EXPLAINING NATURAL RIGHTS: ONTOLOGICAL FREEDOM AND THE FOUNDATIONS OF POLITICAL DISCOURSE

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INTRODUCTION

Most people think that humans have rights. This popular view now has a great deal of legal authority to support it. Human rights are enshrined in a plethora of international legal instruments, from the United Nations *Universal Declaration of Human Rights* to regional conventions such as the *European Convention on Human Rights* and the *African Charter on Human and People's Rights*. In the domestic sphere, an increasing number of jurisdictions are adopting formal bills of rights, either at the constitutional level or in the form of legislation. Judges in many countries are increasingly willing to draw on international human rights conventions to inform their interpretations of domestic law.[1] More generally, political and legal discourse abounds with references to putative human rights, from the right to freedom of speech to the right to government aid in times of hardship.

The idea that human beings have certain fundamental rights simply by virtue of being human beings has a long philosophical tradition behind it. Philosophers often call these rights *natural rights*.[2] In attempting to make sense of the philosophical debates surrounding this notion, it is useful to distinguish three questions that theorists have sought to answer. Let us call them the *explanatory question*, the *analytical question*, and the *normative question*.

The *explanatory question* seeks to understand and explain the shared concern people have with the concept of natural rights. The central problem might be posed as follows: how *is it or could it be possible* that humans have natural rights? In other words, what is it about humans that makes them the type of entities to which natural rights could potentially belong? The *analytical question* seeks to clarify the logical or analytical structure of rights discourse. It asks

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[1] For a critical discussion of this trend, see James Allan & Grant Huscroft, *Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts*, 43 SAN DIEGO L. REV. 1 (2006).

[2] A number of prominent theorists have defined natural rights along these lines. *See, e.g.*, JOEL FEINBERG, *Voluntary Euthanasia and the Inalienable Right to Life*, *in* RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY 221, 225 (1980); JUDITH JARVIS THOMSON, *Self Defense and Rights*, *in* RIGHTS, RESTITUTION AND RISK: ESSAYS IN MORAL THEORY 33, 44 (1986); H. L. A. Hart, *Are There Any Natural Rights?*, *in* THEORIES OF RIGHTS 77 (Jeremy Waldron ed., 1984).

what is the *clearest or most useful* conceptual framework for understanding rights and the role that they play in practical reasoning. Another dimension of this inquiry involves identifying and clarifying the different conceptions of rights that surface in moral and political discourse.

Finally, the *normative question* enquires into the precise content of natural rights and seeks to apply them to various practical questions. In other words, it evaluates the normative force of the various different conceptions of natural rights, in order to discover the *most morally desirable* understanding of the concept.

The present article considers each of these three questions in turn and outlines a preliminary response. I turn first to the explanatory question: how is it or could it be possible that humans have natural rights? I start by exploring the response offered by Robert Nozick, one of the leading exponents of an explanatory approach to natural rights theory.[3] Nozick's response to the explanatory question ultimately proves unsatisfying; however, I argue that his approach can fruitfully be developed by reference to the central role in human social experience of what I call *ontological freedom*. This notion provides an illuminating explanatory backdrop for understanding what it is about humans that makes them potential bearers of natural rights. It is intended to capture a particular feature of the phenomenology of human action: namely, the sense of simultaneous freedom and responsibility that accompanies certain ethically significant choices.

The next part of the article considers the analytical question: what is the clearest or most useful conceptual framework for understanding rights discourse? I begin by introducing three possible conceptions of natural rights, which I call *absolute rights*, *pro tanto rights*, and *prima facie rights*. I argue that the most appealing conceptual framework for analyzing competing moral and political rights claims is one that incorporates both absolute rights and prima facie rights, but omits *pro tanto* rights. I then explore the conceptual relationship between rights and the important notion of political freedom. I argue that the influential distinction between negative and

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[3] *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974) [hereinafter NOZICK, ANARCHY, STATE, AND UTOPIA].

positive forms of freedom, as outlined by Isaiah Berlin,[4] is usefully understood in terms of the different types of rights invoked by those two conceptions.

The final part of the article examines the normative implications of the view of rights outlined in the previous sections. I contend that an explanatory theory of natural rights based around the notion of ontological freedom enables us better to understand the normative force of many rights claims that figure in legal and political debates. Specifically, an examination of the nature of the human experience of moral choice suggests that political discourse involves balancing a strong prima facie right to non-interference on the part of each individual against a range of narrower, but potentially more weighty prima facie rights to positive assistance in the performance of particular actions. The resulting theory provides a general framework for evaluating the normative status of rights claims in legal and political contexts.

The aim of this article is not to provide a comprehensive or exclusive explanation of natural rights, but rather to offer a partial explanation and analysis of the concept that may assist in our understanding of rights and political discourse. The explanatory methodology that I adopt not only leaves open the possibility of multiple theoretical frameworks, but actually encourages such alternative approaches, insofar as they provide new and fruitful ways of thinking about the sources, structure, and content of our moral and political obligations. There are, no doubt, many routes to extending and deepening our collective store of knowledge about this important subject. This article examines one of them.

I. THE EXPLANATORY QUESTION

We noted above that most people think that humans have rights. There are two ways a theorist might respond to this popular view. One possible methodology, which we might call the *skeptical approach*, attempts to falsify the popular view by producing reasons for doubting the existence or, indeed, the possibility of natural rights. It was in this spirit that the utilitarian philosopher Jeremy Bentham famously described the idea of natural rights as "nonsense

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[4] ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118 (1969).

upon stilts."[5] This skeptical approach represents one possible way to explore the philosophical status of natural rights, but it is not the only one. We might usefully contrast it with what I will call the *explanatory approach*.

In a social context where people commonly take it for granted that natural rights exist—and where the notion plays a ubiquitous role in legal and political discourse—a skeptical analysis of the concept hardly seems the most fruitful way to proceed. In philosophical terms, natural rights play an important role in *folk theories* of practical reasoning; rather than positing from the outset that one of the basic components of folk understandings of morality and politics is mistaken, it seems potentially more useful to adopt the notion as part of our philosophical framework and ask how it might be made to work.[6] The explanatory approach proceeds in this spirit. Rather than seeking to debunk the concept of natural rights, it asks what type of philosophical backdrop would be necessary to make the idea plausible.

This methodological approach yields the explanatory question that I posed above: how is it or could it be possible that humans have natural rights? In other words, if we take it that humans do have natural rights, how might we go about *explaining* that proposition? The basic form of this question is adapted from Nozick, who applied an explanatory methodology to the issue of natural rights in *Anarchy, State, and Utopia*[7] and refined the approach further in *Philosophical Explanations*.[8] I will argue below that Nozick's theory of natural rights ultimately fails in its explanatory task, but it nonetheless provides a useful starting point for addressing the explanatory question.

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[5] Jeremy Bentham, *Anarchical Fallacies*, *in* 'NONSENSE UPON STILTS': BENTHAM, BURKE AND MARX ON THE RIGHTS OF MAN 46, 53 (Jeremy Waldron ed., 1987). For further examples of the skeptical methodology in moral and political theory, see JAMES ALLAN, A SCEPTICAL THEORY OF MORALITY AND LAW (1998); J. L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG (1977).

[6] As the influential philosopher David Lewis notes, "a credible theory must be conservative"; it cannot hold credence if it rejects too much of what we previously believed. DAVID LEWIS, ON THE PLURALITY OF WORLDS 134 (1986).

[7] NOZICK, ANARCHY, STATE, AND UTOPIA, *supra* note 3.

[8] ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS (1981) [hereinafter NOZICK, PHILOSOPHICAL EXPLANATIONS].

