

Why Can't My Daughter Drive A Tank? Reflections on the Meaning of Liberty and Freedom in a Civil Society

When my daughter turned sixteen, and received her driving license, I half-seriously joked about buying her a tank for her first car. Like many parents, I experienced the deep fear of turning my child loose with her driving license. Parents rightfully worry about their children's safety and lives. The large number of teenager fatalities and accidents are a sound basis for that fear.

And so I half jokingly told my daughter that I was going to buy her a military tank as her first car. The idea was simple and logical really. A tank was large and strong enough to protect her as she drove about the local streets and highways. Even if she had an accident, she would be safe. In a tank, it was nearly impossible (or so I imagined) that she would be harmed, assuming, of course, the background of a relatively safe civil society.

The idea, obviously, was ludicrous and it was nothing more than a way of expressing my concern over her safety. Not only would my daughter have refused to drive a tank because of peer pressure, but driving regulations in California forbid civilians from driving vehicles of a certain size without a commercial license. Even had she agreed, the state would have prevented me from carrying out my plan.¹

Beyond the humorous image of putting a teenage driver in a tank, however, is a serious and interesting question about the nature of liberty in a free society. Why is my daughter forbidden to drive a tank? Doesn't freedom mean that she should be able to drive any vehicle she likes? The obvious answer is: "No that isn't what freedom means". Freedom doesn't mean the ability to do what one likes. Living in a free society always means living within a framework that limits individual behavior to some extent. My freedom has to be restricted so as to protect someone else's freedom. Most everyone who endorses liberty as a key concept for organizing social life agrees that freedom means that individuals have some form of right to "life, liberty and property". And to protect those rights, individuals can not kill or enslave another person or steal property to name the core limitations on which most everyone agrees. Even in free societies, then, there are limits on what people can do and liberty in a free society implies some rules and restrictions.

But what about my daughter's tank? Why does driving the tank fall into the category of activities that are forbidden? Is the law against driving a

tank related to protecting someone else’s right to their “life, liberty and property” and if so, how? And furthermore how does the activity of driving a tank, which is forbidden, differ from the activity of driving a Hummer or SUV or even a large commercial tanker, which are all permitted? By what criteria are these distinctions made and why does the tank constitute more of a violation of someone else’s fundamental rights than these other vehicles? ²

Indeed, once we dig into the question of the tank, the question reasonably arises as to why driving automobiles is permitted in the first place. Given the large number of motor vehicle fatalities, it would seem reasonable to argue that motor vehicles in general constitute a danger to people’s lives and property and therefore should be prohibited on the grounds of liberty. Why does our society permit motor vehicles at all? How can these “death machines” be reconciled with the right to “life, liberty and property”? And if we are permitting motor vehicles, why do we allow them to be driven at speeds that kill people?

The question of the tank and of motor vehicles generally, then, is one way to get at the heart of one of the most difficult and important questions about liberty in a free society. If we agree that liberty does *not* mean the ability to do whatever I like as an individual, what then does liberty mean? If we all acknowledge that limits should be set on individual liberty in a free society, by what criteria are they set? How far can the limits go, by what criteria are they established, and who gets to decide? Are there general abstract and substantive guidelines that apply in all cases? Or is the determination of what constitutes liberty dependent and context bound?

I shall use the examples of the tank, the Hummer, SUV and motor vehicles generally, to explore these questions and argue for a particular view of liberty in a free society. My aim is to show that liberty does not, as is commonly assumed, tell us in advance very much specifically about what activities should and should not be permissible in society. By this I mean that the specifics of what does and does not constitute liberty can not be known ahead of time through any specification of rights or protections. Rather, liberty is better understood as a process or framework whereby society can ensure that human life has a chance to flourish.

Liberty As A Framework for Defining Human Flourishing

What human flourishing means is not something that is defined once and for all. That is why liberty can not be exhaustively specified in a detailed set of substantive and known rules ahead of time, without knowing the conditions of life or the values of those who live in those conditions. Human flourishing or happiness is defined here as the outcome of a collective engagement with social and individual values, our situation in life and the world, and our personal needs and psychologies. What constitutes human

flourishing can and does change from generation to generation. One generation’s sense of flourishing is not another’s. And within a given generation not everyone’s concept of flourishing can be fully realized or is the same.

The realization that people disagree about human flourishing is arguably one of the core insights that gave rise to the liberty tradition in the first place.³ And the concept of liberty was in part a way to think about how diverse conceptions of human flourishing could be worked out within a given social life. Liberty in this view is best understood as the process and framework of enabling a peaceful or non-violent way in which our diverse interests, values and images of flourishing interact to organize and structure social life. On this view, liberty can be thought of as both a framework and set of guidelines for working out the specific decisions of social life.

This way of understanding liberty differs from a more common and popular understanding of liberty as a set of known and substantive commitments. Whether these are called rights specifically, as some refer to them, or are thought of as commitments based on a utilitarian analysis, this other view of liberty assumes that both liberty and human flourishing can be more or less understood without reference to some specific social and historical context. Liberty, in that view, is an abstraction that cares nothing about the specifics of time and place. The implication is that the implementation of liberty should be the same anywhere and everywhere. On this more common understanding of freedom, what constitutes liberty is known before we delve into the details of social life. This other view of liberty is reflected for example in the thinking of many libertarian and conservative-leaning theorists of liberty as well as some liberal theorists as well.⁴ The notions that liberty means “minimal government intervention,” or that “economic freedom is by definition part of freedom” or that there is a set of “simple rules for a complex world” implies that the substance of liberty is known in advance before we know any details of the social situation we face. Also, the notion that we can rationally define liberty under a “veil of ignorance” implies that specific social contexts are irrelevant to the discussion. Such theories assume that there is a substantive understanding of both liberty and of human flourishing that can be agreed upon before the specifics of the social situation are examined. On many of these theories, liberty means that government should minimize its involvement as much as possible and the economy should be allowed to be as free as possible. The protections of life, liberty and property, whether justified as rights, or as the logical consequence of utilitarian analysis, are substantive principles that tell us how to implement liberty and how to create the best form of social life, before deliberation occurs.

