

Moralising liberty

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I Introduction

There are some things we have a right to do.¹ These things we are free to do. There are other things that we do not have a right to do. These things we are not free to do. This connection between rights and freedom² lies at the basis of moralised or rights-based conceptions of freedom, which form a sub-family of negative conceptions of liberty.³ Moralised accounts distinguish liberty from licence and do not indiscriminately consider all interferences as being inimical to liberty. In particular, liberty is not infringed when people are prevented from performing actions that they do not have a right to do, since they are not free to do those things in the first place. Non-moralised conceptions, by contrast, consider liberty to be a purely descriptive concept, the analysis of which does not make reference to rights or other moral notions, and hence do not differentiate interferences on the basis of whether or not the person being interfered with has a right to perform the action in question.⁴

¹Rights, which are throughout to be understood as moral rights, include not only claim rights but also liberty rights (Hohfeldian privileges).

²'Liberty' and 'freedom' will be treated as synonyms.

³This paper is concerned with negative conceptions that consider liberty as an opportunity-concept and that are to be distinguished from positive conceptions that treat it as an exercise-concept. Moralised accounts are not the only negative conception of liberty that invoke moral or evaluation notions. Responsibility-based views (such as those espoused by Miller and Kristjánsson) appeal to the notion of moral responsibility in specifying which interferences classify as constraints on freedom (cf. Bader: 2016), whilst accounts (such as Kramer's) bring in evaluative notions when it comes to determining the extent of an agent's overall freedom.

⁴This does not imply that non-moralised conceptions have to consider all interferences with all actions as infringements of liberty. Restrictions can be imposed both on the range of interferences that classify as constraints, e.g. interferences can be restricted to those that result from intentional human agency, and on the kinds of actions that agents can be free to perform, e.g. a non-moralised trivalent conception such as an ability-dependent theory will restrict the domain of the z-parameter to those actions that the agent in question is able to perform. (For arguments to the effect that the justification and precise specification of the requisite restrictions of the y-parameter cannot proceed without bringing in moral notions cf. Miller: 1983; Miller: 1985; Shnayderman: 2013, sections 1-3 and Bader: 2016.)

Whilst the rights-based approach used to have some prominent proponents, having been endorsed and developed by Locke, Kant, Nozick, and Dworkin amongst others, it has recently come under sustained criticism and has largely fallen out of favour. This paper will argue in support of moralising liberty on the grounds that distinguishing between liberty and licence allows us to develop a theoretically fruitful notion of freedom that is intrinsically normatively significant and that can play a substantive role in political philosophy. Section 2 argues that the contrast between liberty and licence is to be understood in terms of a moralisation of the z-parameter, whereby the domain of this parameter consists of permissible courses of actions. Section 3 defuses the prisoner objection, which is frequently taken to be one of the primary reasons for rejecting moralised accounts. Section 4 argues that only moralised conceptions of liberty can underwrite the presumption of liberty by providing us with a notion of freedom that is intrinsically normatively significant.

2 Liberty v. licence

Attributions of liberty can be understood in terms of the following triadic schema (cf. MacCallum: 1967):

agent x is free from constraints y to do/be/become z

Differing conceptions of freedom disagree about the specification of the domains of these parameters, i.e. to which subjects freedom is to be attributed (= x), which obstacles classify as constraints on freedom (= y), and which actions an agent can be free or unfree to perform (= z).⁵

Using this schema, we can distinguish between an agent being free, unfree and not-free to perform action ϕ .⁶

- x is free to ϕ iff ϕ is in z and nothing in y is preventing x from ϕ -ing.
- x is unfree to ϕ iff ϕ is in z and something in y is preventing x from ϕ -ing.
- x is not-free to ϕ iff ϕ is not in z.⁷

⁵Since we are concerned with negative conceptions of liberty, cases where z involves being/becoming can be set aside. The domain of the z-parameter accordingly is a domain of actions.

⁶An agent being free simpliciter can be understood in terms of being free to ϕ for all ϕ in z.

⁷The locution 'x is not-free to ϕ ' is not equivalent to 'it is not the case that x is free to ϕ '. As long as ϕ is restricted to actions, it is equivalent to 'x is neither free nor unfree to ϕ '. Whilst one can understand not-free in terms of neither free nor unfree, this does not imply that these notions are conceptually prior, nor that not-free is essentially negative. Since free, unfree, and not-free exhaust the domain of actions, any two can be used to define the third, e.g. one can define 'free to ϕ ' as 'neither unfree nor not-free to ϕ '. In fact, not-free can be characterised positively by the moralised theorist insofar as it is to be identified with licence.

The domain of the z-parameter specifies the possible actions that an agent can be free or unfree to perform. Any action that is not in this domain is not in the relevant sense a possible action in the first place and is hence not one to which freedom is applicable, which ensures that an agent can neither be free nor unfree to perform such an action. The distinction between freedom and unfreedom is only applicable within the domain of the z-parameter, i.e. amongst ‘possible’ actions.

Rights-based conceptions consider only rights-violating interferences as infringements of liberty. A rights-violating interference is an interference with an action that (i) an agent has a right to perform, and that (ii) violates this right.⁸ This implies that such accounts involve moralised characterisations of both the y- and the z-parameter, giving rise to restrictions with respect to the source of the obstacle as well as with respect to the type of action that is being interfered with.⁹ In particular, they distinguish liberty from licence when characterising the domain of the z-parameter (cf. Locke: 1689, §6), insofar as they consider this domain to consist only of legitimate courses of actions, i.e. one can only be free to do things one has a right to do. The relevant notion of possibility that specifies which actions an agent can be free or unfree to perform is thus normative possibility. Actions that are not normatively possible, i.e. impermissible actions, are not ones that one is free to perform (where one is not unfree to perform them either, but where one is rather neither free nor unfree to perform such actions). As such, they are not in the domain of the z-parameter and are not part of liberty, but instead belong to mere licence.

The restriction to normatively possible courses of actions has the effect that certain obstacles do not infringe liberty. In particular, any obstacle that interferes with a normatively impossible action will not be a constraint on freedom. This is because actions that are not normatively possible are ones to which freedom is not applicable and hence ones which one cannot be rendered unfree to perform. Put differently, if the agent is prevented from doing something that he is not free to do in the first place, due to not having a right to do that thing, then the agent’s freedom has not been infringed. Accordingly, only rights-violating interferences infringe liberty, whereas preventing someone from doing something that person does not have a right to do does not infringe freedom. Instead of these kinds of interferences infringing liberty, they merely infringe licence.

⁸Whilst both claim rights and liberty rights satisfy condition (i), only interferences with claim rights can satisfy condition (ii). This is because there is no such thing as a violation of a liberty right. This means that, though mere privileges belong to the domain of liberty as opposed to licence, there are no rights-violating interferences when it comes to privileges. This, in turn, implies that it is not possible to be rendered unfree to perform an action that one is merely at liberty to do and which is not protected by claim rights. Interferences with mere privileges, accordingly, do not result in unfreedom but only in inability.

