

**FREEDOM, MORALITY, AND LAW**  
**Rediscovering Their Ancient Harmony**

**Delivered to the Catholic Midshipman's Club  
and the Constitutional Society  
at the U.S. Naval Academy  
Annapolis, Maryland  
18 October 2016**

Every year at Harvard University's commencement exercises, the university president promotes the graduates of the law school by declaring them fit "to aid in the shaping and application of those wise restraints that make men free." That's a beautifully crafted phrase. Its poetry captures the imagination as the phrase signals to the law graduates not only the importance of the legal vocation but also the reverence that new lawyers should bring to their work. The phrase reminds the graduates that, by shaping and applying "the wise constraints that make men free," the lawyer commits himself or herself to pursuing not only technical excellence in the law but also wisdom, as well as the freedom that wisdom promises. To be wise in the law, the phrase suggests, is to know how to employ the right legal means at the right time and in the right way to bind the wills of citizens toward the noble end of preserving human freedom.

Were that all graduation ceremonies filled with such high-reaching and soul-lifting rhetoric.

As attractive a description of law and lawyering as this phrase remains, however, one might wonder whether the description is accurate? I'm sure that the president's description of law leaves not a few of Harvard's graduates wondering just how a restraint placed on human choice results in the preservation of freedom. In our postmodern age, at least, such a thought appears nonsensical.

Like all poetical flourishes, the description of law as “the wise constraint that makes men free”—which was authored by Harvard law professor John MacArthur Maguire in 1936—is subject to a variety of interpretations. For example, some read the phrase as confirming the wise and noble quality that law should possess. This is the reading given to Maguire’s phrase in one of the congressional Church Committee reports of the mid 1970s. In their largely negative assessment of the nation’s intelligence services, the reports warn:

The United States must not adopt the tactics of the enemy. Means are as important as ends. Crisis makes it tempting to ignore the wise constraints that make men free. But each time we do so, each time the means we use are wrong, our inner strength, the strength that makes us free, is lessened.<sup>1</sup>

More recently, Maguire’s description of law has been invoked to underscore not law’s wisdom but its usefulness as a tool to secure freedom, namely, the freedom of choice. Drew Faust, Harvard’s current president, recently celebrated her university’s contribution to the shaping of the American “restraints that make men free.” Harvard University, she boasts,

is where Louis Brandeis shaped a constitutional right to privacy, Charles Hamilton Houston prepared to do battle against racial segregation, and a whole host of individuals, beginning in the 1980s, laid the groundwork for what is now a constitutional right to marry whomever you love.<sup>2</sup>

According to Faust, law’s purpose today is not only to place wise restraints on human willing in the interest of preserving freedom but also, in the same interest of freedom, to loosen the restraints imposed on choice by previous generations. But what is the measure used to make this distinction? How does one generation’s restraint become another generation’s shackle?

In the few minutes I have this evening, I do not propose to arbitrate between conflicting interpretations of Maguire’s description of law. What I propose instead is to question the paradox that Maguire supposes law to possess. Maguire’s description of law as the “wise restraint that makes men free” turns wholly on the supposition that law and freedom remain in perpetual conflict, which conflict appears for Maguire in the incongruity of legal restraints being somehow a cause of freedom. This is the paradox that informs his poetry. But

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<sup>1</sup> Frederick A. O. Schwartz, Jr., and Aziz Z. Huq, *Unchecked and Unbalanced: Presidential Power in a Time of Terror* (New Press, 2007), 47.

<sup>2</sup> Drew Faust, “Wise Restraints,” *Harvard Magazine* 118.3 (January-February 2016): 5.

does this paradox really exist? We can question the paradox in two ways. First, we can ask whether law is essentially a restraint? Is law's nature only to bind the will and limit choice? Second, we can question the notion of freedom that Maguire's description of law presupposes. Is the maximization of choice, which law seems inherently to threaten, the essence of human freedom? It seems so, if Maguire's paradox is to be, in fact, a paradox. My purpose this evening is to answer both of these questions by examining classical notions of how law and freedom relate to each other. For the ancients, law and freedom hold together not in a paradoxical tension but in a close bond—they fit hand-in-glove—in large part because the ancients did not reduce law to a restraint on willing, nor did they reduce freedom to the issue of choice.

In looking at the ancient treatment of these two topics, let's begin with freedom.