The alternative view of liberty that I am developing here does not treat liberty as a quantity known in advance, precisely because the notion of human flourishing is variable. This is a fundamental point that underlies this understanding of liberty. Here we recognize not only that the

conceptions of human flourishing are diverse but that alternative conceptions can be equally good. In other words, alternative forms of life that differ from each other in many fundamental respects of law can both be good and equally protect principles of life, liberty and property. This is a critical assumption and conviction underlying this alternative view of liberty, namely, that an implementation of liberty can result in significantly different types of social formations. Though different from each other, each can be equally free societies. As examples, one might point to certain versions of democracies in Europe compared to the one implemented in the United States. This point is often missed in discussions of liberty for the assumption is that all free societies have to look exactly the same. But in fact there is no single social formation or organization that best represents liberty. Instead, there are alternative competing versions of social life and government that can equally claim to implement liberty. If this assumption is granted, then we cannot possibly know in advance which of the alternative possible social formations should be adopted. The only way to answer that question is by engaging in specific discussions debating those alternative arrangements.

That is not to say that any conception of social life is acceptable. Some forms of social life can be eliminated as not conforming to the requirements of a free society. This is in fact the ostensive purpose of the protections of life, liberty and property. They rule out certain forms of life, such as a dictatorship, socialism and communism, as falling outside the boundaries of a free society. We can also say, for example, that a society that permits murder, theft, and slavery is not free and therefore bad. The protections of life, liberty and property thus do have “bite” to them. They do rule out some forms of social life. But we cannot say what a free society will look like in more detail, because there can be many different forms of life that equally protect life, liberty and property. Nor can we say ahead of time that any one of them is necessarily better than others. The protection of life, liberty, and property is open to interpretation when it comes to the specifics of social life. What the dedication to liberty gives us, then, is not a single picture of what a free society should look like, nor an answer to all future questions about social life, but a framework in which we agree to engage the questions.

The notion that liberty can be implemented by many different social forms was recognized by important liberty theorists as the tradition developed historically. European thinkers such as Locke, John Trenchard and Thomas Gordon, and American champions of liberty such as James Otis, John Adams, and others, understood that free societies could implement liberty in very different forms of government. In general there was agreement that since government was predicated on the consent of the people, a people could choose either a democracy, an aristocracy or a monarchy and all were compatible with liberty. One might argue with this point today, but the key point here is that even in the founding liberty tradition, freedom was understood to be a framework for achieving the public good, and not necessarily a specific set of substantive claims about how to organize social life.⁵

Tanks, SUV’s, and Hummers

The example of driving the tank helps us to elucidate and understand this conception of liberty. As a society that endorses liberty as a value, we know that life, liberty and property should be protected. But does that knowledge help us at all to know what to do about driving a tank? In fact, it doesn’t. As we shall now see, there is nothing in the concept of liberty that helps us resolve the question as to whether our society should allow teenagers to drive tanks. One can construct an argument both for and against driving tanks based on the conception of liberty.

Advancing an argument in favor of tank driving, for example, I might argue that my daughter’s life would actually be protected by a tank and that driving tanks would be consistent with the protections of life, liberty and property. I might also argue that her driving a tank would actually protect other people’s lives as well, because she would not be able to drive above speed limits and would therefore not be another dangerous teenage driver on the road. To protect life, both hers and others, therefore, society should permit the use of a tank.

But of course this argument will not fly precisely because it has not considered how tanks on the road may impact other drivers and citizens. Tank driving may constitute a risk to them because such a slow vehicle on the highways may cause a danger to others. The tank is also potentially a danger to property especially as my daughter tries to navigate around city streets which are not designed for such large vehicles. If it does not damage personal property directly, it may cause damage to streets and sidewalks for which other people pay via taxes. In this indirect way, tank driving will impact other people’s property. They may be forced to pay higher taxes to support increased road repair.

And yet as logical as these arguments sound, they are inadequate by themselves. At stake after all is our liberty. I could argue that society should make accommodations for tank driving, especially since my daughter’s liberty to drive the tank protects her life. When we weigh taxes against protection of life, surely life is of higher value than property, which is a protection really already derivative from the protection of life?⁶ Society should make accommodations for slow tanks on the highway, perhaps by allowing them in the slow lane or by widening the city roads. Is not this kind of effort analogous to what we are already doing today when we build bicycle lanes and build special wheelchair ramps from taxpayer’s money for disabled people who cannot climb steps? So what if the taxpayers have to foot the bill? This is a matter of liberty and protecting my daughter’s life should supersede other people’s worries about taxes?

This argument of course will sound ludicrous to most of us. Though tank permits could be justified based on a protection of life, liberty and property and though it may resemble other liberties that are permitted,

California (and I assume other states as well) have outlawed the driving of tanks. Why is that?

Before we attempt to answer this question, let us add some further complexity to the question. Whatever reasons we give for forbidding permits for military vehicles, we must also explain why California permits the driving of SUV's. What rationale makes the driving of these vehicles permissible while outlawing the driving of a tank? Presumably the argument would run something like this. There are a couple of fundamental differences between SUV's and tanks: 1) a tank is larger than an SUV and moves more slowly and 2) a tank is really designed for military purposes, whereas an SUV is designed for civilian purposes. Here we would have to actually check the facts and determine whether a tank is actually larger or actually slower than SUV's. A superficial survey suggests that in fact the M1 tank, which is 32 ft long and 12 ft wide, is twice the length and width of the 2008 Cadillac Escalade which is only 16 ft long and 6.6 feet wide.⁷ Moreover, the M1 tank which is considered a relatively fast tank has top speeds of 45 mph and weighs 60-70 tons (about 120,000 pounds) whereas the Escalade can drive at speeds exceeding 60 mph and is only 14,000 lbs. I'm not positive that these arguments have ever been used to explain why tank driving is forbidden but presumably this is something like the discussion that would unfold if someone argued that tank driving was a matter of personal liberty.

Now let us take for granted for a moment that the above arguments are factually true (i.e., the tank is heavier, bigger, and slower). If I were really serious about my daughter's tank driving, I might respond in a couple of different ways. First, I might dismiss the issue of as inconsequential. In fact, there are some commercial vehicles that are much larger than tanks. Why should commercial drivers receive an exemption on large tankers? Aren't the rights of the individual more important than the rights of commercial businesses? Moreover, if size is the decisive factor, I might be willing to build a tank of smaller dimensions. If I built a very small tank, I could argue, my daughter should be allowed to drive it.