⁹This paper focuses only on the latter. For an account of the former cf. Bader: 2016.

2.1 Justified infringements

Moralised accounts are frequently characterised as classifying only unjustified interferences as infringements of liberty. This construal locates the moralisation in the y -parameter, distinguishing justified from unjustified obstacles and considering only the latter but not the former to be constraints on freedom. Whilst rights-based views do involve a moralisation of the y -parameter, the contrast between liberty and licence that is at issue here, and which gives rise to the distinctive commitment that liberty is not infringed when preventing someone from doing something that he does not have a right to do, is to be understood in terms of the z -parameter.

The construal in terms of justified v. unjustified interferences is problematic for four reasons.

1. The y -parameter characterisation is not extensionally adequate if there can be justified rights violations since this ensures that there can be justified infringements of liberty. If there is no absolute prohibition on rights-violations, then x can be permissibly prevented from ϕ -ing despite x having a right to ϕ . This requires that rights are not considered as absolute side-constraints that render interferences inadmissible and that one rejects the equivalence between preventing x from ϕ -ing being illegitimate and ϕ -ing being something that x has a right to do.¹⁰ If such an understanding of rights is accepted, it becomes possible for there to be cases where x has a right to ϕ , but where y can nonetheless be justified in preventing x from ϕ -ing, such that x can be rendered unfree in a permissible manner. This means that there can then be justified unfreedom.

Allowing for justified infringements of liberty does not in any way affect the core commitment of rights-based accounts that if x lacks a right to ϕ , then x is not-free to ϕ and preventing x from ϕ -ing does not constitute an infringement of freedom. However, if there can be interferences that are justified despite x having a right to ϕ , it will no longer be the case that justifiably preventing x from ϕ -ing never constitutes an infringement of liberty. Instead, preventing x from ϕ -ing constitutes an infringement of x 's liberty iff doing so involves a violation of x 's rights (independently of whether or not this is justified). This means that, rather than liberty being infringed only by unjustified interferences, liberty is infringed by interferences with what one has a right to do. The operative distinction, accordingly, is that between interferences that violate rights and those that do not, rather than that between unjustified and justified interferences.

Even those who endorse a strong connection between (moralised) liberty and (moralised) voluntariness, claiming that voluntariness is not undermined and liberty is not infringed as long as people act within their rights (cf. Nozick: 1974, p. 262), can retain their core commitments and only need to slightly restate their

¹⁰Cf. "Rightful actions – actions that are exercises of rights – are thus both *permissible* and *inviolable*. Actions interfering with or preventing the performance of rightful actions are themselves impermissible" (Steiner: 1977, p. 767).

position.¹¹ Although allowing for justified infringements makes it possible that *y*, whilst acting within his rights, infringes *x*'s freedom and makes *x*'s action non-voluntary (for instance, if *x* has the right to ϕ or ψ and *y* is justified in preventing *x* from ψ -ing in order to avoid a catastrophic moral horror, then *x*'s ϕ -ing may well end up being non-voluntary as a result of *y*'s interference), this problem turns out to be superficial (contra Cohen: 1995, p. 63). This is because one can allow for justified coercion, i.e. *y* can be justified in acting in a way that undermines *x*'s voluntariness, in the same way as one can allow for justified unfreedom. Accordingly, the claim can be restated in a straightforward manner insofar as liberty is not infringed and voluntariness is not undermined as long as no rights are being violated. There is thus a simple restatement in terms of behaviour that does not involve any rights violations rather than in terms of justified behaviour.

2. The fact that it is conceptually possible for the *y*-parameter characterisation to be extensionally inadequate implies that this way of understanding moralised conceptions is not perspicacious and does not carve nature at its joints, even in those cases where the characterisation in terms of justified v. unjustified interferences is extensionally adequate (because unjustified interferences are treated as being equivalent to interferences that violate the agent's rights). This is because it mistakenly suggests that, by their very nature, moralised conceptions cannot allow for justified infringements of liberty, which, however, is not the case but only follows given certain additional commitments that are not integral to a moralised theory. The fundamental characterisation of rights-based accounts, accordingly, has to focus on the agent's rights rather than the legitimacy of the interference and is, accordingly, to be understood in terms of the *z*-parameter, i.e. in terms of interferences with actions that the agent has a right to perform v. lacks a right to perform.

3. The *y*-parameter characterisation will misclassify Hohfeldian privileges as belonging to licence. If the operative distinction is between justified and unjustified interferences and only the latter are considered to be infringements of liberty whereas the former are classified as infringements of mere licence, then privileges will mistakenly be classified as belonging to mere licence. This is because, unlike claim rights, mere privileges do not have correlative duties. As a result, agent's can justifiably be prevented from exercising them. Yet they do not belong to licence but are part of liberty. This is achieved by the *z*-parameter characterisation, since it understands the domain of liberty as the domain of permissible courses of actions, which includes mere privileges alongside actions protected by claim rights.

4. Moralising the *y*-parameter and focusing on the legitimacy of interferences misleadingly suggests that proponents of moralised conceptions are only concerned with unfreedom resulting from unjustified interferences. This misses an important dimension of the concern for liberty, insofar as it focuses only on

¹¹For criticisms of this understanding of voluntariness cf. Olsaretti: 1998.

infringements of liberty and ignores unjustified restrictions of liberty. There are two ways in which something can be inimical to liberty, namely insofar as an agent can be rendered unfree to ϕ or not-free to ϕ .

INFRINGEMENT OF LIBERTY: x 's liberty is infringed iff x is rendered unfree to ϕ .

RESTRICTION OF LIBERTY: x 's liberty is restricted iff x is rendered not-free to ϕ .

The latter way of being inimical to liberty has nothing to do with unjustified interferences that prevent an agent from ϕ -ing, yet nevertheless constitutes an important issue of concern. If x is not prevented from ϕ -ing but ϕ -ing is illegitimately rendered normatively ineligible, such that there is a switch from x being free to ϕ to being not-free to ϕ , then x 's liberty is impermissibly restricted due to this impermissible shrinking of the domain of the z -parameter (cf. Bader: manuscript).

2.2 Legitimate courses of actions

Specifying the domain of the z -parameter amounts to specifying the possible courses of actions. Once they have been specified, one can then determine which of them are prevented, i.e. those that one is unfree to do, and which are not prevented, i.e. those that one is free to do.¹² The ratio of those that are not prevented to the set of possible actions yields the degree of freedom.