A. NOZICK'S THEORY OF RIGHTS

Nozick begins *Anarchy, State, and Utopia* with the following bold statement: "Individuals have rights, and there are things no person or group may do to them (without violating their rights)."[9] He goes on to formulate his theory of rights in terms of what he calls "side constraints" on action, meaning that the rights of any given person can be viewed as placing rigid constraints upon the actions of others.[10] It is important to note that Nozick does not see himself as deducing these rights from first premises. Rather, he adopts an approach to rights theory that focuses on providing *explanation*, rather than *proof*. In Nozick's words, the aim is to explore "our separate philosophical insights," seeking to "unite and unify them under an overarching roof of general principles or themes."[11] Such a methodology emphasizes philosophical questions that ask "how something is or can be possible."[12]

In *Anarchy, State, and Utopia*, Nozick's explanatory methodology provides the basis for his use of state of nature theory to ground his normative argument. Nozick readily acknowledges that the state of nature does not describe some actual historical situation; this, however, does not detract from its philosophical importance.[13] The philosophical merit of the device arises from its capacity to provide an explanation of the political realm in wholly non-political terms. Such a *fundamental* mode of explanation holds the potential to encompass the whole of political discourse, therefore increasing our understanding of the background assumptions that underpin political philosophy as a discipline.[14] A key element of Nozick's explanatory notion of the state of nature is the existence of certain natural rights. It is worth emphasizing again that Nozick does not attempt to *prove* the existence of these rights; rather, he argues that they occupy an important role within a fundamental explanation of the political realm.

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[9] NOZICK, ANARCHY, STATE, AND UTOPIA, *supra* note 3, at ix.

[10] *Id.* at 29.

[11] NOZICK, PHILOSOPHICAL EXPLANATIONS, *supra* note 8, at 3.

[12] *Id.* at 8.

[13] NOZICK, ANARCHY, STATE, AND UTOPIA, *supra* note 3, at 7.

[14] *Id.* at 6–8.

Nozick's theory of rights has attracted extensive comment and criticism. A succession of critics have complained that the specific rights Nozick relies on—in particular, a highly stringent right to self-ownership—are not sufficiently well-integrated into his overall explanatory theory.[15] Nozick himself acknowledges this weakness, noting in the opening section of *Anarchy, State, and Utopia* that the book "does not present a precise theory of the moral basis of individual rights."[16] However, although Nozick never fully spells out the explanatory context for his conception of rights, he nonetheless hints at several of the elements that such a theory might include.

The central idea that Nozick relies on in this context is the notion of the *human capacity to lead a meaningful life*. In a crucial passage in *Anarchy, State, and Utopia*, Nozick poses the following question: "in virtue of precisely what characteristics of persons are there moral constraints on how they may treat each other or be treated?"[17] The answer he suggests is that these rights are connected with the "ability to form a picture of one's whole life . . . and to act in terms of some overall conception of the life one wishes to lead."[18] This connection has to do with the basic existential issue of "the meaning of life"; the only way that a person can add meaning to her life is to shape it according to an overarching plan that she herself formulates.[19]

This suggestion of the capacity to have or strive for a meaningful life as the human attribute that explains natural rights reappears at other points in *Anarchy, State, and Utopia*. Thomas Nagel cites a passage where Nozick argues that individual rights may not be violated to attain a social good, because "us[ing] a person in this way does not sufficiently respect   . . . the fact that [she]

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[15] *See, e.g.*, JONATHAN WOLFF, ROBERT NOZICK: PROPERTY, JUSTICE AND THE MINIMAL STATE 27 (1991); Thomas Nagel, *Libertarianism Without Foundations, in* READING NOZICK: ESSAYS ON ANARCHY, STATE, AND UTOPIA 191, 196–97 (Jeffrey Paul ed., 1981); Samuel Scheffler, *Natural Rights, Equality, and the Minimal State, in* READING NOZICK: ESSAYS ON ANARCHY, STATE, AND UTOPIA, *supra*, at 148, 152; Judith Jarvis Thomson, *Some Ruminations on Rights*, 19 ARIZ. L. REV. 45 (1977).

[16] NOZICK, ANARCHY, STATE, AND UTOPIA, *supra* note 3, at xiv.

[17] *Id.* at 48.

[18] *Id.* at 50.

[19] *Id.*

is a separate person, that [hers] is the only life [she] has."[20] Nagel objects that "it is not clear how Nozick thinks individual rights derive from the fact that each person's life is the only one [she] has."[21] I would suggest Nozick's argument is not that individual rights *derive from* this fact, but that individual rights can be *explained by reference to* this fact. But let that pass.

Nagel's brief comment does not do justice to more extensive remarks on this issue Nozick makes in other passages, such as the "meaningful life" passage mentioned above. If a person's capacity to lead a meaningful life plays a central role in explaining the nature and content of her natural rights, then it might well also be relevant that she has *only one* life, for it follows from this that she has *only one chance* to live a *meaningful* life. Nevertheless, Nagel has a point: exactly how and why a person might go about exercising her capacity to lead a meaningful life—and how this capacity supports a strong right to self-ownership—is never made very clear by Nozick.[22]

Further insight into the explanatory context for Nozick's conception of natural rights is afforded by his discussion of the hypothetical "experience machine."[23] Nozick asks the reader to posit a machine that can give a person the illusion of undergoing any experience she chooses, while in fact she is floating in a vat with electrodes stimulating her brain. Would we choose to plug into the machine and thereafter experience the life of our choosing? Nozick argues we would not, for two main reasons. First, we would desire to *do* certain things and *be* certain types of people (courageous, kind, sympathetic, generous, and so forth), not just to have the corresponding experiences.[24] Second, we would want to leave ourselves open to "actual contact with [a] deeper reality," to "a plumbing of

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[20] Nagel, *supra* note 15, at 196–97 (quoting NOZICK, ANARCHY, STATE, AND UTOPIA, *supra* note 3, at 33).

[21] *Id.* at 197.

[22] Nozick offers a more extensive analysis of the notion of the meaning of life in *Philosophical Explanations*. *See* NOZICK, PHILOSOPHICAL EXPLANATIONS, *supra* note 8, at 571–647. However, he makes no attempt to link the views presented there to the political theory advanced in *Anarchy, State, and Utopia*. *See* NOZICK, ANARCHY, STATE, AND UTOPIA, *supra* note 3.

[23] NOZICK, ANARCHY, STATE, AND UTOPIA, *supra* note 3, at 42.

[24] *Id.* at 43.

deeper significance."[25] These reasons sit well with Nozick's central emphasis on the human capacity to live a meaningful life; once again, however, it is unclear how they support the specific conception of natural rights that Nozick advances.

Clearly, Nozick's appeal to the individual's capacity to lead a meaningful life as explaining his preferred view of natural rights is in need of further elucidation. It is not at all obvious from *Anarchy, State, and Utopia* exactly how this capacity supports a right to self-ownership, particularly one as robust as Nozick seems to assume. What we have is a suggestion that our rights can be explained by reference to the following factors: (a) a person's ability to shape her life in accordance with an overarching design; (b) the fact that each person only has one life to live; (c) the idea that people desire to *do* certain things and *be* certain people, rather than just having certain experiences; and (d) the enigmatic possibility of "a plumbing of deeper significance." It seems worthwhile to ask whether we can build on Nozick's analysis to provide a richer explanatory context for these four ideas.

B. ONTOLOGICAL FREEDOM

I wish to suggest that Nozick's explanatory theory of natural rights can fruitfully be developed by reference to the central position in human experience of what I will call *ontological freedom*. The term ontological freedom is used here to describe freedom as a pure category that is both abstract and grounded; it represents the basic category of freedom designated in the unreflective proposition, "all humans are free." This understanding of freedom rarely figures overtly in debates about public policy. However, it occupies a foundational position in relation to moral and legal ideas of responsibility.

Western political philosophers have frequently distinguished between ontological freedom, in the above sense, and more ideologically significant conceptions of political freedom. However, they have also often recognized that the two categories are not unconnected. For example, Jean-Jacques Rousseau's famous dictum that

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[25] *Id.*

humankind "is born free and is everywhere in chains"[26] can be read as suggesting an incongruity between the basic fact of ontological freedom and a lack of Rousseau's preferred conception of political freedom. The maxim gains its rhetorical force from the inherent sense of social significance captured in the first part of the statement.

A similar appeal to ontological freedom occurs in the opening passages of John Locke's *Second Treatise*. When Locke notes that all humans naturally occupy a state of "perfect freedom,"[27] he does not necessarily mean that humans were ever entirely free from the practical constraints of coercion and political authority.[28] Rather, he wishes to make an ontological claim about human nature, before embarking on an exploration of political freedom. Similarly, although John Stuart Mill ostensibly touches upon "Liberty of the Will" in his opening words in *On Liberty* only to make clear his focus on political freedom,[29] there is a sense in which the basic element of human experience to which the phrase refers resonates throughout the remainder of the work. The impression is reinforced by the historical analysis that immediately follows the opening paragraph. Mill is at pains to emphasize humankind's natural antagonism towards coercion; in so doing, he invokes a specific picture of the human situation.

