate or impair those opportunities, then the opportunities are securely available. For Simmonds, however, the secure availability of the opportunities is not sufficient to warrant their being classified as freedoms. On the contrary, they are clearly not freedoms—according to his conception of liberty—because their secure availability is dependent on the wills of legal–governmental officials. It is dependent on the officials' remaining disinclined to deviate from the rule of law.

In short, far from being able to conclude validly that the rule of law is inherently connected to freedom, Simmonds is committed to the conclusion that everyone living under the rule of law is comprehensively unfree. The difficulties that he faces are akin to those faced by civic republicans when they declare that freedoms exist only if the occurrence of dominating interference by other people is not merely unlikely but impossible. Pettit writes, for example, that "[t]he point [of establishing a republican government with the rule of law] is not just to make arbitrary interference

34. SIMMONDS, *supra* note 24, at 101.

35. A conditional is a statement with the form "If X, then Y." The "If X" clause is the antecedent of the conditional.

36. SIMMONDS, *supra* note 24, at 101.

improbable; the point is to make it inaccessible."[37] As I have maintained elsewhere,[38] this republican objective is a sheer fantasy that can never be realized in any society. To insist on its realization as a condition for the existence of any freedoms is to commit oneself to the thesis that everyone in every society is comprehensively unfree. Simmonds has saddled himself with a similarly unpalatable conclusion.

2. Sleight of Hand with Slavery

Let us probe one further passage from Simmonds, which immediately follows those that have already been quoted:

> The law might, of course, serve to establish slavery: but slaves are objects of proprietary right, not the bearers of legal rights and duties; to that extent they stand outside the system of jural relationships. If, however, the slaves enjoy certain legal protections (against the violence of their masters, for example), those protections are independent of the will of others, and dependent upon the law. To be governed by law is to enjoy a degree of independence from the will of others.[39]

This passage suffers from the same major problem that afflicts the immediately preceding passage. That is, it errs in suggesting that dependence upon the law entails independence of the wills of other people, and it consequently errs in suggesting that opportunities whose continued existence depends partly upon the law are classifiable by Simmonds as freedoms. Instead of considering that problem afresh, we should glance here at one further point.

Simmonds acknowledges that the rule of law can serve to establish the institution of chattel slavery. In a discussion aimed at drawing an inherent connection between law and liberty—where liberty is understood as the antithesis of slavery—such an acknowledgment is hardly inconsequential. However, Simmonds seeks to defuse it by observing that slaves devoid of any legal protections are only the objects of jural relations and are not themselves jural subjects. Though this latter observation is unexceptionable in itself, it does not counteract the damagingness of the fact that the rule of law can serve to establish the institution of chattel slavery. After all, the slaves remain human beings when they are excluded from the status of jural subjects. Their very exclusion from that status within a particular legal system is inimical to the notion that every such system serves the

37. PETTIT, REPUBLICANISM, *supra* note 11, at 74.
38. KRAMER, *supra* note 3, at 138–39.
39. SIMMONDS, *supra* note 24, at 101.

value of liberty. Simmonds cannot vindicate that mistaken notion by pointing out that the unprotected slaves are not jural subjects; the very fact that they are not jural subjects within the legal–governmental system that presides over them and defines the nature of their slavery is precisely what renders so ludicrous the idea that that system serves the value of liberty.

Of course, given Simmonds's conception of liberty, even the jural subjects within any legal system are comprehensively unfree. Because the continued existence of each subject's opportunities is dependent partly on the continued disinclination of legal–governmental officials to squelch those opportunities by departing from the rule of law, no subject's opportunities qualify as freedoms under Simmonds's conception. Even under a more sensible conception that does not generate such a conclusion about the jural subjects, moreover, the fact that a legal–governmental system might reduce many human beings to chattel slavery with no protections against arbitrary onslaughts is a ground for rejecting the thesis that "the rule of law is intrinsically linked to liberty."[40] No sizeable society can secure ample degrees of freedom for individuals without the rule of law, but likewise no sizeable society can sustain the institution of chattel slavery over a long period without the rule of law. Hence, we should neither infer that the rule of law is inherently connected to liberty nor infer that it is inherently connected to slavery; instead, we should recognize that its moral bearings are protean.[41]

CONCLUSION

This Essay has brought together some of the ideas about freedom that I have developed in my work on political philosophy and some of the ideas about the rule of law that I have developed in my work on legal philosophy. Though a negative-liberty position in the former domain neither entails nor is entailed by a legal-positivist position in the latter domain, the two positions can combine fruitfully. In particular, this Essay has endeavored to expose both the inadequacy of Simmonds's conception of freedom and the untenability of his natural-law insistence on an intrinsic connection between law and the ideal of liberty. In this context, and undoubtedly in a number of other contexts as well, a solid grasp of matters in political philosophy contributes to a solid grasp of jurisprudential matters.

---

40. *Id*.

41. In KRAMER, *supra* note 21, at 143–86, I have distinguished between the rule of law and the Rule of Law. The former consists in the necessary and sufficient conditions for the existence of a legal system (whatever the political complexion of the system might be), whereas the latter consists in the existence of a legal system that is both expressive and promotive of liberal-democratic values. Obviously, my remarks in the text are focused on the rule of law rather than on the Rule of Law. Legal positivists and natural-law theorists disagree about the former rather than about the latter.