- x is free to ϕ iff $\phi \in z$ and nothing in y is preventing x from ϕ -ing
- x is free to degree n iff $|\phi: x \text{ is free to } \phi| / |\phi: \phi \in z| = n$
- x is free simpliciter iff x is free to ϕ for all $\phi \in z$, i.e. x is free to degree = 1

An important problem arises for trivalent conceptions of freedom (that countenance 'not-free' in addition to 'free' and 'unfree') if the notion of possibility that is used in specifying the domain of the z -parameter gives rise to a variable domain.¹³ If the domain can be modified, then there is the risk that it can be manipulated. This has the problematic implication that one can become more free as a result of a restriction of the domain of the z -parameter.¹⁴ The restriction can be internal,

¹²If inability does not classify as a constraint on freedom, then the set of actions one is able to do can be a subset of the set of unprevented actions, i.e. one can be free to ϕ yet not able to ϕ . On a moralised account, it is also possible that one is able to ϕ but that ϕ -ing is not a possible (= legitimate) action, i.e. one can be able to ϕ without being free to ϕ . Likewise, on a desire-dependent account, one can be able to ϕ yet not desire to ϕ and hence not be free to ϕ .

¹³Not all trivalent conceptions give rise to a variable domain. For instance, an account in terms of nomological possibility generates a trivalent conception with a fixed domain.

¹⁴Restricting the domain to increase freedom classifies as a form of 'moral avoidance' (cf. Nozick: 1981, pp. 460-462).

i.e. on the part of the agent, as well as external, i.e. on the part of other people.

DESIRES

The problem is particularly pronounced when the domain is construed in terms of desires, i.e. free iff not prevented from doing what one wants to do.¹⁵ Desires can be externally restricted through brainwashing and indoctrination, as well as internally restricted if an agent can extinguish his desires (what Berlin calls the ‘retreat to the inner citadel’). This leads to the problem of desire-dependence.

DESIRE-DEPENDENCE: a person who is prevented from ϕ -ing can give up the desire to ϕ and thereby make himself more free / can be brainwashed into no longer desiring to ϕ and thereby be made more free.

It is worth noting that it is not the case that the agent becomes free to ϕ as a result of the change in desires, i.e. we do not have a switch from unfree to ϕ to free to ϕ . Instead, there is a switch from unfree to ϕ to not-free to ϕ , since ϕ -ing is no longer in the domain of the z-parameter. The agent accordingly becomes more free since the ratio of actions that the agent is free to perform relative to the total number of actions in z increases.

ABILITIES

While many people reject accounts in terms of desires for precisely this reason, this problem is usually considered to be relatively superficial and it is thought that it can be dealt with by switching from desires to abilities, i.e. free iff not prevented from doing what one is capable of doing.¹⁶ The problem, however, runs deeper. In the same way that desire-dependence yields objectionable results, insofar as freedom can be increased, not by removing obstacles or interferences, but by modifying desires, so ability-dependence yields problematic results, insofar as freedom can again be increased, not by the removal of obstacles or interferences, but by modifying abilities.¹⁷ In particular, abilities can be restricted, both internally and externally.¹⁸

ABILITY-DEPENDENCE: a person who is prevented from ϕ -ing can make himself incapable of ϕ -ing and thereby make himself more free / can be rendered incapable of ϕ -ing and thereby be made more free.

¹⁵Berlin initially held this view, but abandoned it in response to Wollheim’s critique.

¹⁶Cf. “A person’s abilities and inabilities, rather than her preferences, form the boundaries of her freedom and unfreedom” (Kramer: 2003, p. 34).

¹⁷Additionally, problems arise if one wants to distinguish between ability and freedom, something that is not possible if the z-parameter is characterised in terms of abilities.

¹⁸Kramer does not straightforwardly identify the domain of the z-parameter in terms of abilities since he wants to treat inabilities that are self-inflicted or brought about by nature differently from those that are attributable to other agents. As a result, his account does not allow for external restrictions, since he considers them to result in unfreedom rather than mere inability (cf. Kramer: 2003, p. 42).

Cohen has suggested that every theory involves a form of ability-dependence since “*interference is never sufficient for unfreedom because lack of means is always necessary for it. That is so, because, absolutely generally, an interference restricts my freedom to do x only if I lack the means to overcome that interference, and, therefore, the ability to do x despite that interference*” (Cohen: 2011, p. 195).¹⁹

First, this variety of ability-dependence is unproblematic and to be sharply distinguished from that involved in characterising the z-parameter in terms of abilities. This is because Cohen’s version only allows for rendering oneself unfree, insofar as changing one’s abilities can ensure that a certain interference does make an action impossible. However, it does not make room for rendering oneself more free, on the grounds that if one can acquire an ability then the relevant action is already possible for the agent (i.e. possibility claims are governed by a collapse principle such that if x is at t in a position to acquire at t’ the ability to overcome the interference to ϕ -ing, then it is already possible at t for x to ϕ at t’, such that the interference does not render ϕ -ing at t’ impossible).²⁰ Even if this were possible, there would not be any problems since this would render the interference ineffective, which differs from the problematic situation whereby the agent is classified as being free despite the interference still being present and despite the agent still not being in a position to perform the action. It is this latter situation that involves moral avoidance, since the morally problematic interference is still present but is not classified as such because the domain of the z-parameter has been shrunk.

Second, Cohen’s claim is problematic insofar as ϕ -ing will (at least in ordinary cases) involve different actions when this requires overcoming the interference than ϕ -ing does in the absence of the interference. Even if the same outcome can be brought about, this will be achieved by different means. This is because one needs to do something different and/or do something in addition in order to overcome the interference. This means that, although interference with ϕ -ing is not sufficient to ensure unfreedom to ϕ , it is nevertheless sufficient to ensure some unfreedom, whether this is unfreedom to ϕ in a particular way or unfreedom to perform the conjunctive action of ϕ -ing without ψ -ing.

RIGHTS

According to moralised conceptions of freedom, the z-parameter ranges over all legitimate courses of actions. Given that normative possibilities can change, insofar as people can waive, alienate, or forfeit rights, it would appear that the moralised account does not avoid the problem at hand. Likewise, others can change what rights an agent has, at least when they possess the relevant normative powers to do so. The problem of rights-dependence would seem to arise in

¹⁹He attributes this point to Arnold Zuboff.

²⁰The only thing that can happen is that other people increase one’s abilities and make it possible for one to overcome various interferences.

an analogous manner. For instance, one can make oneself more free by alienating rights that are being infringed.

RIGHTS-DEPENDENCE: a person who is prevented from ϕ -ing can waive, alienate or forfeit the right to ϕ and thereby make himself more free / can have his right to ϕ taken away and thereby be made more free.

Rights-dependence differs crucially from the other forms of dependence. What is problematic about desire- and ability-dependence is that what is wrong, namely the interference, is still in place. As a result of the change in desires/abilities it simply is not classified as such any more. This is what makes these construals of the domain of the z-parameter problematic, i.e. they allow that the objectionable situation still persists but is no longer classified as involving an infringement of liberty.²¹

For instance, being in chains is problematic even when one does not want to move around or does not have the ability to do so. Such an obstacle is objectionable and in need of justification even when the agent lacks the relevant desires/abilities. In particular, it seems intuitive to criticise the obstacle on the basis of being an undue limitation of the agent's freedom. This kind of interference is something that one should be concerned about when one cares about freedom and, accordingly, should be classified as an infringement of liberty.