In this way, the ineffable sense of simultaneous freedom and responsibility that permeates human social interaction serves as an unacknowledged premise of classical liberal arguments. Ontological freedom figures in such works almost as an element of the philosophical imaginary, playing a central but largely unacknowledged role in fleshing out arguments about natural rights and the role of government. Once the central role of ontological freedom in such theories is properly recognized and understood, considerable progress will have been made in grounding the classical liberal project.

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[26] JEAN-JACQUES ROUSSEAU, DU CONTRAT SOCIAL 58 (Aubier 1943) (1762) ("L'homme est né líbre, et partout il est dans les fers."); *cf.* JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT 1 (G. D. H. Cole trans., Dover 2003) (1762).

[27] JOHN LOCKE, TWO TREATISES OF GOVERNMENT 269 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

[28] *Cf. id.* at 276–78.

[29] JOHN STUART MILL, ON LIBERTY AND OTHER WRITINGS 1, 5 (Stefan Collini ed., 1989) (1859).

In *The Philosophical Imaginary*, Michèle Le Doeuff provides a useful account of how such unacknowledged premises sometimes operate in philosophical discussions. Le Doeuff's idea of the "philosophical imaginary" relates to the philosophical device of "thinking in images,"[30] whereby an image or impression is used to flesh out an otherwise incomplete argument. Le Doeuff points out that images in theoretical texts have traditionally been posited as "extrinsic to the . . . work."[31] According to this traditional approach, images can be excised from a philosophical work without compromising the underlying argument. As such, any analysis paying undue attention to images in the text is regarded as unphilosophical. For Le Doeuff, however, this overt denial of the importance of images often serves to obscure the important role such devices play in philosophical arguments.

Le Doeuff's most prominent example of thinking in images within Western political philosophy concerns Thomas More's depiction of the island of Utopia.[32] However, her approach has since been applied to other elements of Western political thought; for example, Marguerite La Caze draws on the idea of the philosophical imaginary to explore the role of the "social contract" in contemporary political theories.[33] A similar analysis can be applied to the image of the "natural person" as it figures in seminal Western political texts, such as Locke's *Second Treatise*, Mill's *On Liberty* and Rousseau's *The Social Contract*.

For Locke, Mill, and Rousseau, the natural person is both free and, in some sense, responsible. Locke notes that humankind's natural state involves "perfect freedom," but not unlimited "licence"; in regard to both one's possessions and other living beings, human action in the state of nature is limited by practical reason.[34] Mill depicts humans as resistant to authority, but conscious of their responsibilities towards "the weaker members of the community."[35] For Rousseau, humans are confronted in their natural state with

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[30] MICHÈLE LE DOEUFF, THE PHILOSOPHICAL IMAGINARY 2 (Colin Gordon trans., 1989).

[31] *See id.*

[32] *Id.* at 21–28.

[33] MARGUERITE LA CAZE, THE ANALYTIC IMAGINARY 94–118 (2002).

[34] LOCKE, *supra* note 27, at 269–71.

[35] MILL, *supra* note 29, at 6.

both their dominion over their own persons and the moral respon-
sibility that this entails.[36]

It is difficult to find much reasoned philosophical argument
underpinning these depictions of humankind's natural state.
Rather, the images in question are presented as appeals to the
reader's intuitions. I would suggest that such depictions serve a
crucial function in the relevant texts by reminding the reader about
her *ontological* freedom. In particular, the reader is prompted by the
image of the free, responsible, natural human to recall her own ex-
periences of moral deliberation. The resulting political argument is
then able to draw on the reader's pre-reflective sense of freedom's
value, without incorporating rigorous discussion about its precise
foundations.

It is no accident that in so many seminal political works the
reader is reminded early on that "humans are free." It is clear that
such statements, when made by the likes of Locke, Mill and Rous-
seau, are not meant to rest on metaphysical arguments. No discus-
sion ensues about free will, determinism, and compatibilism.
Rather, these are phenomenological spurs, intended to bring to
mind an ontological point. Like the "spur" with which Jacques Der-
rida compares philosophical style,[37] these images of the natural per-
son both prepare the reader for what follows and defend the text
from becoming undermined through philosophical exploration. In
Derrida's terms, the spur is both "the projection of the ship which
surges ahead to meet the sea's attack and cleave its hostile surface"
and a "means of protection."[38] Its function is to leave a "trace" or
"mark" in advance of the text's arguments.[39] The importance of
freedom in human life is thus presented as undeniable.

C. SARTRE ON ONTOLOGY AND POLITICS

Philosophical works drawing upon the relationship between
ontological freedom and political freedom, such as those mentioned
in the previous section, have generally focused on exploring the
latter conception. The early writings of Jean-Paul Sartre, by contrast,

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[36] *See* ROUSSEAU, ON THE SOCIAL CONTRACT, *supra* note 26, at 5.

[37] *See* JACQUES DERRIDA, SPURS: NIETZSCHE'S STYLES (Barbara Harlow trans., 1979).

[38] *Id.* at 39.

[39] *Id.* at 41.

exhibit the opposite emphasis, rendering them a useful starting-point for examining ontological freedom in more detail.

In *Being and Nothingness*, Sartre presents ontological freedom as the defining feature of human experience. Sartre's comments about the world as it appears in everyday perception revolve around a fundamental distinction between two modes of existence: being-in-itself [*l'être-en-soi*] and being-for-itself [*l'être-pour-soi*].[40] The being-in-itself is a non-conscious object, which can be encapsulated by reference to a pre-determined essence or function. The being-for-itself, by contrast, is a conscious agent able to perceive and reflect upon the world around it. Sartre suggests that, far from possessing a pre-determined essence, the being-for-itself is permanently haunted by the possibility of "nothingness" or negation.[41]

Sartre argues that the being-for-itself must continually confront the possibility that things might be otherwise than they are. In our everyday lives, we are constantly engaged in practical enquiries about the state of the world. However, since any question we might phrase about the world admits the possibility of a negative response, it seems to us that our place in the world is not necessary, but contingent. Furthermore, this realization is experienced not simply as an abstract thought, but also as the concrete, immediate presence of ambiguity or doubt. Since every course we follow is pregnant with alternative paths it appears we might have taken, it seems that we cannot avoid accepting ultimate responsibility for our choices.

For Sartre, this sense of responsibility for our own existence tends to give rise to "anguish."[42] It is this anguish I feel when, to borrow Sartre's example, my passage along a narrow ledge and awareness of the importance of treading carefully are accompanied by the realization that, despite my present care and attention, I

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[40] In reproducing Sartre's distinction, I adopt his practice of using the terms "being-in-itself" and "being-for-itself" to describe both two *modes of being* and the two types of *entities* that partake in those modes of being. Nothing much rests on Sartre's double use of the terms. For further discussion, see GREGORY MCCULLOCH, USING SARTRE: AN ANALYTICAL INTRODUCTION TO EARLY SARTREAN THEMES 3 (1994); Stefanie Grüne, *Sartre on Mistaken Sincerity*, 11 EUR. J. PHIL. 145, 158 n.2 (2003).

[41] JEAN-PAUL SARTRE, BEING AND NOTHINGNESS 11, 16 (Hazel E. Barnes trans., Citadel Press 1989) (1943).

[42] *Id.* at 17, 29–45.

could just as easily throw myself over the precipice. In this respect, Sartre views human experience as imbued with an unavoidable double realization. In the first place, the possibilities represented in negation reveal to me that "I am free." At the same time, however, I am also aware that "I am *responsible*," since I am confronted with the apparent absence of constraints on potential, significant exercises of my freedom.

Sartre's basic distinction between being-in-itself and being-for-itself has often been misunderstood by those working outside the phenomenological tradition. Such misinterpretations have taken two main forms. First, analytical metaphysicians sometimes read Sartre as presenting a metaphysical argument, leading to the accusation that his scheme is unsophisticated and naive.[43] However, Sartre does not intend to make a metaphysical argument about the world, but rather a phenomenological claim about the significance the world holds as an object of experience for the conscious subject. It does not seem far-fetched to suggest, as a claim about social intuitions and the norms that arise from them, that humans credit themselves with an inherent significance that is denied to material objects.