## **Freedom**

Thanks to the twentieth-century renaissance of virtue ethics, we see clearly that modernity's concept of freedom is very different from the notion of freedom possessed by ancient thinkers and their medieval commentators. Beginning in the early modern period, philosophers generally, and moral theorists in particular, began to gravitate toward a notion of freedom that some have termed a "freedom of indifference." This notion of freedom stands in stark contrast to the more classical notion, which can be termed a "freedom for excellence."<sup>3</sup> What distinguishes these two notions of freedom is the premium that the modern notion places on the freedom and independence of the human will. Now, it isn't the case that classical thinkers ignored the freedom that accompanies human choice. They certainly did not, as the works of Plato and Augustine, and of Aristotle and Aquinas, demonstrate. What changes in the modern notion is that the intellect and the will are no longer seen to work in tandem in the subject's deliberation, judgment, and command of a free act, where the intellect remains spontaneously inclined to truth and the will spontaneously inclined to the good. According to the modern notion, in order for choice to be really free—and thus for the person to be really free—the will must detach itself from the intellect, such that the will can stand indifferent to the claims of truth. To be free, the will must act according to its

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<sup>3</sup> Fr. Servais Pinckaers, O.P., standardizes this language in his magisterial history of moral theology, *The Sources of Christian Ethics* (Washington, D.C.: The Catholic University of America Press, 1995).

own lights and power. To be free, the moderns thought, the will must remain unmoved before the good. To be free, the will must be moved only by itself.

In modern moral theory, the will, uncoupled from the intellect, assumes a new role in human action. Will—appetite—steps into the driver’s seat. No longer subject to the intellect’s indications about what is good for the person to pursue, the will assumes the role of an arbiter between the insights of the intellect, on the one hand, and the promptings of the passions, on the other. The will stands above what the intellect knows to be true and what the passions desire, to choose freely and indifferently between the intellect and the passions. As free, the will can also chart its own course and choose neither the lights of the intellect nor the hankerings of the passions. “The heart has its reasons about which reason knows nothing,” Pascal says, giving a refined expression to the thought of his age.<sup>4</sup>

Modernity’s regard for the will as the indifferent arbiter between intellect and passion has a long history whose details we cannot recount now. It suffices for our discussion to acknowledge that the effects of the modern shift toward the notion of freedom as indifferent remain with us. Today, it is generally accepted that the person is identified by the freedom of his will, free in the sense of being indifferent to nature and nature’s ordering, indifferent to natural and revealed truth, indifferent to sense and passion: indifferent not by accident but as a prerequisite to the will’s being and remaining free.

The novelty of modernity’s understanding of human freedom as indifferent appears clearly when we compare it to the classical notion of freedom as the fruit of excellence. Key to the classical understanding of freedom is that freedom does not precede choice so much as it follows many instances of choosing the good. According to the ancients, a person becomes freer as he achieves higher goods in life. As a result, freedom according to the classical understanding is not the prerequisite for choice but rather the reward for choosing well.

According to this notion of freedom, the free person is not the one who stands indifferently before the good but rather is inclined toward it, embraces it, and frees himself to enjoy this good in its most perfect form. In this sense, the free person is the baseball player who bats .300, the quarterback who throws for

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<sup>4</sup> Pascal, *Pensées*, n. 423: “Le cœur a ses raisons que la raison ne connaît point.”

5,000 yards a season, the pianist who can improvise a Beethoven sonata, the ice skater who can land a triple axel, the linguist who recites Virgil or Dante, the poet who masters the use of metaphor, and the chef who can make a perfect soufflé. These persons are free because once drawn to a particular good, they free themselves—through free choice—of every ignorance and weakness that keeps them from enjoying their desired good in the most excellent way possible. According to this sense of freedom, the free person is not just a chooser but an achiever, one who employs choice to attain the excellent good that stands before the person as an object of his desire.

This point about the classical notion freedom cannot be stressed enough. The freedom for excellence is born not from the will's standing aloof to the good but rather from the will's inclination to it. Freedom grows out of the spontaneous attraction of the will to all that is good. This attraction of the will serves as a driving force pushing the person to pursue the good, in terms both of creating opportunities for seeking the good as well as overcoming the obstacles that impede one's progress toward it. Drew Brees is freer than I to enjoy the good of football. Michelle Kwan is freer than I to enjoy the good of ice skating. Bobby Fisher is freer than I to enjoy the good of chess. These persons are freer than I in all of these areas. They love their sports and games more than I do, and they are free of the hindrances that keep me from playing their games and sports excellently.

## **Morality**

When we apply this notion of freedom to the moral life, several interesting facts emerge. First of all, we see that freedom comes not at the beginning of one's moral maturation but instead at the end of it. At the beginning of the moral life, one lacks the freedom necessary to pursue the good well. One's vision of the excellent is undeveloped; one's will for the excellent is weak. This is why chicken nuggets and grilled cheese sandwiches appear on most children's menus and not *coq-au-vin* or goat cheese truffles. But step-by-step, the slow and persistent pursuit of the good leads one to appreciate the excellent better. The will is strengthened by minor victories in the pursuit of virtue, and over time these minor victories ensure that even major battles become winnable. The freedom for excellence equips one to render another his due in justice, to enjoy a fine meal with temperance, or to face down one's enemies with courage.