This kind of problematic situation, however, cannot arise in the case of rights. If a right is waived, alienated or forfeited then there is no longer any objectionable interference. Although the relevant obstacle can still be present and although it can, correspondingly, still be impossible for the agent to ϕ , this obstacle will no longer be objectionable since the agent will no longer have a right to ϕ .²² In fact, since ϕ -ing will now be part of licence, preventing the agent from ϕ -ing may be precisely what is called for. Accordingly, we can see that the problematic form of dependence, whereby the objectionable interference or obstacle is still in place but the agent is nevertheless classified as free, cannot arise when dealing with a rights-based characterisation of the z-parameter.

²¹That this is what is problematic about these cases can be brought out by considering cases involving contingent causal connections where an interference will be removed if the agent's desires or abilities change. For instance, if someone is in chains yet the chains will be removed as soon as that person no longer has the desire to move around, then that agent can render himself free by changing desires without ending up with a problematic retreat to the inner citadel. (Pettit's argument that liberty as non-interference is unstable and should be replaced by non-domination mistakenly treats the causal and the domain-restriction cases alike (cf. Pettit: 2011, p. 704). One needs to sharply distinguish the contingent removal of an obstacle from a situation in which an obstacle is still present but no longer classifies as a constraint.)

²²It is of course possible that there is something objectionable about the manner in which the right is changed and in which the objectionableness of the interference is removed. Yet once the right has been waived/alienated/forfeited, there is no longer anything objectionable about the relevant interference. That is, even though the process by means of which this situation was brought about may well be objectionable, the resulting situation does not involve an objectionable interference.

3 Freedom, prison, and poverty

Although rights-dependence does not have objectionable implications analogous to those involved in desire- and ability-dependence, it might nevertheless be deemed to be problematic on the grounds of generating a notion of liberty that does not cohere well with ordinary usage.²³ Since the extent to which one is free is a function of the extent to which one is prevented from doing the things one has a right to do, it is possible to be completely free despite being subject to numerous interferences as long as one does not have a right not to be interfered with in these ways. This problem is nicely illustrated by the well-known prisoner objection. As Cohen has argued, the rights-based conception will not classify a prisoner who is justly imprisoned as being unfree. Given that the restrictions imposed on such a person are justified and do not violate the prisoner's rights, they do not count as infringements of liberty (cf. Cohen: 1995, p. 60). This, however, is highly counter-intuitive since being imprisoned seems to be a paradigm case of unfreedom. This unpalatable consequence is one of the main reasons that is usually cited when rejecting rights-based conceptions.²⁴

This section will show that moralised accounts have the requisite resources to defuse this objection and provide a satisfactory explanation of the prisoner case.

3.1 Justified imprisonment

According to the prisoner objection, moralised conceptions have the counter-intuitive commitment that they do not classify justified imprisonment as a constraint on freedom. Whether this commitment does in fact follow depends on the reason for which imprisonment is deemed to be justified. There are three options in this regard:

1. UNJUSTIFIED

One can deny that imprisonment can be justified. The idea that imprisonment can be justified is denied by a number of theories, such as restorative as well as restitutive approaches (even a retributivist need not think that imprisonment is the correct form of punishment). In that case the prisoner objection does not get off the ground.

2. JUSTIFIED RIGHTS VIOLATION

One can allow that imprisonment can be justified, e.g. for deterrence reasons, but consider it to involve rights violations. If justified imprisonment is consid-

²³Bentham already complained that defenders of moralised conceptions “pervert language; they refuse to employ the word *liberty* in its common acceptation; they speak a tongue peculiar to themselves” (quoted in Waldron: 2006, p. 168).

²⁴The other main reason, namely that the moralised notion of liberty cannot play a fundamental justificatory role, will be discussed in section 4.2 below.

ered to amount to a justified rights violation, then the prisoner objection can be addressed straightforwardly. By allowing for justified infringements of rights, one makes room for justified unfreedom and hence can claim that the prisoner has a right to, say, move about freely but that this right can be justifiably infringed, such that imprisonment is justified whilst nevertheless violating rights and infringing liberty. A moralised account thus yields the result that the justly imprisoned prisoner is unfree to leave as long as imprisonment is classified as a justified rights violation.

3. JUSTIFIED WITHOUT RIGHTS VIOLATIONS

One can allow that imprisonment can be justified and that it does not involve any rights violations. This can be due to various mechanisms.

- First, it can be due to rights forfeiture. Someone who is justly imprisoned has forfeited various rights and hence does not have a right to leave the prison. Preventing that person from leaving, consequently, does not involve any rights violations and does not infringe liberty.
- Second, it can be due to the prisoner's right being taken away by someone who has the Hohfeldian power to do so. Someone can be imprisoned without this involving any rights violations once a suitable authority has divested the person of the relevant rights.
- Third, one can bring in conditional rights, saying that the right to move about freely is conditional in nature, e.g. it is a right to move about freely unless justly imprisoned. Given that it is conditional upon not being justly imprisoned, this right is not infringed by justified imprisonment.

This is the most challenging scenario for moralised accounts (though not necessarily the most plausible understanding of punishment). Since no rights are violated, liberty is not being infringed. A justly imprisoned prisoner, accordingly, would not seem to be lacking in freedom.

It is important to note that, although the prisoner is not considered to be unfree to leave, this does not imply the even more troubling consequence that the prisoner is deemed to be free to leave despite being prevented from doing so. Carter, for instance, suggests that the moralised account goes against our linguistic intuitions insofar as it will answer the following questions in the negative: "If I am physically prevented from crossing your justly acquired land, do I not lack the freedom to do so?", and "Does the justly imprisoned thief in the high-security prison not lack the freedom to leave?" (Carter: 1999, p. 71). This, however, is incorrect. These questions can be answered in the affirmative, since the agents in question will not be free to perform the relevant actions. The moralised account does not consider the prisoner to be free to leave. Rather the prisoner is judged to be free despite lacking the freedom to leave, because leaving is no longer

something that is in the domain of the z -parameter and hence is not something with respect to which the agent can be unfree. A prisoner can, accordingly, be free (simpliciter) since it is possible that, despite being imprisoned, he is not prevented from doing anything he has a right to do.