But if the primary issue is cost to the taxpayers due to road damage, then I might ask why SUVs, trucks and oil tankers are permitted? Why do taxpayers foot the bill for road work caused by those large vehicles? With regard to the argument that the tank was not designed for civilian purposes, I could point to the fact that California allows people to drive the Hummer which was designed originally as a military vehicle. Finally, I could argue that in fact tank driving is actually more consistent with a society that protects “life, liberty and property” than permits of automobiles because putting teenagers in tanks would reduce vehicular deaths and thus protect life.

On deeper reflection, I might actually raise the question of why automobiles are permitted in general. The number of automobile fatalities yearly is quite high. In 2005, 39,000 people died from automobile accidents in the United States.⁸ Why does our society permit automobile driving which

are so dangerous to human life? How many deaths are acceptable to us? If there were one million deaths per year would we permit automotive driving? The answer is clearly that we allow people the liberty to take the risk of driving, but we try to mitigate the risks by safety standards, by mandating speed limits, and safety belts, and bumpers recognizes that drivers are safer at certain speeds than at others and that change in the vehicles standards can reduce deaths. But if we really wanted to eliminate fatalities almost entirely we could reduce the limits from 55 mph on the highway to perhaps 35 mph. Those speeds would likely eliminate most if not all fatalities. But we do not eliminate automobiles or limit speed limits further because our form of life has become so dependent on the car and on the ability to cover distances at certain speeds. Speed limits of 35 mph would so severely impact our ways of life, that no one has thought to make such arguments and few people would take them seriously. Our society has made the distinction that driving, though potentially fatal, is legal. But driving at 80 or 90 mph is (in California at least) is not legal.

Key Dimensions Of A Immanent Liberty Concept

This somewhat ludicrous discussion that began with the issue of the tank helps to points out certain key aspects of the conception of liberty discussed above.

First, it makes obvious that any kind of human activity can be justified by the principle of liberty. This insight about liberty is very important. Almost anything we can do imagine doing can be justified in terms of life, liberty and property. Consider a few other relevant examples: smoking cigarettes, drinking alcohol, gun ownership, smoking marijuana, same-sex marriage, abortion and so on and so forth. Or take some less contentious examples: driving at 100 mph, having the right to paint my house any color I like, having the right to build my home as high as I wish, or putting a for-sale sign on my car that is sitting in my driveway. So the first insight about liberty is any action can be justified by an appeal to liberty. By the same token, one can argue for the prohibition of any action on the basis of liberty. Since what constitutes harm to another person is dependent on notions of harm that are variable and affected by people’s values, any action can conceivably be construed by another person as creating harm.

This brings us to the second important insight. The concept of liberty by itself can’t assist us in determining what types of actions go into the forbidden category and which into the permitted category. Some other grounds of appeal must be invoked to make that decision. In other words, the protections of life, liberty and property do not by themselves help us draw distinctions between what is acceptable and what is not, between cars, SUV’s and Hummers, on the one hand, and tanks, on the other. We have to

appeal to other criteria outside of these basic protections: size, function, impact on road repair, our values, the mortality statistics. Then we have to weigh the implications of each of those. Does the size or speed matter? Does the amount of road repair matter? How many deaths are acceptable? How dependent are we on automobiles to function as a society?

This is true of most distinctions that society makes. There is no “liberty quotient” that makes one action permissible and another forbidden. We can't appeal to liberty in general to understand whether smoking, carrying guns, same-sex marriage, polygamy or any other contentious social issue should be permissible or forbidden. Without weighing the facts, the social conditions, and knowledge, we can't make a decision. And even then we may have conflicting views of what those facts, conditions and knowledge mean. Liberty tells us only that we have to engage the conceptions of life, liberty and property when we make the decisions and that we must have an agreed procedure for resolving the disagreements.

The conception of liberty does not by itself tell us how we should answer the question about tank permits or how we should distinguish between what is in and what is out of the category of permitted actions. This is because the concept of liberty has very little specific substantive content to it. It tells us to weigh life, liberty and property as criteria in decision making. But there is a huge distance to travel from those concepts to the specific question of whether cigarettes or tanks should be permitted. Liberty, in other words, generally can not say what should be in the box of permissible or forbidden activities. This is what H. N. Hirsch, for example, means when he says that liberty is a “black box” whose content can't be specified.⁹ A variety of other values and judgments enter into the decision that tips the decision towards making an action acceptable or not. It is wrong then to say that my liberty is restricted when government or society forbid an action or that liberty mandates minimal government involvement. Liberty mandates no such thing. It does not predict ahead of time how most questions that societies face should be answered.

What the concept of liberty does is something else. Liberty gives us guidance as to how to engage the question and some key criteria to weigh in our decision making process. But it does not give us specific rules for answering the question. That is why there can not be “simple rules for a complex world” as Richard Epstein says. On the contrary, liberty implies that society must debate distinctions between what is allowed and what is not. Precisely because those distinctions are messy, complex and dependent on social values and the particular social conditions, no rules can be given in advance. For people who want simple rules, a free society is not really the answer. In reality, they are preferring a totalitarian framework where rules are set ahead of time by some philosophical judicial body and enforced with no further discussion. A free society is by definition messy and complex because there are no rules that can be decided in advance without digging

into the specifics of the social situation and the values by which society goes about making its decisions.

This brings us to a further point about liberty. Any law is a restriction on someone’s liberty, because to have law is by definition to restrict someone’s liberty. Or to put it another way, to live in society is by definition to have agreed to be bound by rules. But there is no contradiction in that fact.¹⁰ Law both restricts and limits freedom even as it makes freedom possible. Liberty then does not tell us which actions to forbid or which to permit. Other values enter in to make the decision. This is the point that is often overlooked in discussions of liberty. The concept of liberty brings certain formal values to the table: It says that the criteria of life, liberty and property should be considerations. But beyond that, liberty does not tell us what other criteria to weigh or how to weigh them. It does not tell us whether 39,000 deaths caused by automobile fatalities is too much or tolerable. It does not tell us whether the distinctions between a Hummer and a tank warrant permitting one and forbidding the other. It does not tell us, in other words, what values to use in drawing distinctions or even what distinctions to find meaningful. Liberty can not tell us what values to use because values differ between groups, they change over time and part of freedom is allowing different notions of human flourishing to shape how we draw distinctions.