The second misunderstanding to which Sartre's ontology has been subjected concerns its normative implications. Sartre's phenomenological writings have sometimes been interpreted as presenting a normative account of freedom, according to which a person should be regarded as free for political purposes provided that she is free *ontologically*. This interpretation has led some commentators to portray Sartre's comments about freedom as indicating an extreme indifference to political oppression.[44] This interpretation has also been used to support the argument that Sartre's later, explicitly political writings, which deal directly with political and social restrictions on free action, were intended as a repudiation of his earlier position. However, such a reading of Sartre fails to distinguish between ontological freedom, on the one hand, and political or social freedom, on the other.

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[43] *See, e.g.*, DANIEL C. DENNETT, ELBOW ROOM: THE VARIETIES OF FREE WILL WORTH WANTING 83 (1984).

[44] In one passage, for example, Sartre states that a human "can not be sometimes slave and sometimes free"; either she is "wholly and forever free" or she "is not free at all." SARTRE, *supra* note 41, at 441.

It is true that Sartre himself does not draw the above distinction as clearly and consistently as he might have done. In his early writings, such as *Being and Nothingness*, political freedom as such is rarely mentioned, perhaps encouraging the mistaken conclusion that all references to "freedom" are to be interpreted in a political light. In later works, however, Sartre explicitly notes that ontological freedom and political freedom hold distinct, although perhaps connected, places within our conceptual universe. In *Search for a Method*, for example, he makes the following comment about the link between ontological freedom and its political counterpart:

> As soon as there will exist *for everyone* a margin of *real* freedom beyond the production of life, [political ideology[45]] will have lived out its span; a philosophy of freedom will take its place. But we have no means, no intellectual instrument, no concrete experience which allows us to conceive of this freedom or of this philosophy.[46]

Sartre's reference to "real freedom" in the above passage clearly designates political freedom (interpreted in accordance with Sartre's preferred conception), while his appeal to a possible "philosophy of freedom" appears to be a reference to his earlier writings about ontological freedom. At first glance, it may seem Sartre intends in this passage to wholly repudiate the relevance of his earlier work to political philosophy, but this is too hasty a reading.

Sartre wishes to make the point that observations concerning ontological freedom have no *direct* political application. The reason he gives is that political action is necessarily mediated by "concrete experience"; it entails reflective engagement with the contingencies of the social environment.[47] However, it does not follow that such a general concept of freedom has no usefulness whatsoever. Importantly, although Sartre appears to rule out the possibility that we

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[45] Sartre refers specifically to Marxism. However, his comment can be read as a general remark about ideology and its relationship to political action.

[46] JEAN-PAUL SARTRE, SEARCH FOR A METHOD 34 (Hazel E. Barnes trans., Vintage Books 1963) (1960).

[47] *Id.*; *cf.* EMMANUEL LEVINAS, TOTALITY AND INFINITY: AN ESSAY ON EXTERIORITY 77 (Alphonso Lingis trans., 1969) (ethical recognition of the Other "passes necessarily through the interposition of things").

can formulate a useful political program founded *purely* on ontological freedom, he does not say that ontological freedom plays no role at all in the formation of our ideas about political action. While Sartre clearly does not regard his earlier writings as *directly* concerned with political freedom, he stops well short of repudiating the relevance of his earlier work in setting the parameters for political debates.

The notion of ontological freedom, as outlined above, provides a prima facie plausible answer to the question posed by Nozick: in virtue of what characteristics of persons are there moral constraints on how they may be treated? Nozick's own sketchy explanation of how it is or could be possible that humans hold natural rights resonates significantly with the account of the human condition offered by Sartre. On both accounts, the ethical personality of mature humans is dominated by their capacity for moral self-expression by means of responsible choice. When people make moral choices, they shape their lives in accordance with their own designs, make themselves into people with particular values and commitments, and plumb the possibility of a deeper level of meaning behind their individual priorities.

I wish to suggest in the remainder of this article that we can usefully view ontological freedom as foundational to more practical, political understandings of the concept. Our intuitive awareness of our ontological freedom enables us immediately to grasp the practical importance of freedom in moral and political spheres of action. In this way, ontological freedom serves as a starting-point for the development of our reflective views on the proper scope and orientation of the political community. It follows that theories of law and politics can legitimately be tested by examining whether they are consistent with the foundational role played by our ethical experiences.

II. THE ANALYTICAL QUESTION

The aim of the explanatory approach to natural rights theory is to construct a theoretical framework that helps us to understand and consolidate our pre-existing knowledge about the normative context for human action. The account of the human condition furnished by the notion of ontological freedom represents a rich and potentially illuminating framework for discharging this task. There may also be other possible approaches; from an explanatory perspective, such alternative accounts are to be welcomed. The

elaboration and comparison of multiple explanatory theories can only add to our communal store of knowledge about the concept of natural rights.

The notion of ontological freedom helps us to explain our shared concern with the notion of natural rights. In order to apply this theory to practical questions in law and politics, however, it is necessary to develop a more detailed account of how rights function in practical reasoning. This brings us to what I have called the *analytical question*: what is the clearest or most useful conceptual framework for analyzing the role rights play in moral and political discourse? The present section outlines an answer to this question. I begin by evaluating three possible conceptions of moral rights, before exploring the conceptual links between the notions of rights and political freedom.

A. THREE TYPES OF RIGHTS

The basic conceptual framework for rights analysis is furnished by Wesley Newcomb Hohfeld's seminal observation that rights entail correlative duties.[48] A duty is a type of normative requirement; it gives the bearer a reason for action of a particular kind. In the context of rights theory, we might describe duties as supplying their bearers with *other-regarding* reasons for action; they are reasons I have because of what I owe to somebody else. Rights, then, can be analyzed in terms of other-regarding reasons for action.

When a person asserts her *right* to a particular form of treatment, she typically hopes to establish her entitlement to the exclusion of competing concerns. The notion of a right, as it figures in practical discourse, therefore seems to be a *strong* one. There are, however, at least three different ways in which a right may be strong enough to override other considerations. First, a right may be an *absolute right*; it may be an inviolable constraint that conclusively requires or disallows certain actions. Second, a right may be what I will call a *pro tanto right*; it may have genuine normative weight that allows it to override some, but not all, competing factors. Third, a right may be a *prima*

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[48] *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) [hereinafter Hohfeld, *Some Fundamental Legal Conceptions*]; Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

facie right; it may roughly track the content of an absolute right. Each of these possibilities is examined in further detail below.

Let us begin with the notion of an *absolute right*. This conception casts rights as maximally stringent normative requirements. *If A has an absolute right that B perform some action X, then B has a conclusive other-regarding reason to X*. The existence of absolute moral rights has seemed doubtful to many, since for any right one might plausibly hold it is generally easy to imagine a case where the right may be overridden by other practical considerations. Nevertheless, the concept has its defenders. Alan Gewirth is among those to have argued that at least some moral rights are absolute.[49] Russ Shafer-Landau has gone further, arguing that *all* moral rights are absolute.[50]

The second possible type of right is what I call a *pro tanto right*. This conception presents rights as genuine, but not conclusive, moral requirements. A *pro tanto* right supplies what philosophers sometimes call a *pro tanto* reason for action.[51] A *pro tanto* reason carries genuine normative weight, but it may nonetheless sometimes be overridden by other considerations. *If A has a pro tanto right that B perform some action X, then B has a pro tanto other-regarding reason to X*. This general view of moral rights and duties is widespread in the philosophical literature; some of its prominent defenders include Joel Feinberg, A. John Simmons, and Judith Thomson.[52]

The third possible type of right is a *prima facie right*. A prima facie right is an epistemologically qualified notion; it *appears* to be a right, but on closer examination it may turn out to be no right at

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[49] *See, e.g.*, Alan Gewirth, *Are There Any Absolute Rights?*, *in* THEORIES OF RIGHTS, *supra* note 2, at 91.

