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Two notions of liberty revisited

Or how to disentangle Liberty and Slavery

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The modern liberal concept of liberty has roots in Roman law
and the Roman understanding of the master and the slave.
We need to unpick that heritage to imagine a better basis for
our political aspirations

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Our idea of human freedom, with its origins in Roman law, is permeated through and through with the institution of slavery. But its links to slavery twisted the meaning of “freedom” from an empowering notion of what it is to live with dignity in a society of equals to one of mastery and control. Understanding the history of the concept should help us to regain the first and fight the second of those notions.

The meaning of the Roman word *libertas* changed dramatically over time. To be “free” meant, first and foremost, not to be a slave. Since slavery means above all else the annihilation of social ties and the ability to form them, freedom meant the capacity to make and maintain moral commitments to others. The English word “free,” for instance, is derived from a German root meaning “friend,” since to be free meant to be able to make friends, to keep promises, to live within a community of equals. Freed slaves in Rome became citizens — and this makes complete sense because to be free, by definition, meant

to be anchored in a civic community, with all the rights and responsibilities that this entailed.

By the second century AD, however, this had begun to change. The jurists gradually redefined *libertas* until it became almost indistinguishable from the power of the master. It was the right to do absolutely anything, with the exception, again, of all those things one could not do. In the *Digest*, the basic text of Roman law, the definitions of freedom and slavery appear back to back:

Freedom is the natural faculty to do whatever one wishes that is not prevented by force or law. Slavery is an institution according to the law of nations whereby one person becomes private property (dominium) of another, contrary to nature.”

Medieval commentators immediately noticed the problem here. But wouldn't this mean that everyone is free? After all, even slaves are free to do absolutely anything they're actually permitted to do. To say a slave is free (except insofar as he isn't) is a bit like saying the earth is square (except insofar as it is round), or that the sun is blue (except insofar as it is yellow), or, again, that we have an absolute right to do anything we wish with our chainsaw (except those things that we can't).

In fact, the definition introduces all sorts of complications. If freedom is natural, then surely slavery is unnatural, but if freedom and slavery are just matters of degree, then, logically, would not all restrictions on freedom be to some degree unnatural? Would not that imply that society, social rules, in fact even property rights, are unnatural as well? This is precisely what many Roman jurists did conclude—that is, when they did venture to comment on such abstract matters, which was only rarely. Originally, human beings lived in a state of nature where all things were held in common; it was war that first divided up the world, and the resultant “law of nations,”

that the first thing holds natural dominion over the second—flies in the face of just about everything we now know about cognitive science. It's obviously untrue, but we continue to hold onto it anyway, for the simple reason that none of our everyday assumptions about property, law, and freedom would make any sense without it.

To understand the history and, ultimately, incoherence of the notions of liberty grounded in Roman notions of dominion is to potentially free ourselves to re-imagine liberty. For example, to recognise the forgotten “obligations owed everyone in the entire world” inherent in our freedoms; but also to resurrect the older notion of liberty as the state achieved by citizens acting together in determination of a common good.

Before long, similar arguments came to be employed to justify the absolute power of the state. Thomas Hobbes was the first to really develop this argument in the seventeenth century, but it soon became commonplace. Government was essentially a contract, a kind of business arrangement, whereby citizens had voluntarily given up some of their natural liberties to the sovereign. Finally, similar ideas have become the basis of that most basic, dominant institution of our present economic life: wage labor, which is, effectively, the renting of our freedom in the same way that slavery can be conceived as its sale.

It's not only our freedoms that we own; the same logic has come to be applied even to our own bodies, which are treated, in such formulations, as really no different than houses, cars, or furniture. We own ourselves, therefore outsiders have no right to trespass on us.

This might seem an innocuous, even a positive notion, but it looks rather different when we take into consideration the Roman tradition of property on which it is based. To say that we own ourselves is, oddly enough, to cast ourselves as both master and slave simultaneously. 'We' are both owners (exercising absolute power over our property), and yet somehow, at the same time, the things being owned (being the object of absolute power).

The ancient Roman household, far from having been forgotten in the mists of history, is preserved in our most basic conception of ourselves—and, once again, just as in property law, the result is so strangely incoherent that it spins off into endless paradoxes the moment one tries to figure out what it would actually mean in practice. Just as lawyers have spent a thousand years trying to make sense of Roman property concepts, so have philosophers spent centuries trying to understand how it could be possible for us to have a relation of domination over ourselves. The most popular solution—to say that each of us has something called a “mind” and that this is completely separate from something else, which we can call “the body,” and

the common usages of mankind that regulate such matters as conquest, slavery, treaties, and borders, that was first responsible for inequalities of property as well.