The issue of contention regards, on the one hand, what makes it the case that these agents are not free to perform the actions in question. The moralised account understands the lack of freedom in terms of the agent being not-free to leave and explains it on the basis that the person lacks the relevant rights, whereas the non-moralised account understands the lack of freedom in terms of the agent being unfree to leave which is explained in terms of the physical obstacles involved in being imprisoned. This difference implies that situations in which there is no physical prevention will be evaluated differently. In such cases, the non-moralised account will classify the agent who has forfeited the relevant rights as being free to perform the actions in question, whereas the moralised account will consider the agent to lack this freedom. On the other hand, the views differ as to whether this lack of freedom classifies as an infringement of liberty. According to the moralised conception, the prisoner will be free despite lacking the freedom to leave, whereas on the non-moralised account lacking this freedom amounts to being unfree.

3.2 Defusing the prisoner objection

In order to address the prisoner objection, one needs to identify a salient and normatively significant sense in which the prisoner is less free than someone who is not imprisoned.²⁵ The problem now is that if justified imprisonment is considered not to involve any rights violations, then imprisonment does not classify as an infringement of freedom. The moralised view, however, can nevertheless account for the fact that a justly imprisoned prisoner is lacking freedom. This is because there are three ways of understanding the extent of liberty on the moralised view:

1. the extent of actions one has a right to do.
2. the extent of unprevented actions one has a right to do.
3. the extent to which one is being prevented from doing the things one has a right to do.

²⁵Mack has suggested that “individual I 's liberty consists in the absence of those interferences that violate his rights or would violate his rights had those rights not been waived or forfeited by I . The justly incarcerated I does suffer a loss of liberty even though no right of his is violated because he is subjected to interferences that would violate his rights had he not forfeited them” (Mack: 1995, p. 57 footnote 1). This suggestion is problematic since it disconnects the loss of liberty from rights violations, thereby depriving freedom of its intrinsic significance. Given that the loss of liberty is construed counterfactually, insofar as it consists in the fact that the interferences in question would have violated rights had they not been forfeited, it becomes unclear in what way it is meant to be normatively significant.

The first construal is concerned with normative freedom. It is concerned with the size of the z -parameter, i.e. with all the actions one has a right to perform independently of whether or not they are infringed, and thus measures the range of permissible actions. The second and third are concerned with physical freedom, i.e. with the actions that are in z and that are not prevented by anything in y . Whereas the second is an absolute notion that is concerned with the range of unprevented actions that one has a right to do, the last construal is a relative notion that is concerned with the degree to which one's liberty is infringed, which is given by the proportion of unprevented actions to the total number of actions one has a right to perform, i.e. it is concerned with the extent of type-2 relative to type-1.²⁶

This third notion is based on the core commitment of the moralised conception that one is free to ϕ if one has the right to ϕ and is not being prevented from ϕ -ing in a rights-violating manner, whereas one fails to be free to ϕ if one either lacks the right to ϕ or is prevented from ϕ -ing. Given that it is a relative notion, one can be entirely free independently of the number of rights one has (at least given that the number is greater than zero). The extent to which an agent is free, according to this construal, is thus not to be understood in terms of the range of options available to the agent, but in terms of the extent to which the agent is interfered with, such that an agent is completely free if he is not subject to any interference even if there might not be many options that are open to him.

This distinction between the absolute notions and the relative notion allows us to understand the justly imprisoned prisoner as someone whose freedom has been reduced by having had certain freedoms taken away from him. This means that such a prisoner is someone who suffers a reduction in terms of type-1 and type-2 freedom. Though the range of things he is free to do is restricted, he is not being prevented from doing any of the things he has a right to do, which means that his freedom is not infringed. Accordingly his type-3 freedom is unaffected.²⁷ The fact that imprisonment is not classified as a constraint on freedom thus only implies that it will not constitute an infringement of liberty. This, however, still allows for the prisoner to be lacking in freedom due to a restriction of freedom. In short, we need to distinguish a restriction of freedom from an infringement of freedom. The prisoner suffers the former but not the latter.²⁸

Moralised conceptions thus have the resources to explain how someone who

²⁶Although the degree of infringement is a relative notion that is defined in terms of the size of the domain of the z -parameter, the badness of infringement is not relative in this way.

²⁷This presupposes that none of the prisoner's rights are violated, such that the degree of freedom = 1 both before and after he has had various freedoms taken away from him. Otherwise, there will also be a reduction in type-3 freedom since a shrinking of the z -parameter implies that the proportion of prevented actions in z increases if the number of infringements is held fixed.

²⁸As we will see in section 4.1 both type-2 and type-3 are normatively significant notions of freedom, though they differ in important respects. In particular, whilst the significance of type-2 is to be understood axiologically, that of type-3 is to be construed deontically.

is justly imprisoned is lacking in freedom in terms of the fact that the range of actions that are permitted to a prisoner is vastly reduced. Since there are very few things that a prisoner has a right to do, there is not much that he is free to do. This means that, even when no one is infringing his freedom, he is free to do fewer things than other people are free to do, in the sense that the domain of the *z*-parameter contains far fewer courses of action than for non-prisoners. In short, prisoners are less free due to having fewer freedoms.

Additionally, the distinction between type-1 and type-2 freedom allows us to account for the differences between justly and unjustly imprisoned prisoners. Such people do not differ in terms of type-2 freedom, i.e. every unfringed right had by the one is also had by the other. They do, however, differ in terms of the rights that they have and that are being infringed, which ensures that they differ in terms of type-1 and hence also in terms of type-3 freedom. There is thus both a sense in which they are equally free and a sense in which their freedom differs.

An imprisoned and a non-imprisoned criminal, by contrast, will not differ in terms of liberty but only in terms of licence, i.e. they do not differ in terms of what they are free to do, but in terms of which actions belonging to licence they are prevented from doing.²⁹ This means that the physical obstacles involved in imprisonment are only inimical to freedom in the case of unjustly imprisoned prisoners. The justly imprisoned prisoner lacks freedom not due to being imprisoned but due to having had various freedoms taken away from him.

3.3 Freedom and poverty

By differentiating action-tokens from action-types, we are, moreover, able to distinguish the lack of freedom of a poor person from the lack of freedom of a prisoner. Whereas certain action-types are ruled out for the prisoner, a person lacking resources has the same rights regarding action-types as a person having plenty of resources and differs only in terms of action-tokens.³⁰ When comparing a poor

²⁹This only holds as long as they have the very same rights. Whether this is in fact the case depends on the particular mechanism that ensures that imprisonment does not involve rights violations. For instance, they have the same rights if the action that warrants imprisonment also ensures rights forfeiture. By contrast, if the relevant rights are taken away by someone with the relevant Hohfeldian power, then differences can emerge. When concerned with conditional rights, there can be differences in terms of detached rights, e.g. if the agent has the conditional right to move about freely unless justly imprisoned, since the condition will then only be satisfied in the case of the non-imprisoned criminal. This difference, however, disappears if the condition corresponds to that involved in rights forfeiture, e.g. if the agent has the conditional right to move about freely unless he has performed an action that warrants imprisonment.