My argument then is that there are no absolute set of criteria someplace outside of social life and outside of people’s specific commitments that allow us to know whether to prohibit tank driving or cigarette smoking or same-sex marriage. There is no legitimate notion of freedom or liberty that will say that one set of activities should be permitted and another set forbidden. And the reason for that is that liberty’s protection of life, liberty and property are general criteria that have to be implemented with some set of distinctions. Those distinctions are not themselves contained in the concept of liberty but are drawn up and made through the normal intercourse of social life. What liberty ensures is that “life, liberty and property” are substantive concepts that enter into the conversation and shape it. But those concepts don’t settle what specifically counts as life, liberty or property in specific situations.

The fact that the concept of liberty really gives little guidance as to how to draw distinctions in social life leads one theorist to throw up his hands and declare that the concept of liberty is therefore meaningless.¹¹ But this open-ended context-sensitive quality of liberty is better viewed as the concept’s very strength. Indeed, one can argue that the flexibility of a liberty-based society is precisely liberty’s intent and core strength. The protections on life, liberty and property have some content to them, since they rule out certain types of human social organizations as illegitimate (totalitarian, communist and socialist). But the power of liberty is precisely in leaving open a great many decisions about social life and in recognizing that a wide range of social forms can all be equally free. This openness and

flexibility comes from the recognition that people disagree about social life and bring different values to the social table. The decisions of a social body that values liberty have to take account of such diversity as it navigates through decisions about what to permit and what to forbid.

Advantages to the Immanent View of Liberty

We can describe the view of liberty developed here as “context-sensitive,” as “conditions-based” , as “open-ended” or even as “immanent,” as each of these descriptions captures certain aspects of liberty and distinguish it from other concepts.

There are several advantage of the view of liberty being developed here. First, this conception gives flexibility to how societies implement liberty. Different forms of government and constitutions can all be legitimized within a framework of liberty. That is why when the American founders debated the nature of the American constitution, various models were considered. They didn't immediately know which form of government would best create their ideal of liberty. They debated how much control to give the federal government, whether to have a single or bi-cameral congress, whether to have representation based on the size of state population or whether to give each state equal representation. All of the options on the table were argued within a framework that endorsed liberty. The constitutional debates had everything to do with disagreements about the best way of creating a free society and how much a free society should be governed by popular consent. The constitution arguably represented a pragmatic compromise between competing visions of what the best form of free government should be.¹² And those competing visions continued to debate the meaning of the Constitution after its ratification.¹³ The American Constitution, then, could have ended up with a very different set of laws than it did. The Constitution also provides for the ability to be changed by amendment in recognition that the founding principles of a society do not always stay stable or static. There are no specific set of rules that constitute liberty, except perhaps the generic protections of life, liberty and property, which themselves need specification within both a constitution. Even the rules have to be decided by constitutional frameworks and so can vary from society to society and over time.

Second, this concept of liberty is advantageous because it leaves open a great deal of room for societies to debate social values. No one can predict ahead of time how societies will decide specific matters. Those decisions are worked out in the institutions of decision making in that particular society. This concept of liberty gives societies flexibility to change and respond to new information and new situations. It also recognizes the fact that people have very different moral and religious frameworks. The separation of church and

state and the protection of free speech recognize this same fact. People have very deep seated convictions about what is the ultimate good and the ultimate picture of human flourishing. This open ended view of liberty allows for those clashes of view to emerge, coexist and engage each other. And it allows for decisions of social life to emerge out of those clashes of view. We cannot say up front that a particular law should be prohibited or allowed, without arguing the details in a specific social situation shaped by moral, religious and personal values. Similarly, were we to decide ahead of time that only a certain particular relationship of government to economy met the requirements of liberty, we would be limiting the actual liberty of society to decide how to manage its economy.

Third, the open ended concept of liberty makes the most sense of what actually happens historically in free societies. If one looks back in a free society like the United States, we find that the rules have changed over time and in some instances reversed themselves. Alcohol was prohibited at one point and is now permitted. A similar reversal occurred with smoking only in the opposite direction. Smoking was permitted in public spaces and is no longer. Abortion was forbidden at one point and is now permitted, although we could see encroachments on this activity in the new court. The fact is that changes can occur because there are advances in knowledge (e.g., we know cigarettes can cause death and disease), and there can be changes in values. What one supreme court ruled as legal, a later one can rule as unconstitutional. If we don't see liberty as flexible and changing, there is no way to allow or understand how one generation comes to disagree and reverse the decisions of a previous generation. To say one generation is wrong and the next is right is to miss the very core of the liberty tradition: diverse concepts of human flourishing change and conflict. The notions of flourishing respond to social situations. Limitation of government can be much more important to one generation than to an earlier one. Free societies do not have unchanging values. Those values and conceptions of human flourishing have to be fought out and renewed regularly.¹⁴ That is what consent of the people ultimately means. Each generation can sincerely believe it is adhering to the founding principles of liberty and societies' guidelines, but each can see the same issue very differently.¹⁵

Before leaving this subject of the tank completely let us consider a possible objection. Might not someone argue that the case of the tank is a trivial and non-serious example because no one seriously would argue for the liberty to drive a tank. Deriving a view of liberty from this example is therefore problematic because most issues related to liberty such as abortion or same-sex marriage are much more serious and contentious. But I would argue that there is no way to predict ahead of time which issues will become contentious. Had this essay been written in the 1930's instead of 2007, the same objection might have been made of what are very contentious issues today. In the 1930's or 40's, before the link between cigarette smoking and cancer was established, no one would have seriously advocated laws

prohibiting smoking in public places. Had they done so, the argument would have sounded as absurd as mine about tanks. Similarly, had anyone seriously argued for same-sex marriage before homosexuality was legalized, they would not have been taken seriously. The point is that changes in knowledge and values will shift the boundary of where the question of liberty and harm falls. We can never say ahead of time which actions that were previously prohibited with no serious complaint about liberty infringement will turn out one day to be major areas of contest. In other words, liberty has no predictive value for determining where the contests over liberty will occur. The notion of what is harm is itself dependent on social context and since what to one generation constitutes harm to another does not. This enlarges our view of liberty because what amounts to protections of We can only in retrospect look back and understand how an issue came to be scrutinized as a problem of liberty. This means that many of our taken-for granted prohibitions (like driving at the 60 mph speed limit, or driving tanks, or polygamy) could in the future, under certain conditions not yet imaginable, end up being at the center of debates over personal liberty.