Something else we notice about the moral life when we regard freedom not as the maximization of choice but as the pursuit of the excellent is that the possession of the excellent minimizes choice in a person's life. The higher we move toward the excellent, and the more we grow in freedom, the fewer options there are that remain for us to choose. For example, to be an NFL quarterback requires that I spend more time on the football field than on the tennis court. To be a champion skater requires that I spend more time on the ice than at the mall. To be a champion chess player requires that I spend more time playing the game with others than spending time alone at Starbucks. It's the same with growing in the virtues. To grow in justice means that cheating on my taxes ceases to be an option for me. To become courageous means that postponing difficult decisions ceases to be an option for me. To become temperate means that daily trips to McDonald's or even occasional looks at pornography cease to be an option for me. And to lose these options for the sake of excellence does not make me less free. The loss of these options frees me to act with excellence and perfection. To think otherwise is to think the unthinkable, that someone like Mother Teresa, for example, was free to abandon Calcutta and seek her fortune in Vegas. Mother Teresa was not free to go to Vegas; she was freer for lacking this freedom.

Aristotle uses two images to make this point about the inverse relation of excellence and choice. The first involves, interestingly enough, a brick. A person can maintain his independence and indifference before the good, Aristotle says, but such a one remains free only as a brick thrown on a pile remains free. While on the pile, the brick escapes the constraints of constituting part of a house. As a result, the brick on the pile appears freer than the brick in a wall. The brick on the pile has more options available to it. But Aristotle argues that this freedom is illusory. Though constrained by other bricks and the mortar between them, the brick in the wall is freer to do what it is that bricks to, which is to constitute parts of a wall. The brick on the pile keeps its options open, but in so doing it never achieves the excellence of brickness.

The other example that Aristotle offers is more personal in nature. He compares the respective freedoms of a servant and a son in a household.<sup>5</sup> From one point of view, Aristotle observes, the servant and the son appear to live the same life and to possess the same freedom; they both follow the

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<sup>5</sup> Aristotle, *Metaphysics* XII, ch. 10 (1075a19–22).

commands of the father, or the head of the household. But from the viewpoint of indifference, Aristotle argues, the servant is freer than the son. The servant follows the orders of the head of the household, to be sure, but he is less restrained by the good of the household than the son is. The servant follows the orders of his master but remains free to pursue his will in other matters. From the viewpoint of excellence, however, the son is freer than the servant. The son's life is more excellent, for it resembles more the life of the father. The son's options are fewer than the servant's, but for that reason the son is freer to contribute to the good of the household, not out of obedience like the servant but by choice like the father.

These two examples of the brick in the wall and the son in the household reveal that for Aristotle freedom is more than the ability to choose between contraries. Freedom involves surrendering to the attraction of the good to arrive freely—through the perfection of intellect, will, and passion—at the excellent possession of the good.

## **LAW**

The distinction between the freedom of indifference and the freedom of excellence allows us to unravel the paradox of Maguire's description of law as "the wise restraint that makes men free." Law appears only as a restraint to the one who believes that human freedom is in essence an indifferent freedom. If the will is not inclined naturally to any good, and if will does not spontaneously hunger for the excellent, then law is a restraint that compels choice. Law is to be resisted as unnatural but accepted nonetheless because of the social benefit that it offers the individual. To the contrary, if human freedom is in essence the freedom for excellence, then law appears as something else. It appears as a necessary guide for the individual to enjoy the common good. Law helps him to coordinate his activity with others so that he might attain the social good that he desires. Law in this sense is not a restraint on the will but first and foremost a guide for the intellect, so that the individual can act of his own prudence in his striving for an excellent sharing in the common good. Law might reduce one's options, to be sure, but in so doing law only imitates the natural limiting of choice that the good itself places on individuals, a limiting that frees individuals to act together in pursuit of their common sharing of the common good.

These two notions of law are important to distinguish. Whether law is a restraint on the indifferent or a guide toward the excellent is an important thing for the lawmaker to know. After all, for whom does the lawmaker legislate? For the brick in the pile, or the brick in the wall? For the servant of the household, or the son of the father? The administrative state is the regime for the indifferent, as the Julia character from President Obama's 2012 campaign made evident. Such a state imposes certain obligations on the individual so that the individual can (seemingly) retain as many options in life as possible. By contrast, the republic is the regime for the son—the citizen—whose freedom is found in bearing responsibility for the social good. This social responsibility demands a lot of the citizen—his life is less given to caprice—but he becomes freer due to the excellence of the good that he achieves.

In conclusion, if we could rewrite Maguire's description of law, then we would have to expand on it a bit. Our description would sacrifice Maguire's poetry in exchange for greater accuracy. In line with Aristotle and Aquinas, we might say that law is "the wise prescription of the political authority that allows citizens to share the common good freely and excellently."

Thank you.