[50] *See* Russ Shafer-Landau, *Specifying Absolute Rights*, 37 ARIZ. L. REV. 209, 224 (1995). Nozick is widely regarded as another theorist who depicts all rights as absolute. *See, e.g.*, Jeremy Waldron, *Introduction* to THEORIES OF RIGHTS, *supra* note 2, at 1, 15. In a crucial footnote in *Anarchy, State, and Utopia*, however, Nozick explicitly leaves open the question of whether side constraints "may be violated in order to avoid catastrophic moral horror." NOZICK, ANARCHY, STATE, AND UTOPIA, *supra* note 3, at 30. This suggests that, although Nozick clearly views rights as highly stringent moral requirements, he does not necessarily regard them as inviolable. For further discussion, see Thomson, *supra* note 15, at 51–52.

[51] *See* SHELLY KAGAN, THE LIMITS OF MORALITY 17 (1989).

[52] *See* FEINBERG, *supra* note 2, at 226; A. JOHN SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS 24–28 (1979); JUDITH JARVIS THOMSON, THE REALM OF RIGHTS 149–175 (1990); THOMSON, *supra* note 2.

all.[53] *If A has a prima facie right that B perform some action X, then B has presumptive reason to believe that B has a conclusive other-regarding reason to X*. The Hohfeldian correlative of a prima facie right is a *prima facie duty*. The notion of a "prima facie duty" was brought to philosophical prominence by W. D. Ross in *The Right and the Good;*[54] since then, it has been widely discussed.[55] Strictly speaking, prima facie duties are not really duties at all; they represent preliminary judgments as to what our duties require. Ross describes them as picking out "the characteristic of . . . *tending to be* our duty."[56]

These three conceptions of moral rights all exhibit a basic level of philosophical coherence: they are logically consistent and exhibit some prima facie resemblance to the types of rights we ordinarily take ourselves to have. Which of them best capture our ordinary understanding of rights? In the remainder of this section, I wish to argue briefly for the following claim: the clearest and most fruitful way of understanding the role of rights claims in ordinary moral and political discourse is to posit that we have absolute rights and prima facie rights, but no *pro tanto* rights. I will begin by exploring the analytical relationship between absolute rights and prima facie rights, before outlining my reasons for rejecting the notion of *pro tanto* rights.

The main objection to the idea of absolute rights is the one mentioned above: for any given right that we ordinarily take ourselves to hold, it is generally easy to imagine a case where it may permissibly be infringed. I will henceforth describe the rights we commonly take ourselves to hold as *everyday rights*. Take my everyday right that you not punch me in the arm. It seems obvious that I have such a right. However, if my ruthless enemy claims credibly that she will kill five innocent people unless you punch me, it seems equally obvious that you should do so. It would therefore seem that, even though I have a right not to be punched,

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[53] *See* KAGAN, *supra* note 51, at 17.

[54] W. D. ROSS, THE RIGHT AND THE GOOD (Phillip Stratton-Lake ed., 2002) (1930).

[55] *See, e.g.,* A. I. MELDEN, RIGHTS AND PERSONS 4–15 (1977); SIMMONS, *supra* note 52, at 24–28; Donald Davidson, *How is Weakness of the Will Possible?, in* MORAL CONCEPTS 93 (Joel Feinberg ed., 1970); W. K. Frankena, *Natural and Inalienable Rights,* 64 PHIL. REV. 212 (1955); Philip Montague, *When Rights Are Permissibly Infringed,* 53 PHIL. STUD. 347 (1988); John Searle, *Prima Facie Obligations, in* PRACTICAL REASONING 81 (Joseph Raz ed., 1978).

[56] ROSS, *supra* note 54, at 28 (emphasis added).

you will sometimes be justified in punching me. This suggests that my right is not absolute.

This well-known objection to absolute rights has an equally well-known response. The response involves a strategy known as *specification*.[57] The specificationist view denies that I have anything as simple as a right that you not punch me in the arm. Rather, what I have is more accurately described as a right that you not punch me in the arm *except* in circumstances *A*, *B*, *C*, *D*, and so on. Alternatively, one might say that I have a right that you not punch me in the arm *unjustly*.[58] In either case, when the content of my right is fully specified, it turns out that what appeared to be a justified infringement of the right is really reflected in the contours of the right itself.

There are three main objections to the specificationist view. The first, which I will call the *argument from ignorance*, objects that if specificationism is true then it is impossible for anyone to know in advance exactly what rights they hold.[59] This seems counter-intuitive; it also potentially undermines the normative force that we normally take rights claims to hold in practical discourse. The second objection, which I call the *argument from explanation*, contends that the specificationist view drains rights of much of their explanatory power. If specificationism is correct, the argument goes, then we cannot use rights to work out what we ought to do; rather, we have to work out what we ought to do *in order to* see what rights we have.

The third objection is what I call the *argument from responses*. This argument claims that if specificiationism is true it is difficult to explain and justify certain seemingly appropriate responses to morally significant situations. Take the case where you punch me in the arm in order to save five lives. Even though you were justified in punching me, we would normally think it is morally appropriate for you to respond to your action in one or more of the following ways: a sense of guilt or regret, an apology, an explanation, or some form of restitution. In other words, your action seems to leave a

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[57] The label is due to Thomson. *See* THOMSON, *supra* note 2, at 37. For further discussion, see generally Montague, *supra* note 55; Shafer-Landau, *supra* note 50.

[58] Thomson calls the former strategy "factual specification" and the latter "moral specification." *See* THOMSON, *supra* note 2, at 37.

[59] *Id.* at 39; FEINBERG, *supra* note 2, at 227–29.

kind of *moral residue* that requires appropriate acknowledgement.[60] However, why should this be the case if none of my rights have been violated?

These objections raise some important questions, but none of them is decisive against specificationism. The first two arguments appeal to the notion that rights play a particular role in moral deliberation, which is undermined by a specificationist analysis. However, these objections assume that when we invoke rights in the course of practical reasoning, we are treating them as rights we *actually* hold. The other possibility is that, when we consider competing rights claims, we are undertaking a preliminary assessment of the types of rights we are *likely* to have, in order to work out what rights we *actually* have. This is the notion of a *prima facie right* introduced above.

If *A* holds a prima facie right with respect to *B*, then *B* has presumptive reason to believe that *B* has a conclusive other-regarding reason to act in a particular way. In other words, prima facie rights *roughly track* the content of absolute rights. Suppose you know that I have a right that you not punch me in the arm, except in certain exceptional circumstances. However, you do not and perhaps could not know what all those circumstances are. You then find yourself standing beside me; you are considering whether to punch me or not. Even without knowing the exact content of my right, you know enough to infer that it probably prohibits you from punching me on this occasion. In other words, you know enough to have presumptive reason to believe that you have conclusive reason not to punch me.

This analysis suggests that most of the everyday rights we rely upon in practical reasoning are actually prima facie rights; that is, they reflect our preliminary judgments about what absolute rights are likely to require. One such prima facie right is my right that you not punch me in the arm. If you treat this presumptively as an absolute right, you will tend to act correctly in a broad range of cases. However, it is only a prima facie judgment; in cases such as the one involving the threat by my enemy, this judgment is modified to reflect more closely my actual entitlement. Prima facie rights will not always pick out the right thing to do, but they will *tend* to pick out

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[60] *See* SIMMONS, *supra* note 52, at 27–28. For a critical exposition and analysis of this type of argument, see Montague, *supra* note 55.

the right thing to do.[61] That is enough to give them a useful role in practical reasoning.

If the preceding account is sound, then the arguments from ignorance and explanation fail to undermine specificationism. It may be that we cannot ever know the full content of our absolute rights. However, we surely always know at least *part* of the content of our rights; in the case of rights with relatively few exceptive clauses, we may even know *most* of their content. This knowledge enables us to formulate prima facie rights that track our actual rights sufficiently closely to stand in for them in many types of practical deliberation. These prima facie rights, in turn, will hold sufficient explanatory power to account for many, although certainly not all, of our considered conclusions about what rights require us to do.

This leaves us with the argument from responses. The thought behind this argument is that everyday rights do not simply drop out of sight when outweighed; rather, they continue to exert a type of moral force even after they are overridden.[62] This is meant to show that everyday rights are best regarded as *pro tanto* rights, rather than merely prima facie standards. How can we explain why it is appropriate to respond to certain types of morally justified actions with regret, apology, restitution, and so forth if, as the specificationist argues, nobody's rights have ultimately been infringed?