This in turn meant that there was no intrinsic difference between private property and political power—at least, insofar as that power was based in violence. *Dominium*, a word derived from *dominus*, meaning “master”, or “slave-owner”, is the term in Roman law that means absolute private property. It is the sort of property-right that today has been theorised as the model case of a “negative freedom” — that which you can do with no interference from anyone else.

As time went on, Roman emperors also began claiming something like *dominium*, insisting that within their dominions, they had absolute freedom—in fact, that they were not bound by laws. At the same time, Roman society shifted from a republic of slave-holders to arrangements that increasingly resembled later feudal Europe, with magnates on their great estates surrounded by dependent peasants, debt servants, and an endless variety of slaves—with whom they could largely do as they pleased. The barbarian invasions that overthrew the empire merely formalized the situation, largely eliminating chattel slavery, but at the same time introducing the notion that the noble classes were descendants of the Germanic conquerors, and that the common people were inherently subservient.

Still, even in this new Medieval world, the old Roman concept of freedom remained. Freedom was simply power. When Medieval political theorists spoke of “liberty,” they were normally referring to a lord's right to do whatever he wanted within his own domains — his *dominium*. This was, again, usually assumed to be not something originally established by agreement, but a mere fact of conquest: one famous English legend holds that when, around 1290, King Edward I asked his lords to produce documents to demonstrate by what right they held their franchises (or “liberties”), the Earl Warenne

presented the king only with his rusty sword. Like Roman dominium, it was less a right than a power, and a power exercised first and foremost over people—which is why in the Middle Ages it was common to speak of the “liberty of the gallows,” meaning a lord’s right to maintain his own private place of execution.

By the time Roman law began to be recovered and modernized in the twelfth century, the term dominium posed a particular problem, since, in ordinary church Latin of the time, it had come to be used equally for “lordship” and “private property.” Medieval jurists spent a great deal of time and argument establishing whether there was indeed a difference between the two. It was a particularly thorny problem because, if property rights really were, as the Digest insisted, a form of absolute power, it was very difficult to see how anyone could have it but a king—or even, for certain jurists, God.

This genealogy of liberty allows us to understand precisely how Liberals like Adam Smith were able to imagine the world the way they did. This is a tradition that assumes that liberty is essentially the right to do what one likes with one’s own property. In fact, not only does it make property a right, it treats rights themselves as a form of property. In a way, this is the greatest paradox of all. We are so used to the idea of “having” rights—that rights are something one can possess—that we rarely think about what this might actually mean. In fact (as Medieval jurists were well aware), one man’s right is simply another’s obligation. My right to free speech is others’ obligation not to punish me for speaking; my right to a trial by a jury of my peers is the responsibility of the government to maintain a system of jury duty. The problem is just the same as it was with property rights: when we are talking about obligations owed by everyone in the entire world, it’s difficult to think about it that way. It’s much easier to speak of “having” rights and freedoms. Still, if freedom is basically our right to own things, or to treat things as if we own them, then what would it mean to

“own” a freedom—wouldn’t it have to mean that our right to own property is itself a form of property? That does seem unnecessarily convoluted. What possible reason would one have to want to define it this way?

Historically, there is a simple—if somewhat disturbing—answer to this. Those who have argued that we are the natural owners of our rights and liberties have been mainly interested in asserting that we should be free to give them away, or even to sell them.

Modern ideas of rights and liberties are derived from what came to be known as “natural rights theory”—from the time when Jean Gerson, Rector of the University of Paris, began to lay them out around 1400, building on Roman law concepts. As Richard Tuck, the premier historian of such ideas, has long noted, it is one of the great ironies of history that this was always a body of theory embraced not by the progressives of that time, but by conservatives. “For a Gersonian, liberty was property and could be exchanged in the same way and in the same terms as any other property”—sold, swapped, loaned, or otherwise voluntarily surrendered.” It followed that there could be nothing intrinsically wrong with, say, debt peonage, or even slavery. And this is exactly what natural-rights theorists came to assert. In fact, over the next centuries, these ideas came to be developed above all in Antwerp and Lisbon, cities at the very center of the emerging slave trade. After all, they argued, we don’t really know what’s going on in the lands behind places like Calabar, from which so many men and women were being enslaved and shipped to the Americas, but there is no intrinsic reason to assume that the vast majority of the human cargo conveyed to European ships had not sold themselves, or been disposed of by their legal guardians, or lost their liberty in some other perfectly legitimate fashion. No doubt some had not, but abuses will exist in any system. The important thing was that there was nothing inherently unnatural or illegitimate about the idea that freedom could be sold.