Given this view of liberty, we find that social values, shaped by religious and community traditions and personal experiences enter very heavily into the decisions about liberties and privileges in a community. These values shape how communities allocate weight to facts and circumstances when making decisions about what is a permitted and forbidden activity. The distinction between driving a tank and a Hummer has nothing substantive that tells us which should be permitted and which should be forbidden. It is the social, religious and personal values that both determine what distinctions matter and how people come to a decision. Some set of values have to weigh environmental factors, safety risks, consequences to taxpayers and so forth. Some set of values have to say which distinctions matter in the first place. Depending on how the community weighs those factors and risks, the action may be considered lawful or not. The goal of liberty, then, is not to decide ahead of time the substance of decisions but to provide a framework in which all the various facts and values can be weighed and a decision reached.

It is, of course, reasonable to ask how societies should navigate differences of social opinion and values that weigh in on the question of what actions to permit and which to forbid. The question of how divergent values and views should be handled and whether decisions should be decided by simple majority decisions or whether minority views should be protected and to what extent are all important and critical questions in free societies. But they are not the question of liberty itself. They are questions about how liberty should be implemented in a particular society, in other words, they are questions for constitutions. How fully a society should weigh equal rights or distributive notions of justice are questions that occur within a system of liberty, not questions of liberty itself.¹⁶ In other words, liberty does not tell us whether equal rights should be an ideal or whether free markets should be

ideal. It does not tell us whether human labor should look like a commodities market or be treated by different values. The decisions affecting those decisions have to come from within a liberty system and a set of rules that have been adopted for decision making. This means that two different liberty embracing societies can have very different attitudes towards equal rights and free markets. It also means that minority rights can be weighed differently in two different free societies depending on how the views of minorities and majorities are handled. As I hope to show in another context, even the question of equal rights depends on background values that have to be constituted and agreed. ¹⁷

If the implementation of liberty can differ fundamentally from society to society and generation to generation what is the status of the protections on life, liberty and property? How much substantive content or “bite” do those protections entail?

We are now in position to understand the role of the protections of life, liberty and property. These protections are very broad generalizations within which the discussion takes place. They provide outer boundaries if you will beyond which discussions can’t take place. In this sense they do have substantive “bite” to them. They limit some actions as out of bounds. A free society cannot permit murder, or slavery, or stealing. But beyond those broad and limits, there is a great deal of latitude and flexibility as to what society can do. It can outlaw tanks, Hummers or smoking and it can set regulations around the economy. But it can only do so through defined and known mechanisms that establish what constitutes the people’s will and notion of public good. How it arrives at those notions are part of the notion of liberty. For a society must establish, and has a right to redefine, what it thinks of as “representation” and the “public good”. As long as its methods of arriving at answers, or its image of the public good, stay within the agreed decision making framework, and do not override the basic protections of life, liberty and property, as they have come to be understood and defined in that society, then it can make whatever rules it likes. What the protections of life, liberty and property principally establish, then, is not known laws but a set of procedures for making decisions and ascertaining the public will and setting the notion of human flourishing. At times, as values change, a society may from time to time reconsider how it makes decisions, whether it fairly weighs diverse views, and whether its mechanisms of representation are fair.

Even very basic issues, like what constitutes protections of life, liberty and property are subject to different interpretations. For example, does the death penalty violate the protection of life or can some heinous actions such as murder take away a person’s basic original protection to life? And if property is protected, can government take taxes and how much? Or can a government take away property for public good and under what conditions? The very definitions of life, liberty, and property, therefore are themselves in some sense dependent on the social values that are brought to bear on their meaning. When life starts and ends is not an objective fact but a construction

that is applied by society. And therefore whether abortion is murder or not or whether a doctor should turn off a respirator of a brain dead but breathing patient depends on how a society defines life and death.

On Other Views of Liberty

The view liberty developed in this essay contrasts with many alternative views of liberty promoted by other theorists. As noted earlier, this view tends to be associated with adjectives like context-bound, immanent, open-ended and so on. It contrasts with a view of liberty that is defined outside of context, and that depends on absolute criteria known ahead of time before investigation of social life occurs. The immanent or context bound view of liberty sees government as playing a much more constructive and positive role in the achievement of liberty than do many other views. Rather than seeing liberty as something that exists outside of and before government, and thus something that government limits, this view sees liberty as emerging out of social life through a process structured by government and constitution. Government is not a necessary evil to be tolerated in only its minimal forms, but a positive force that creates liberty as a condition in which we live. Seeing government and liberty in this way involves a fundamental change in perspective, a kind of paradigm shift. Rather than seeing government as a restriction on liberty, which preexists government, we see government as the condition by which liberty comes into existence. Liberty emerges from the collective process of trying to define what forms of practice come closest to giving us the life we want to live, the process of coming to agreement on human flourishing. From this vantage point, liberty is an artifact of a process working itself out. Liberty is the outcome of a clash of values and commitments in a process that attempts to allow alternative viewpoints and experience to decide what life should be like.

This notion of liberty developed here thus diverges in fundamental ways from the thinking of other recently popular theorists of liberty, particularly those who believe the contours of liberty are known in advance without needing any information about the specific contexts of social life. It is beyond the scope of this essay to develop this contrast in full detail and I hope to come back to this issue in another context. In what follows, we look briefly at some other well-known characterizations of liberty.