The idea that everyday rights do not simply disappear from moral consideration when overridden carries some intuitive appeal. On the other hand, it bears noting that everyday rights *do* drop out of consideration when outweighed, in one very important sense: they cease to stipulate what the duty-holder ought to do. The main point of my right that you not punch me is surely that it means you ought not to punch me; if it turns out that you really *should* punch me then my putative right ceases to determine how you ought to behave. According to the argument from responses, it is then potentially the case that my right that you not punch me gives you an obligation to apologize for doing so. However, the connection between these two notions is far from transparent. After all, if my right that you not punch me gives you any obligation at all, surely it is an obligation not to punch me!

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[61] *Cf.* ROSS, *supra* note 54, at 21.

[62] *Cf.* SIMMONS, *supra* note 52, at 27–28.

The above reply to the argument from responses echoes a point emphasized by Hohfeld. The correlative of my right that you not *X* is your duty not to *X*; whether I also have a right to be compensated if you violate your duty is logically quite a separate matter.[63] The two issues are not only logically separate; they also appear to rest on different normative justifications. It seems that, regardless of what type of duty you have not to punch me, a separate explanation will be needed as to why you have an obligation in certain types of situations to apologize if you do so. However, if these two aspects of the situation require distinctive normative justifications, then we no longer have any reason to prefer a *pro tanto* view of rights over a prima facie conception. In either case, it will be necessary to offer some additional account of why it is that you have an obligation to apologize.

I have so far argued for the plausibility of an account of rights that posits the existence of both absolute and prima facie standards. However, even given that this theory is tenable, why should we prefer it to an account that incorporates *pro tanto* rights? The main reason is that a *pro tanto* view of rights does not sit very well with the way that rights figure in ordinary moral and political discourse.[64] We saw at the beginning of this section that the notion of a right is a strong one. When a person asserts a right to a particular form of treatment, she generally hopes to establish the priority of her interest over other considerations. It is, of course, open to other parties to argue that the claimed right is merely illusory; in many ordinary cases, this might be reasonably be interpreted as a claim that the right is prima facie, rather than actual. However, how would we respond to a person who treated everyday rights claims as involving *pro tanto* standards?

Consider the following exchange. *A* claims to have a right that *B* perform some action *X*. *B*, rather than disputing the existence of the right, simply says, "Yes. What of it?" *A* says, "If I have a right that you *X*, you ought to do it." *B* replies, "I admit that you have

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[63] *Cf.* John Finnis, *Some Professorial Fallacies About Rights*, 4 ADEL. L. REV. 377 (1972). For further discussion, see JUDITH JARVIS THOMSON, *Rights and Compensation*, *in* RIGHTS, RESTITUTION AND RISK: ESSAYS IN MORAL THEORY, *supra* note 2, at 66; Shafer-Landau, *supra* note 50, at 216–17.

[64] Thomson concedes as much, even while defending a *pro tanto* conception. *See* THOMSON, *supra* note 52, at 79–80.

such a right. However, that does not mean I ought to *X*. It only means I have a reason to *X*. I have considered that reason and it is outweighed by other factors. Therefore your right does not alter my position." Would we readily follow *B*'s argument? No. We would say that she fails properly to grasp the notion of a right. If *B* fails to understand rights, however, so does the proponent of a *pro tanto* conception.

B. NEGATIVE AND POSITIVE FREEDOM

In the preceding section, I outlined an analytical framework for understanding everyday moral rights. I argued that rights discourse is best understood by positing the existence of absolute and prima facie rights, but not *pro tanto* rights. This is purely an analytical point; the *content* of our absolute and prima facie rights is a separate question. Later in this article, I wish to ask how the normative content of natural rights might be illuminated by reference to the explanatory device of ontological freedom. In order to explore that question, however, it will be useful to bring some analytical clarity to the concept of freedom as it figures in everyday political discourse.

The most influential conceptual framework for analyzing political freedom is the distinction between negative and positive forms of freedom outlined by Berlin. On this account, I am *negatively* free when nobody is deliberately interfering with my actions and *positively* free when I am able to act in accordance with my true, authentic purposes or desires.[65] Berlin himself favored a negative conception of political freedom, arguing that the positive conception is both incoherent and dangerous. However, the positive understanding of freedom has attracted a number of prominent defenders.[66]

Our present concern is not with the normative merits of Berlin's two conceptions of freedom, but rather with their analytical clarity and usefulness. In this respect, as well, Berlin's analysis has been subject to criticism. A number of theorists have argued that the very distinction between negative and positive forms of

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[65] BERLIN, *supra* note 4.
[66] *See, e.g.*, John Christman, *Liberalism and Individual Positive Freedom*, 101 ETHICS 343 (1991); John Christman, *Saving Positive Freedom*, 33 POL. THEORY 79 (2005); *see also* Charles Taylor, *What's Wrong With Negative Liberty?*, *in* THE IDEA OF FREEDOM 175 (Alan Ryan ed., 1979).

freedom is unsustainable. Perhaps the most widely discussed challenge along these lines comes from Gerald MacCallum's article on "Negative and Positive Freedom."[67] MacCallum argues that, rather than yielding two distinctive conceptions, freedom is "always one and the same triadic relation":[68] it is always the freedom *of* some agent *X*, *from* some constraint *Y*, *to* do or not do some action *Z*.[69] He contends that both negative and positive forms of freedom are best described using this overarching scheme.

MacCallum argues that Berlin's dichotomy effectively obscures the true nature of political disputes about freedom. According to MacCallum, proponents of Berlin's two conceptions often contrive to disagree by each emphasizing a different aspect of the triadic relation that constitutes the freedom under discussion. Proponents of negative freedom tend to emphasize the role played by certain types of *constraints* on action, while proponents of positive freedom tend to focus on the significance of particular morally and politically significant *objectives*.[70] For MacCallum, however, both of these considerations are equally important parts of the equation.

MacCallum further notes that advocates of positive and negative views of freedom often disagree on what is capable of constituting a constraint. Proponents of negative freedom tend to hold that only the *presence* of something can make someone unfree; this often translates into the view that only deliberate interference by other persons may constitute a restriction on freedom.[71] Advocates of positive freedom, by contrast, tend to affirm that the *absence* of some enabling condition may render a person unfree. According to MacCallum, the dispute is ultimately incoherent; upon further examination, neither camp is able to maintain a steadfast stance on this issue.[72]

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[67] Gerald C. MacCallum, Jr., *Negative and Positive Freedom*, 76 PHIL. REV. 312 (1967).

[68] *Id.* at 312.

[69] A similar analysis was earlier proposed by Felix Oppenheim. *See* FELIX E. OPPENHEIM, DIMENSIONS OF FREEDOM: AN ANALYSIS (1961). However, Oppenheim depicts an absence of freedom as arising only from certain types of relationships between agents, while MacCallum leaves his concept of a constraint open.

[70] MacCallum, *supra* note 67, at 318–19.

[71] *Id.* at 320–21.

[72] *Id.* at 321–22 n.8.

MacCallum is correct, in my view, that the different emphases he identifies do not support a coherent distinction between negative and positive forms of freedom. Berlin's scheme usefully describes the different normative concerns expressed in two common views of political freedom, but it fails to identify a sustainable analytical distinction between the relevant conceptions. There is, however, another way to draw the conceptual distinction between negative and positive forms of freedom. MacCallum does not see it, because he does not consider the different types of political *rights* invoked by the two conceptions. It is instructive, in this regard, to compare MacCallum's triadic scheme for analyzing freedom with the way freedom is depicted in the scheme of fundamental legal conceptions outlined by Hohfeld. We will see that Hohfeld, too, was unduly myopic in his treatment of freedom; nonetheless, we can learn from his theory.

Hohfeld treats his legal conceptions as triadic relations, but the triad he has in mind is not the same as MacCallum's. For Hohfeld, each instance of a particular legal conception involves a relation of two *persons A* and *B* and some *action X*. Hohfeld draws an important distinction between two different types of relation commonly described by the term "right": "rights" strictly so called (also called "claims") and "privileges" (also described as "liberties").[73] In what follows, I will describe these as *rights* and *privileges* respectively, setting aside the alternative names sometimes employed by Hohfeld. As mentioned above, these are triadic relations. If a person *A* possesses a Hohfeldian right, she must logically have that right in respect of a second person *B* and in regard to some action *X*.