³⁰As Cohen has argued, lacking money or resources (is very likely) to lead to interference if one should attempt to do those things that one could do if one had the requisite resources. (The precise characterisation of the connection between freedom and money is rather complicated, due to the fact that money is neither necessary nor sufficient for avoiding being liable to interference but is only an INUS condition, cf. Cohen: 2011, pp. 177-178.)

person with a rich person, there is accordingly again a difference in freedom (this time merely a difference regarding action-tokens and not also action-types), without there being a difference in terms of infringements of freedom, i.e. x can be less free than y without being more unfree.³¹

This implies that a moralised conception allows one to make sense of the intuitive belief that both poverty and prison in some sense compromise liberty, even when the person in question is not unfree in the sense of having his liberty infringed. On the one hand, one can account for the fact that there is an important sense in which a person lacking resources is less free, namely insofar as there are fewer action-tokens such a person is free to do. On the other hand, one can account for the fact that there is an important sense in which a prisoner is less free, namely insofar as there are fewer action-types (as well as action-tokens) such a person is free to do. Moreover, we can make sense of the idea that the restriction of freedom in the case of a prisoner is more drastic, given that entire classes of actions are ruled out, i.e. a prisoner is someone who has had certain types of freedoms taken away.³²

In a free society, everyone is equally free in the sense that their liberty is not being infringed. No one is prevented from taking whatever legitimate courses of actions are available to them. Yet, they can differ in terms of the range of types as well as of tokens of legitimate courses of actions that are open to them, i.e. they can differ in terms of what they have a right to do and hence are free to do. The poor and the rich are equally free in terms of action-types, yet they differ in terms of the number of action-tokens they are free to perform. Prisoners and non-prisoners, by contrast, differ in terms of both action-types and action-tokens.

4 Intrinsic normative significance

Once we distinguish the extent to which liberty is infringed, i.e. the extent to which there are interferences with legitimate courses of actions, from the extent of actions one is free to do, i.e. the extent of legitimate courses of actions that are open to an agent, the question arises as to which of these we should primarily be concerned with. Should we be concerned with ensuring that people are not interfered with, that their liberty is not infringed? Or is the goal to provide people with a wide range of options and maximise what they are free to do (weighted by

³¹The individuation and classification of action-types is a complicated matter. The intuitive verdicts regarding prisoners and the poor are underwritten by an intuitive individuation of action-types.

³²The concern that certain classes of actions are ruled out also seems to be underlying Waldron's discussion of the troublesome nature of the lack of freedom resulting from homelessness, insofar as the particular prohibitions affecting the homeless effectively amount to a general prohibition, i.e. by preventing someone from performing all the tokens of a given type, one ends up preventing the action-type altogether (cf. Waldron: 1991, pp. 308-311). In this way homelessness would appear to be more akin to imprisonment than to poverty.

the value of the courses of action)? In short, is a free society to be understood in terms of type-2 or type-3 freedom? In order to address this question, one needs to identify the normative significance of freedom.

4.1 The wrongness of interference

As soon as the freedom to torture, to rape and to murder classify as genuine freedoms (as they do on a non-moralised account), it is evident that considerations of freedom do not as such constitute *pro tanto* reasons. As Williams notes, “no sane person can expect that his primitive freedom merely as such should be protected” (Williams: 2001, p. 12). There will be some freedoms that are good and not to be infringed, as well as some that are bad and to be restricted, whilst yet others are neutral. The differences between these freedoms are not explicable in terms of the notion of freedom, but in terms of other values or principles. As a result, freedom loses intrinsic normative significance.

By contrast, the moralised account has intrinsic normative significance built into the concept, which guarantees that infringements of freedom are morally problematic. The moralised account in this way underwrites the presumption of liberty, insofar as we have at least *pro tanto* reason to protect liberty and avoid infringements thereof.³³ In particular, the presumption of liberty is not merely an epistemic default, in that we consider interference to be problematic unless we are provided with evidence to the contrary, but a normative commitment insofar as it amounts to recognising a *pro tanto* reason against interference. This ensures that the moralised notion of liberty is suitable for playing a justificatory role in political theorising.³⁴

It might be objected that the moralised notion is not particularly meaningful, insofar as being free is compatible, on the one hand, with having very few opportunities, and, on the other hand, with the opportunities being merely formal as opposed to real opportunities. Since negative freedom is an opportunity-concept, it is natural to consider the value of freedom to be a function of the value of the opportunities that one is free to pursue. Given that only real and not merely formal opportunities can be actualised, only they can be said to be valuable on this

³³Cf. “If one regards coercion as a neutral concept, like ‘speaking’ or ‘walking’, it is something of a mystery why there should be a *presumption* against coercion, as many philosophers have insisted. The link with individual rights shows how this presumption (like the presumption against theft) is, as it were, built into the concept itself” (Ryan: 1980, pp. 494-495).

³⁴Intrinsic normative significance is compatible with allowing there to be justified infringements of liberty, since this amounts to allowing for the possibility that the significance of freedom can in certain cases be outweighed or overridden, thereby rendering interference justified. Accordingly, one can still hold that all interferences with rightful conduct are *pro tanto* unjustified in virtue of constituting rights violations (i.e. there is something that speaks against any such interference), but then accept that an interference may be all-things-considered justified in certain conditions (i.e. what speaks in favour of the interference may be more weighty than what speaks against it).

way of understanding the value of freedom. Insofar as, according to a moralised conception of liberty, being free as such does not guarantee any real but at most only formal opportunities, it would seem that this kind of freedom is not in itself significant and meaningful but merely formal. Accordingly, it is reasonable to ask why one should care about liberty understood in the moralised sense.

Even though, given certain background understandings of rights,³⁵ being free is compatible with hardly having any real opportunities, one can still consider this kind of liberty to be meaningful and normatively significant. In particular, this merely 'formal' liberty has intrinsic significance that is not reducible to the value of the actions that one is free to do. The morally problematic nature of infringements of liberty is not solely due to precluding the value of the actions being prevented, but is intrinsically objectionable. Preventing someone from doing something that person has a right to do is objectionable on the grounds that it does not respect that person's moral status.³⁶ Liberty understood in this sense is not something that is to be maximised or promoted, but something that is to be respected. Respecting the dignity and moral status of persons requires not preventing them from doing things they have a right to do, even if they lack the ability or resources to do those things.

Given that rights are deontic notions, the best way to think of the normative significance of moralised freedom is not axiologically in terms of the goodness of the resulting opportunities, but deontically in terms of the wrongness of interference. The reason why being free to ϕ matters is not because one thereby has the opportunity to ϕ , but rather because one's right to ϕ is being respected and because one is not illegitimately being prevented from ϕ -ing. Any illegitimate interference with what one has a right to do is intrinsically unjust and disrespectful of one's moral status. By contrast, the opportunity to ϕ is at best derivatively good, and moreover its being good presupposes that the opportunity is a real as opposed to merely formal opportunity.