Consider, first, the writings of Milton Friedman, the influential Pulitzer prize-winning author of *Capitalism and Freedom* and *Free to Choose*. In *Capitalism and Freedom*, Friedman uses the analogy of playing a game to understand the role of liberty within social life. Using this analogy, Friedman explains the role of government as a kind of umpire over a game. Government is only there to enforce the rules. But as an umpire government should as much as possible stay out of the game. Liberty in Friedman's view means that government stays as much as possible out of social life. The

analogy of social life to a game is obviously problematic in that social life has much more severe consequences than most games. Losing at baseball does not have the potentially disastrous consequences of losing at social life. But let’s pursue this analogy anyway. Even if the game analogy did not trivialize the issues, there is another problem with Friedman’s analogy.¹⁸

Friedman’s analogy assumes that we all have agreed to sit down and play a game that has known and agreed rules. But the core issue of liberty as we have seen lies elsewhere. At issue is not simply the enforcement of the game already in play but rather resolving an ongoing debate about which rules we want to play the game. When the rules are agreed to, we need an umpire to enforce them and call the outcome based on observation of the play.

But what Friedman’s view does not capture is the situation when the rules themselves are under debate. In this situation, we need more than an umpire. We need a governing body, a commissioner of baseball if you will, that will determine the rules by which we play the game. The umpire, for example, doesn’t decide what materials can be used for making baseball bats (e.g., wood or aluminum) or in the game of football how a tied game should be resolved in “sudden death” playoff. Some governing body is charged with those decisions. And that governing body is expected to try to take account of competing interests: sports fans, players, business owners and so forth. Similarly, whether we can drive a Hummer or Tank is a decision about what rules govern the game of driving. The problem of liberty then is not just the need for an umpire but for deciding what rules govern the game we want to play.

But in some sense even this analogy fails to grasp the issue of liberty in social life. For in some sense the liberty question is not just what rules should govern the game, but what game do we want to play in the first place? Are we going to play baseball or football, chess or checkers? And what if there is a new game we want to invent and the current games are no longer fun? The debates about whether to allow cigarette smoking, abortion and same-sex marriage are arguably not just setting rules of games we are already playing, but changing the very nature of the game that we agree to play. Friedman’s view of liberty does not account for the way in which liberty requires that we also have to make agreements on the nature of the game we want to play.

Our theory of liberty also contrasts with the theory of liberty put forward by “market liberals”; those like Milton Friedman, F. A. Hayek and founders of the Cato Institute who argue that “economic liberty is by definition part of liberty.” What they mean is that the protections of life, liberty and property imply that governments should stay out of regulating markets. Through a particular understanding of natural rights (in the case of the Cato Institute) or through utilitarian arguments like that of Hayek and Epstein, these thinkers claim to know, even before looking at the specifics of

social life, that liberty necessarily implies minimal government and maximum economic freedom. These thinkers argue that independent of time or place, liberty must necessarily imply free markets. Governments should stay out of regulating social life as much as possible.

But on the view of liberty developed here there can be no known answers in advance about liberty. Without knowing the conditions of those in a society and their values, we cannot enforce a view of government and free markets on them. To impose a view of liberty on them is to deny the very liberty we want to protect. This paradox seems to be completely missed by those who argue that liberty is known before any information is available about social life. Since the right way to implement liberty is independent of context, the specific implementation does not depend on a given people's values or views. They argue that restrictions by government on markets represent infringements of liberty. But the irony is that they are advocating that a specific relationship between government and markets should be adopted regardless of the specific views of the people involved. Doesn't imposing a view of the relationship of government and markets on a society, without consulting that society and its values, deny liberty? What if that society believes that environmental destruction can best be achieved by increasing government regulation?

As I have argued, the very question of where to draw the distinctions in social life, and what to place in the category of permitted and forbidden actions, are themselves subject to the process by which liberty is defined. Thus to define the boundary between government and markets up front, without discussion, debate, and input from the values of a society, is in fact to impose a kind “totalitarian” regime that imposes a particular implementation of liberty without choice or input from those within that society. In other words, whether a society should let the “economy be free” or whether “economic freedom is part of freedom” is an issue that can and does change over time. And a society should be free to change in response to a societies reading of their circumstances, of their understanding of economic theory, and of their values. Liberty does not mean that there is a fixed and necessarily relationship between government and markets. The very boundary between government and markets is one that is precisely at issue when we decide which game to play.¹⁹

The question of whether, at this particular moment in time, minimal government intervention in the economy is preferable to strong government intervention is precisely the kind of question like that between the Hummer and Tank. It depends. And it depends on the current market conditions, and the current values of those who get to make the decision. It depends too on your economic theory and whether which set of economists you want to believe. To be against “economic freedom”, then, is not to be against liberty per se, just as being for a prohibition on Hummers does not make one against liberty. Like the question of the tank and the Hummer, we have to determine what values are relevant to drawing the distinction. Nor can we

say that some issues, like economic markets, are more serious than issues like Hummers and tanks. The very question of what makes an issue serious is itself context bound and dependent on conditions, facts and values that can’t be known in advance.

Conclusion

This discussion of liberty started with the question why society may prohibit my daughter from driving a tank. The case of the tank, I have argued, is like the case of any action that a society decides whether to prohibit. We cannot say, without understanding the specifics of social life in a given place and time, what types of action are candidates for prohibition. We have seen that the distinctions between what is permitted and what is forbidden is something that can only be settled by invoking a set of values and distinctions that make sense to a given society at a specific place and time. No theory of liberty can anticipate the answer to questions such as these. And therefore the classic protections of life, liberty, and property are only general guidelines that are of very little predictive value when it comes down to settling between different forms of social life.

For most actions, the question of liberty can be argued both ways. Arguments can be made on behalf of liberty and arguments can be made for the harm to others and hence for an action’s prohibition. Until we know the specific knowledge set of a given society and the values that it brings to the table, we have no way of knowing ahead of time, whether specific rules should be permitted or forbidden.

That does not mean that the protections of life, liberty and property have no content to them all. They rule out socialist, totalitarian and communist social organizations. They also rule out murder, theft, and slavery. But they do nothing more. They don’t define what constitutes property, when life starts and ends, what constitutes the kinds of harms that should be protected, or what other values society wants to protect beyond those basic protections.

This context-sensitive view of liberty has a number of advantages. It recognizes that values enter into social decision making and acknowledges that values are relevant to making law. It also acknowledges that values are contingent and can vary from context to context, from group to group and from generation to generation. We can all pretend that our values have always been the same since the founders created the constitution, but in fact values change, knowledge and beliefs change, social circumstances are different, and what society wants to achieve may vary.