Each conception discussed by Hohfeld also has another conception as its *correlative*. Rights entail correlative duties.[74] This is to say that if *A* has a right in respect of *B* regarding some action *X*, then it follows logically that *B* has a duty in respect of *A* regarding the same action. If I have a *right* in respect of you that you not punch me in the nose, you have a *duty* in respect of me not to punch me in the nose. The right and the duty both refer to the *same person* (i.e., you) undertaking the *same action* (i.e., punching my nose).[75]

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[73] Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 48, at 30–32.
[74] *Id.* at 31–32.
[75] *Cf.* Finnis, *supra* note 63, at 379.

The correlative of a privilege, on the other hand, is what Hohfeld calls a *no-right*. A privilege can be understood as the negation of a duty.[76] If I have a privilege in respect of you regarding some action *Y*, then I have no duty in respect of you regarding *Y*. In other words, no obligation owed to you precludes me from *Y*-ing. The correlative of my privilege in respect of you regarding *Y* is that you have a no-right in respect of me that I not *Y*.[77] In other words, you *have no right*—in the Hohfeldian sense of a normative claim— that I not *Y*. If I have a privilege to enter my house without asking your permission, you have a no-right that I not enter my house without asking your permission—which is simply to say you have no valid claim that I not do so.

In developing the notion of a privilege, Hohfeld seeks to analyze a form of juridical freedom. He argues that his conception of privilege is often what jurists really mean when they speak of a "liberty." Indeed, Hohfeld goes so far as to claim that the term "liberty," used to describe a legal relation, can have no definite content apart from "privilege":

> A "liberty" considered as a legal relation (or "right" in the loose and generic sense of that term) must mean, if it is to have any definite content at all, precisely the same thing as *privilege* . . . . The only correlative logically implied by the privileges or liberties in question are the "no-rights" of "third parties."[78]

However, this seems an unduly narrow view.[79] The term "liberty" may indeed be used in a legal context to mean a Hohfeldian privilege, but it is also ordinarily and sensibly used to express at least two other types of normative relations. It is instructive in this context to consider the remarks of Lord Lindley in a passage from *Quinn v. Leathem* criticised by Hohfeld. In that case, His Lordship comments that:

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[76] Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 48, at 32–33.
[77] For further discussion, see Glanville Williams, *The Concept of Legal Liberty*, 56 COLUM. L. REV. 1129, 1135–39 (1956).
[78] Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 48, at 36.
[79] For an illuminating discussion of this issue, see THOMSON, *supra* note 52, at 53–56.

> The plaintiff . . . was at liberty to earn his living in his own way . . . . This liberty involved the liberty to deal with other persons who were willing to deal with him. This liberty is a right recognised by law; its correlative is the general duty of every one not to prevent the free exercise of this liberty . . . .[80]

Hohfeld pours scorn on this passage. He says Lord Lindley perpetrates a serious logical confusion by moving from a "liberty to deal with other persons" to a "duty of every one not to prevent the free exercise of this liberty."[81] However, His Lordship's intended meaning is clear: first, that the plaintiff is not normatively prohibited from earning his living in his own way; and, second, that others owe the plaintiff a duty not to prevent him from earning his living. It is true that, interpreted in this way, the passage runs together two distinct ideas. However, the conjunction is a sensible and familiar one.

Lord Lindley's comment enables us to identify two senses of the term "liberty" disclosed by Hohfeld's scheme. The first is what Hohfeld calls a "privilege." We might re-label this as *normative freedom*, since it consists solely in freedom from normative restrictions.[82] The second sense of "liberty" employed in the passage involves a right to *non-interference* in the performance of particular actions; for *A* to hold a liberty in this second sense is for *A* to possess a *right* that a range of persons not interfere in a particular range of ways with *A* doing *X*. Let us call this *negative freedom*. Lord Lindley's claim might then be summarized as follows: the plaintiff is both *normatively* and *negatively* free to earn a living in his own way.

We might also usefully posit a third sense of "liberty," which involves a right to *positive assistance* in the performance of particular actions. For *A* to hold a liberty in this third sense is for *A* to hold a *right* that a range of people assist *A* in a particular range of ways to perform *X*. Let us call this *positive freedom*. We are now in a position

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[80] Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 48, at 36 (quoting Quinn v. Leathem [1901] A.C. 495, 534).

[81] *Id.* at 36–37.

[82] Hohfeld's conceptual framework was intended to apply only to juridical notions. However, it has since been adapted for use within other contexts, including moral and political theory. *See, e.g.*, THOMSON, *supra* note 52, at 39 n.2, 70–73.

to offer the following analysis of moral and political claims about freedom. When we refer in a moral or political context to some person *A*'s "freedom to *X*" (as in "freedom to vote," "freedom to carry a concealed firearm," and so on) or, alternatively, *A*'s "freedom *of X*" (as in "freedom of religion," "freedom of speech," and so forth), we typically affirm one or more of the following three propositions:

1. *Normative Freedom A* owes a range of people [*B*, *C* . . . *N*] no duty not to *X*.
2. *Negative Freedom A* has a right that [*B*, *C* . . . *N*] not prevent *A* from *X*-ing.
3. *Positive Freedom A* has a right that [*B*, *C* . . . *N*] assist *A* to *X*.

These three conceptions of freedom invoke distinctive types of normative claims. Normative freedom refers only to the duties owed (or not owed) by *A* to others. Negative and positive freedom, by contrast, invoke *A*'s *rights* (that is, the duties owed to *A* by other people). Specifically, negative freedom posits a right to *non-interference* in performing a particular action, while positive freedom invokes a right to *positive assistance*. These are two distinctive types of rights; one might expect them to require different normative justifications. For this reason—and notwithstanding MacCallum's legitimate criticisms of Berlin's original scheme—it seems useful to maintain the conceptual distinction between negative and positive forms of freedom, at least for the purposes of moral and political reasoning.

III. THE NORMATIVE QUESTION

We have so far considered the following questions. First, on the assumption that humans have natural rights, how might we go about explaining that proposition? Second, what is the clearest and most useful conceptual scheme for analyzing the role of rights in practical discourse? In the final section of this article, I wish to raise what I have called the *normative question*: what is the *most morally desirable* understanding of natural rights? Taking into account the explanatory and analytical frameworks sketched above, how should we best understand the *content* and *implications* of the rights humans hold?

Let us begin by returning to the notion of ontological freedom introduced in the first part of this article. I have suggested that ontological freedom provides one possible answer to

Nozick's explanatory question: in virtue of what characteristics of persons are there constraints on how they may be treated? I now wish to ask how this response might be used to found a substantive theory of natural rights. One way to approach this question might be to consider our everyday rights in light of the following explanatory principle: *always treat others in such a way as to respect their ontological freedom*. Let us call this the *ontological principle*. This principle posits a conclusive other-regarding reason for action; in terms of the analytical framework outlined in the previous section, we might regard it as expressing an absolute right.

The ontological principle is vague. It purports to pick out conclusively what each person ought to do; however, without further detail as to what it means to respect a person in her ontological freedom, the principle is unlikely to suffice as a practical guide for action. One way of seeking to clarify the issue would be to look more closely at our everyday rights, treating them as social judgments that roughly track the ontological principle across a range of cases. (I have referred to these types of judgments elsewhere as *social judgments of ethical significance*.[83]) These approximations of rights could then be analyzed as prima facie standards that tend to ensure that ontological freedom is respected. On this view, everyday rights are not themselves absolute; they are subsidiary to the ontological principle.

Moral and political discourse notoriously involves difficult questions about how to balance the different ethical claims of members of the community. We can usefully understand these claims as invoking a network of prima facie rights; where it is necessary to engage reflectively with this normative framework, we can appeal to our overarching explanatory theory as a way to clarify the area. In the present section, I seek to apply this methodology to examine the role of freedom in political discourse. I suggest that political debates about freedom can usefully be understood in terms of the rights-based conceptions of negative and positive freedom outlined in the previous section. Political discourse requires us to balance the different types of

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[83] *See* Jonathan Crowe, *Levinasian Ethics and Legal Obligation*, 19 RATIO JURIS 421, 425 (2006); Jonathan Crowe, *Dworkin on the Value of Integrity*, 12 DEAKIN L. REV. 167, 175–78 (2007); Jonathan Crowe, *Existentialism and Natural Law*, 26 ADEL. L. REV. 55, 71–72 (2005).

rights expressed in these conceptions; the explanatory notion of onto-logical freedom helps us to clarify how this ought to be done.