Illegitimate interference is thus intrinsically objectionable, and not merely bad in virtue of precluding valuable opportunities. This implies that this kind of

³⁵The precise characteristics of a particular rights-based conception depend on the particular rights that are part of the background moral theory. If people have a right to a certain level of resources, then being free will require having (at a minimum) opportunities corresponding to this level of resources, which would ensure that the account of freedom would not be merely formal. The (minimal) extent of opportunities bound up with being free accordingly depends on the particular account of rights that is adopted when providing a particular conception of freedom belonging to the family of moralised conceptions. Even in the case of an entitlement theory, the proviso on acquisition, together with its historical shadow, ensures that the opportunities cannot be entirely formal. (This should be sufficient to defuse Waldron's objection based on the case of homelessness (cf. Waldron: 1991).)

³⁶As Cohen notes with respect to legal permissibility, "it is an *insult to the status of persons* when certain acts are [legally] forbidden to them, whether or not the [legal] permissibility of those acts would generate a corresponding freedom [= real opportunity] for those persons" (Cohen: 2011, p. 191).

interference is wrong independent of whether one is concerned with the liberty to do something significant or something trivial, independent of whether or not the person is able to perform the action in question or lacks the relevant ability and would thus only have had a formal opportunity that could not have been realised had the interference not taken place, as well as independent of whether the person cares about the action and would have done it had it not been for the interference. The wrongness is thus not a function of the desires and abilities of the agent nor of the value of the action. This kind of wrongness cannot be explained in terms of preventing the agent from realising the relevant opportunity but instead has to be accounted for in terms of the interference being intrinsically wrong.

Instead of saying that it is good to be free to ϕ one should thus say that it is wrong to be rendered unfree to ϕ . Focusing on the wrongness of interference, accordingly, involves a twofold departure from the traditional approach that is concerned with the value of freedom. First, the significance of freedom is not understood axiologically but deontically. Second, unfreedom is deemed to be objectionable and freedom is only an object of comparative pro-attitudes insofar as it consists in the absence of something wrong, which contrasts with the traditional approach that considers freedom to involve the presence of something good and treats unfreedom to be only comparatively bad insofar as it consists in the absence of a good thing. This difference ensures that more freedom is not preferable as such on the moralised account, since this does not involve more of a good thing. Accordingly, freedom is not to be promoted but to be respected, i.e. what is preferable is less unfreedom rather than more freedom.

Thus, the core issue when it comes to the significance of freedom per se is whether freedom is infringed, not whether the number of action-types or action-tokens is greater or lesser. What primarily matters is thus that one is more free in the sense that one is being less interfered with, not in the sense of being free to do more things, i.e. having a greater range of options available. It is the former sense of freedom that has intrinsic significance. That is, the problem lies in the first place with the interference itself, and not with the resulting lack of opportunities. Considerations of the extent of action-types and action-tokens available to the agent are important issues, but they are not issues that pertain to the intrinsic significance of freedom, and are not pertinent when it comes to respecting and protecting liberty. Instead, other considerations relating to the value of the relevant opportunities need to be appealed to when it comes to explaining their significance. A lack of opportunities only matters derivatively to the extent that the opportunities are significant, such that the importance of promoting the extent of the courses of actions that the agent is free to do derives from the extrinsic value of being free to perform these actions.³⁷

³⁷This means that the way in which the justly imprisoned prisoner is lacking in freedom is not intrinsically objectionable but is problematic (i.e. is bad for that person and hence classifies as a form of punishment) for extrinsic reasons.

In other words, when concerned with the intrinsic significance of freedom one is not concerned with the range of options that are open to the agent. The intrinsic significance of freedom is to be understood deontically in terms of the wrongness of interference, rather than axiologically in terms of the value of the things one is free to do. Accordingly, the primary sense in which one is to care about the extent of freedom is the sense concerned with the extent to which an agent is prevented from doing the things he has a right to do. It is this sense of freedom that matters intrinsically.³⁸

4.2 Liberty as non-fundamental

Although liberty has intrinsic normative significance according to the moralised account, there is a concern that this notion cannot play any fundamental justificatory role if liberty is defined in terms of rights. In particular, it will not be possible to appeal to the notion of liberty in justifying an account of what rights we have. Waldron, for instance, claims that the moralised notion “excludes the concept of freedom altogether from the debate about the justification of property rights” (Waldron: 1991, p. 308). This is because rights will be more fundamental, ensuring that issues regarding rights need to be settled first before freedom can be addressed. Accordingly, liberty will not be fundamental and will not belong to the set of basic normative notions.³⁹

This problem can be illustrated by the well-known fact that Nozick’s claim that liberty upsets patterns is dialectically ineffective. Nozick tries to argue for a certain account of property rights on the basis of considerations regarding freedom, even though he holds a moralised conception of liberty. This kind of argument, however, cannot succeed.⁴⁰ If one uses a moralised notion, then it already

³⁸As mentioned in section 2.1 liberty can be compromised not only if it is infringed but also if it is illegitimately restricted as a result of an immunity violation. The latter also has intrinsic normative significance, yet can be set aside when concerned with the freedom of prisoners and the poor.

³⁹Liberty will be downstream not only in terms of justification but also epistemically. This implies that we might be radically mistaken about how free people are, as well as about which interferences infringe their liberty. This is because we need to know what is legitimate and illegitimate, what people have a right to do and what people do not have a right to do. Otherwise, we will not know how free they are and in what ways their liberty is being infringed. Cf. Bentham: “According to this definition, I can never know whether I have the liberty to do an action, until I have examined all its consequences” (quoted in Waldron: 2006, p. 168). Since there can be a mismatch between the objective facts about morality and our subjective conception thereof, it may turn out that the interferences that really do infringe liberty do not match up with what we ordinarily take to be infringements of liberty.

⁴⁰This was already pointed out in an early review of *Anarchy, State, and Utopia*: “It follows, then, that Nozick cannot appeal to the value of liberty in support of the idea of justice as rights of entitlement, since the former logically presupposes the latter. ...It deprives him of a logically independent concept of freedom in terms of which his theory of justice might be vindicated” (Smith: 1976, p. 89). Also cf. Ryan: 1977; Cohen: 1995, pp. 60-62; Waldron: 1991, p. 308.

needs to be settled what rights people have, if we are to know which interferences infringe their liberty. Put differently, claims about infringements of liberty already presuppose that which is to be established, namely an account of property rights, thereby rendering them question-begging and dialectically ineffective.

Although the moralised notion requires one to treat facts about liberty as being derivative, which excludes the notion of liberty from playing a fundamental justificatory role, it has the advantage of having intrinsic normative significance. As a result of having (derivative) intrinsic significance it can feature in normative explanations and justifications, though not in ultimate explanations.