This view of liberty diverges from those that claim to know how the relationship of government and markets should be implemented without any

reference to the social specifics of the times. Those views that claim to know what liberty means substantively up front before any reference to a specific social situation are, in reality, no better than totalitarian or socialist views that they purport to critique. For they argue that liberty can mean only one specific set of rules and that society should really have no say at all in interpreting what liberty means and how it should be implemented.

There are of course some questions that have not yet been answered in this essay and that are reasonable challenges for the view of liberty advanced here. One of the most difficult is the relationship of the majorities to minorities if liberty is variable and context-bound. The second is whether there are good arguments in certain situations for government intervention in economic or labor markets. Others argue that liberty implies that government should always stay out of those matters. I intend to return to these issues in subsequent essays.

¹ The California State law recognizes ten different of licenses classes of vehicles and requires different license depending on class
<http://www.dmv.ca.gov/pubs/hdbk/pgs03thru06.htm#licenseclasses>.

Standard automobiles require a class c license and cover the typical driver. Basic Class C licenses cover the following types of vehicles:

- any 2-axle vehicle with a GVWR of 26,000 lbs. or less.
- any 3-axle vehicle weighing 6,000 lbs. or less gross.
- any housecar, 40 feet or less.
- a vanpool vehicle, designed to carry more than 10 but no more than 15 persons including the driver. The driver must have a valid medical report on file and carry a valid medical card. The driver must also have a signed certification stating he/she has not been convicted of reckless driving, drunk driving, or hit-and-run in the last five years. ([VC Section 12804.9\(j\)](#)).

If you want to drive any vehicle that is larger in size or weighs more than vehicles in this basic category, you need a commercial class license of which there are several types. But you can't get a commercial class license for private purposes.

The law explains a commercial motor vehicle this way.

" A commercial motor vehicle is a motor vehicle or combination of vehicles designed or used for either the transportation of persons for compensation or property and:

- Has a gross vehicle weight rating (GVWR) of 26,001 pounds or more.
- Tows any vehicle with a GVWR of 10,001 pounds or more.
- Tows more than one vehicle or a trailer bus.
- Has three or more axles (excludes three axle vehicles weighing 6,000 pounds or less gross).
- Is any vehicle (bus, farm labor vehicle, general public paratransit vehicle, etc.) designed, used, or maintained to carry more than 10 passengers including the driver, for hire or profit, or is used by any nonprofit organization or group.
- Transports hazardous materials requiring placarding.*
- Transports hazardous wastes (Health and Safety Code §§25115 and 25117)."

See http://www.dmv.ca.gov/pubs/cdl.htm/sec1_a.htm#w

Military vehicles because of their size and weight would require a commercial class license, unless driven by a "noncivilian" for military purposes. You can

also drive a military vehicle if you are a hobbyist and drive it to and from exhibition events. Exceptions are given for vehicles of historic interest.

<http://www.dmv.ca.gov/pubs/vctop/d03/vc5004.htm>

These can only be “operated or moved over the highway primarily for the purpose of historical exhibition or other similar purpose”.

² There have been some public debates on SUV's and Hummers on both sides of the fence. See <http://skeptoid.com/episodes/4015-1>, for example, on interesting argument why SUV's should not be banned and how Hummers were not based on military vehicle body. Another writer argues that those who object to Hummer's on the road really have a “Puritan” view: <http://www.lewrockwell.com/ocregister/car-happy.html>

³ It is beyond the scope of the present essay to trace the historical causes underlying the emergence of the liberty concept in the West in the seventeenth century. There were many changes occurring in the seventeenth century that likely contributed to the growing importance of this concept. After the Christian Reformation, Europe experienced a large number of wars that were fought at least in part over religious principles and commitments. The fact that different versions of Christianity could all claim to be divine truth undermined the belief that religious authority and revelation was unambiguous and that traditional religion could be unambiguous source of political authority. Over the course of the century, new theories of religion's origin were developing, at the same time that the nature of political authority was being rethought and the notion of divine kingship was being challenged. In England, the vacillation of the monarchy back and forth between Protestant and Catholic commitments further. In addition, a growing rationalism triggered by Descartes placed a greater emphasis on human modes of knowing and understood the source of knowledge to derive from Reason. These changes combined with the beginnings of early forms of capitalism all likely contributed to the newly emerging emphasis on liberty as a powerful political concept. On the changes in the theory of religion, see for example Frank Manuel, *The Seventeenth Century Confronts the God* and Eilberg-Schwartz, *Savage in Judaism*. On the relationship of the early liberty tradition to the post-reformation situation, see Michael Zuckert, *Natural Rights*.

⁴ I will develop this point in more detail below. I have in mind here the conservative or libertarian theorists such as F. A. Hayek, Milton Friedman and Richard Epstein and those who call themselves market liberals, such as the founders of the Cato Institute. It also applies to liberal theorists such as John Rawls, *A Theory of Justice*, who derives a theory of justice from an “original position.” The theory of liberty here is more at home in the political theory of Michael Walzer, *Spheres of Justice*, who argues that a theory of distributive justice can not rest on absolute timeless principles. Walzer does

not deal with liberty specifically in this context. The theory of liberty developed here fits well with Walzer's general trend of thought.

⁵ I am not addressing here the issue of whether other protections such as trial by jury, free speech, religious freedom and representation are part of the core notion of liberty. It is arguable that the core concept of liberty depended on the protections of "life, liberty and property" with "liberty" meaning specifically that one can not be enslaved. On this meaning of liberty, see Schwartz, "Liberty is Not Freedom."

Indeed, it is arguable that the core protection was thought to be life and even the protection on liberty and property were derivative of that protection. The other protections or rights of trial by jury, free speech and press, were thought by many to be core protections of the English constitution "common law" and then were reaffirmed in the American constitution. There is evidence that the latter rights were understood to be specific rights implemented by the British Constitution and not universal natural rights, as understood by the tradition emanating from Locke. These derivative rights were ones that were protected by a specific social contract and had historical precedent. This discussion takes us beyond the scope of the present essay. For some discussion of the core protections as understood in Locke and the early modern liberty tradition see my essay "Liberty is not Freedom To Do What You Like: How Notions of Public Good Constrain Liberty In John Locke and the Early Liberty Tradition," April 2007 published on www.freedomandcapitalism.com.