By contrast, the non-moralised account lacks intrinsic normative significance altogether. Liberty, as such, will not have any value or significance. A non-moralised account will only end up with a “flat description that carries, in itself, no suggestion of endorsement or complaint” (Dworkin: 2000, p. 125). It is only particular liberties that can be (dis)valuable, deriving their significance from the value of the specific opportunities that are available to the agent.⁴¹ As a result of lacking intrinsic normative significance, the non-moralised notion cannot play any justificatory role, not even a derivative justificatory role, in particular it cannot be appealed to in establishing substantive conclusions about rights.

This means that anyone wanting to assign a central role in political theorising to the notion of liberty faces a dilemma. Either one adopts a moralised account, which ensures that liberty has intrinsic normative significance but this significance is not fundamental. In this case, liberty cannot play a fundamental justificatory role, since all justification will ultimately proceed via the more basic notions in terms of which the moralised notion is defined. Or one accepts a non-moralised account, in which case liberty lacks intrinsic normative significance, which means that it is unable to play a substantive justificatory role and that, similarly, all justification will ultimately proceed via the normative notions that account for the extrinsic value that non-moralised liberties can have. Either way, the notion of liberty is unable to perform fundamental justificatory work.⁴²

⁴¹Carter has attempted to argue that freedom has non-specific value (cf. Carter: 1999). However, his arguments at best establish that freedom has extrinsic value (primarily instrumental value) but not intrinsic value, which is brought out by the fact that the supposed non-specific value is contingent and dependent on the particular empirical circumstances.

⁴²This type of dilemma, whereby a notion either is too thin and lacks intrinsic normative significance or is too thick and only ends up being derivatively significant, arises in the case of other concepts as well. For instance, the concept of harm can either be moralised by means of a normative baseline, or it can be construed in a non-moralised manner by means of an actual, counterfactual or statistical baseline. Neither account will classify the notion of harm as a basic normative notion, which means that this concept will not play any role in fundamental theorising.

(On the upside, the wide-spread phenomenon of moralisation might be taken to suggest that, rather than having a heap of independent normative notions, there is hope for a unified approach based on a supreme principle underlying the various moralisations. The different moralised concepts would then represent different facets of this unified underlying structure.)

4.3 A consistent system of liberty

Conflicts of liberty and hence infringements of liberty will inevitably arise on the non-moralised approach. This implies that a non-moralised account does not allow for a consistent system of liberty and does not validate the idea that liberty should not be in conflict with itself. It will in principle not be possible to arrive at a situation in which everyone is free. At most, one can end up with everyone being equally (un)free.⁴³ However, complete freedom (whereby everyone is free to ϕ for all ϕ in z) will be impossible.

By contrast, the moralised account can avoid conflicts of liberty as long as rights are compossible. In this way, it allows for a consistent system of liberty and makes room for a situation in which everyone is (completely) free. This suggests that the claim that the moralised concept of freedom is excluded altogether from the justification of rights is actually too strong. Whilst considerations of freedom will not have a foundational role, they can nonetheless play a limited justificatory role. In particular, the accounts of freedom and of rights can be mutually reinforcing. One can support a particular conception of rights on the basis that it allows for a consistent system of liberty. Since a consistent system of liberty requires a consistent system of rights, we have an additional reason for accepting a compossibility requirement on the theory of rights, and hence adopt a theory that recognises only negative but not positive rights. More generally, structural requirements on freedom, such as a compossibility requirement, need to be satisfied by the underlying structure of rights. Whereas particular claims about what people are free or not free to do depend on what rights they have, structural claims about liberty are not dependent in this way and can accordingly function as constraints on the theory of rights.

Moreover, whilst rights-based accounts presuppose rights that are logically prior and independently specified, an alternative Kantian moralisation in terms of a universalisability requirement simultaneously generates both a moralised notion of freedom and a specification of rights. For instance, Waldron has suggested that “we might attach normative significance in Kantian fashion only to assignments of liberty that are compatible with the assignment of equal liberty (even equal mundane liberty) to everyone else, and denigrate as licence claims to freedom that are not universalizable in this way” (Waldron: 2006, p. 170). Freedom, on this account, will be moralised and one will only be free to do what one has a right to do, yet freedom will not be derivative from rights but on a par with rights.⁴⁴

The Kantian approach starts with the non-moralised notion of freedom, i.e.

⁴³When clashes of freedom arise, one will have to bring in substantive moral commitments that are separate from considerations of freedom to determine which side is to be privileged. Freedom by itself will not settle the conflict.

⁴⁴Whether this can be made to work depends on whether the universalisability requirement is sufficient for symmetry-breaking and can exclude not only asymmetrical distributions but also rule out problematic symmetrical distributions.

non-moralised liberty is the input that is subjected to the universalisation constraint to result in a partition into universalisable moralised liberty and non-universalisable licence. Here one might wonder why we are universalising freedom as opposed to something else. In particular, it might be thought that non-moralised freedom has to matter in order to explain why moralised freedom (= universalisable non-moralised freedom) matters. Yet, the reason why we are interested in non-moralised freedom is not because it has normative significance but because it constitutes the relevant domain. This is because external actions are the objects of juridical evaluation and thus function as the external counterparts of maxims. In the same way that one can care about universalisability of maxims without having to think that maxims as such are of value or the like, one can care about the universalisability of non-moralised freedom without having to think that this notion of freedom matters. This means that, although one starts with non-moralised freedom, what is doing all the normative work and gives rise to the normative significance of the resulting moralised notion is universalisability.

5 Conclusion

Thus, we have seen that moralised conceptions of liberty have significant theoretical advantages and that the objections that have been raised against them can be defused. In particular, we have to be operating with a moralised notion when we say that freedom matters as such. The moralisation ensures that liberty is intrinsically normatively significant, whereas non-moralised conceptions are unable to attribute intrinsic value to freedom but are only able to locate value in the actions that people are free to do rather than in freedom itself. Moreover, a rights-based definition allows us to provide a fine-grained account that distinguishes the extent of infringement of liberty from the extent of action-types and action-tokens one is free to do. This enables us to capture the sense in which a justly imprisoned prisoner is lacking freedom, insofar as there are fewer action-types such a person is free to do, as well as the sense in which poverty is inimical to freedom, insofar as there are fewer action-tokens a poor person is free to do, while retaining the idea that, as long as they are not subject to rights-violating interferences, none of their liberties are being infringed.

Maybe political philosophy (as well as political discourse) would be served best if the concept of freedom were abandoned in favour of more fundamental concepts that have non-derivative significance. But it is clear that if this concept is not relinquished, then it is to be retained in the form of a moralised conception.⁴⁵

⁴⁵For helpful comments, I would like to thank audiences in Tucson, Prague and at the OSPP conference in Barcelona, as well as Joseph Carlsmith and Dan Waxman. Special thanks to Ian Carter for detailed comments on an earlier draft of this paper. Thanks also to two anonymous referees.

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