⁶ See H. Schwartz "Liberty is not Freedom."

⁷ Some information on tank size can be found at the following: <http://www.globalsecurity.org/military/systems/ground/m1-intro.htm>. Information on the Escalade was found at Vehix.com: <http://www.vehix.com/research/vehicleSpecificationsVehicleDetails.aspx?year=2008&make=160000000000A&model=Escalade&trimid=19000000016625&zip=94028>

⁸ See the National Center for Statistics and Analysis (NCSA) and the National Highway Traffic Safety Administration (NHTSA) tracks fatalities and statistics. <http://www-fars.nhtsa.dot.gov/>

⁹ See Hirsch, *A Theory of Liberty*, 29-71. Hirsch argues that there are some bounds or outer limits around liberty that are determined, in the American context at least, by the founding American constitution and by the range of historical meanings that that document could have had. Liberty in his view is not completely open-ended. The view articulated here is consistent with Hirsch's view although it does not take up the question of how open-ended is the meaning of the Constitution's interpretation, which is another issue. The question of liberty in general and the particular implementation of it in a particular society are conceptually separate but

related topics. Hirsch gives much less weight to the importance that other values play in shaping notions of liberty. Or at least he sees those fluctuating values as constrained by original constitutions with a determinative range of meanings.

¹⁰ On the subject of how law both restricts liberty and makes liberty possible at the same time, see Schwartz, “Liberty Is Not Freedom.”

¹¹ See Dworkin, *Taking Rights Seriously*, 272. I agree with many of the statements Dworkin makes about liberty but not his ultimate conclusion. Dworkin makes the case quite clearly that liberty does not help us decide what is in or out of the category of prohibited actions. I agree with his sentiments when he writes the following for example:

Let us suppose two cases in which government constrains a citizen from doing what he might want to do: the government prevents him from speaking his mind on political issues; from driving his car uptown on Lexington Avenue. What is the connection between these two cases, and the difference between them, such that though they are both cases in which a citizen is constrained and deprived of liberty, his right to liberty is infringed only in the first, and not in the second? (270)

He goes on to conclude:

If we have a right to basic liberties not because they are cases in which the commodity of liberty is somehow especially at stake, but because an assault on basic liberties injures us or demeans us in some way that goes beyond its impact on liberty, then what we have a right to is not liberty at all, but to the values or interests or standing that this particular constraint defeats. (271)

I agree with Dworkin that values or interests are what determine whether the rule is prohibited or not. But I disagree with his conclusion that the concept of liberty is therefore not meaningful or in his words: “The idea of a right to liberty is a misconceived concept that does a dis-service to political thought in at least two ways” (271). After essentially abandoning the concept of liberty, Dworkin goes on to base his theory of the concept of equality.

On my view, liberty is the framework that protects the possibility that people can debate what values enter in and shape the particular notions of harm and liberty with which a given society and generation make its decisions. Dworkin himself comes to the conclusion that the protection of liberty is therefore meaningless and instead argues that society should be organized around the protection of equality. The very question of whether society should be based on “equality” à la Dworkin or “justice” à la Rawls, or a utilitarian analysis à la Hayek and Epstein, as the primary organizing principle for decision making, seems to me to be precisely the question that

liberty is meant to protect in advance.

¹² An accounts of the American Constitution’s meaning can be found in Amar, Akhil Reed, 2005, *America’s Constitution* and in Elkins and McKittrick, *The Age of Federalism*.

¹³ The early debates between Federalists and Republicans, that is, between the Jeffersonian view of the constitution and government on the one hand, and the Hamiltonian view, are amply documented in Elkins and McKittrick, *Age of Federalism*. These competing views were present during the debates leading up to the ratification of the Constitution and reappeared almost immediately as the first government under Washington tried to make policy. These debates before and after the ratification show that stable agreed meanings of the constitution had never been achieved.

¹⁴ Of course it is reasonable to ask whether there are mechanisms to allow this to be fought out and what is the meaning of these differences in values. But I argue the decision about how to let values interact in a society is not a matter of liberty, it is a matter of justice and other values. In other words, a free society has to make a decision about how to deal with variation and that decision is the outcome of liberty but not contained in liberty. Other writers in my view attempt to answer this question and then attribute the answer to the concept of liberty. But on my view, liberty does not provide an answer, only a framework for how to get to an answer. There are still many questions that are left unresolved by liberty: How does or should a society deal with the range of values? How does it balance the need to get things done with the desire to recognize the widest diversity of values and forms of life? How does it balance the desires of a majority against those of a minority? Which minorities should be taken seriously? I intend to come back to this issue in a subsequent essay.

¹⁵ The view of liberty endorsed here in some ways builds on the early modern theories of liberty found in John Locke and the American Revolutionaries. But there is one way in which it diverges completely. Locke and some of the founders believed that one could determine absolute and timeless truths through the use of Reason. This view of liberty, by contrast, sees the outcome of liberty as much more context-bound and historically dependent.

¹⁶ In other words, Rawls arguments about “justice as fairness” or of Epstein’s utilitarian arguments on the limits that should be placed on government, are in my view debates about values that occur within a free society, but should not be thought of as a framework for understanding liberty. That is why Epstein and other libertarians are wrong when they say that a liberal society should limit government rules. A liberal society should only protect the possibility of asking and resolving the question of where to

place the boundary between markets and government. That decision depends on how societies value utilitarian analyses of Epstein's sort. But liberty does not mandate that we take a utilitarian approach to social decisions.

¹⁷ I hope to develop this current line of thinking represented in this paragraph in a fuller essay later. My contention is that liberty is the framework of decision making but does not set the values or outcomes. The values are set by the constitution and the interpretation of constitutions. Liberty becomes largely irrelevant after the constitution is set, except as a guarantee that the constitution if revised has to stay within certain boundaries. Within the framework, however, what becomes meaningful is the set of values by which each generation interprets its constitution.

¹⁸ I have developed a critique of Friedman in more detail in my H. I. Schwartz, “What Color Tie Do You Vote For?: Or “Is Economic Freedom Part of Liberty”?

¹⁹ See my essay, H. I. Schwartz, “What Color Tie Do You Vote For?”

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