A. FREEDOM, VALUE AND CHOICE

I suggested above that political discourse is usefully under-stood as a process of balancing prima facie rights. It should be clear there is an important role for the political process in both advancing community knowledge of how these claims objectively should be balanced and forging a workable resolution where competing claims appear evenly poised. There is something to be said in this context for the notion of *discourse ethics*, which requires that all hu-mans be regarded as cooperative participants in the resolution of social questions.[84] On the other hand, the concept of natural rights entails that the proper realm for political negotiation on social and legal issues is not unlimited. The ontological principle outlined above represents one possible framework for coming to grips with this notion.

The ontological principle posits an absolute moral constraint on political action. It therefore gives expression to the idea, empha-sized by Nozick in his notion of rights as side constraints, that rights place stringent limits on how people may legitimately be treated by others. In order to give practical content to this principle, however, it is necessary to examine the prima facie rights that stand in for it in everyday practical discourse. I wish to argue that resolv-ing political questions consistently with this framework involves balancing strong prima facie claims by individuals to non-interference in the performance of a range of actions (what I de-scribed in the previous section as *negative freedom*) with a range of less pervasive, but potentially more weighty prima facie claims for positive assistance in achieving specific objectives (what I character-ized above as *positive freedom*).

The explanatory theory outlined in the first part of this article suggests that we value freedom because it is central to our ethical

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[84] *See generally* Jürgen Habermas, *Discourse Ethics: Notes on a Program of Philosophical Justification*, *in* THE COMMUNICATIVE ETHICS CONTROVERSY 60 (Seyla Benhabib & Fred Dallmayr eds., 1990). For a more extensive exposition of Habermas's legal and politi-cal theory, see JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS (William Rehg trans., 1996).

experiences. The overarching lesson of social interaction, on this account, is that we are both free to choose and unable to avoid responsibility for our actions. Metaphysical debates about free will and determinism aside, nobody genuinely engaging in moral deliberation would deny that we have the capacity to make ethically significant choices. Similarly, anyone who sincerely considers a moral dilemma would be hard pressed to escape the sense of social significance that accompanies such a decision. This sense is particularly strong where the choice impacts directly on the welfare of other people.

It is useful to recall the precise manner in which we become aware of our ontological status as free and responsible moral agents. In the first place, our pre-reflective sense of ontological freedom arises from our experiences involving practical choice, but not all our choices involve the same type of awareness of our ontological status. Our ontological self-apprehension is keenest when we are confronted with choices that seem both *significant* and *difficult*.

It bears noting that a choice can be difficult without seeming significant. For instance, I may find it difficult to decide whether to have orange juice or coffee with my breakfast, while recognizing that the outcome holds little moral importance. In contemplating such a choice, I feel free, but not responsible in an ethical sense. On the other hand, a choice can also be significant but not difficult. Suppose a ruthless political operative threatens to kill ten innocent bystanders unless I donate a small sum to a political cause with which I disagree. In such a case, my decision carries a high level of moral significance, but the average person would not see the choice as difficult.

It is tempting to conclude that, in the latter scenario, I feel responsible, but not free. However, further reflection reveals this description as inadequate. Sartre's comments concerning anguish show that, in such a situation, my phenomenological freedom is undiminished. In walking along a narrow ledge, it may seem obvious that I should not leap into the void, but I am nevertheless well aware that the option is available. In such cases, my freedom appears to be located in the option of choosing against value; it seems that I can embrace either value or freedom, but not both. Far from diminishing our intuitions about ontological freedom,

such experiences reveal to us the dialectical interchange between freedom and value.

However, any choice to prioritize either freedom or value in such a situation proves abortive. In the event that I simply follow value's dictates, my freedom seems purely nominal. However, without freedom I am not responsible, so genuinely embracing value appears impossible. On the other hand, should I embrace freedom and reject the constraints represented in value, I alone become responsible for my choices. I am unable to avoid recognizing freedom's importance in founding meaning. My freedom comes to be experienced as a constant stream of normative questions issued to me from elsewhere, making it unfeasible to regard my actions as holding purely subjective importance. In this way, choices that present value and freedom as opposing options militate against our attempts to grasp our ontological status.

Progress in understanding the relationship between freedom and value is only possible in contexts where both ideas can be embraced at the same time. Such a context depends on moral choices that are both significant *and* difficult. These choices are characterized by the need to decide between competing representations of moral value. Suppose that our political operative adopts a more open approach to seeking donations and, rather than threatening to kill the ten innocent bystanders, simply offers me the opportunity to donate to any (or none) of several different causes. In contemplating such a choice, I feel both free and responsible. Since there is more than one outcome that is consistent with value, there is no need to prioritize either value or freedom. In such a situation, I am able to *choose* value, thus resolving the tension between these two currents in my ontological self-image.

Choices that are significant, but not difficult, can be described as *closed*. Meanwhile, choices that are both significant *and* difficult are *open*. In order to understand this distinction, it will be useful to construct a basic calculus of choice. Choices are frequently represented in everyday discourse on a *simple* model. Simple choices are choices between two or more self-contained value-significant events. Such choices might be represented as [*a* $\underline{V}$ *b*] or [*a* $\underline{V}$ *b* $\underline{V}$ *c*].[85]

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[85] The symbols I use to represent choices in the following paragraphs are based on standard logical notation. However, I do not mean to indicate that reductions or

However, most actual choices we make in our lives are better understood as *compound* choices. Compound choices involve alternatives that represent more than one discrete event. Such choices manifest various degrees of complexity. A relatively simple compound choice might be represented as [(*a* & *b*) V (*c* & *d*)], whereas a more complex choice might be depicted as [(*a* & *b* & ~*c*) V (*a* & *d*) V (*b* & ~*e*)]. The extent to which we distinguish between different events in assessing the complexity of a given choice depends upon whether and to what extent those events are apprehended by us as value-significant outcomes demanding our moral consideration.

The distinction becomes clearer when discussed through practical examples. Let us consider the significant *and* difficult choice concerning political donations discussed above. It would be commonplace in everyday conversation to discuss the choice on a simple model. In this manner, I might recount how I chose to support a reproductive rights group rather than an anti-pollution organization, using the model [*a* V *b*]. However, it would be clear to all involved that this was not a comprehensive account. For instance, since I have limited resources, my choice to support a particular organization entails not using the funds for other ends. In this regard, the choice is better represented as [(*a* & ~*b* & ~*c* & . . . ~*n*) V (*b* & ~*a* & ~*c* & . . . ~*n*)]. In other words, each alternative compounds several distinct events.

Nevertheless, the choice described above remains *open*, because neither compound alternative dominates the equation at an intuitive level. In other words, one would expect significant disagreement about the optimal outcome among reasonable and sensitive people within a shared social context. The same cannot be said about the choice represented in the earlier scenario involving our political operative. In describing that situation on a simple model, I would speak about being obliged to choose between causing ten innocent deaths and making an undesired political donation. However, a more adequate account would represent the choice as [(*d* & ~*p*) V (*p* & ~*d*)], where *d* represents ten innocent

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equivalences can necessarily be determined by treating the representations as logical equations. It should be noted that the symbol "V" is intended to be read as an *exclusive* disjunction. For those who prefer to think in linguistic terms, (*x* & *y*) can be read as "*x* and *y*," (~*x*) as "not *x*," and (*x* V *y*) as "*x* or *y* but not both."

deaths and *p* represents an unwanted political donation. This elaboration enables us to appreciate that, although there are two distinct value-significant events in the equation (*p* and *d*), the choice is dominated by a single event (*d*). In other words, I experience the choice on a *binary* model that can be represented as [*d* <u>V</u> ~*d*].[86] The moral importance I might otherwise attach to the comparison [~*p* <u>V</u> *p*] becomes insignificant.

It is for this reason that *closed* choices reduce to a dialectical competition between freedom and value. In a situation involving a closed choice, I am confronted with a binary opposition between value and its negation. Since the value-laden option appears foisted upon me, its negation is experienced as freedom. Open choices, on the other hand, resist binary representations. Such choices therefore allow agents to find freedom in positive value-affirmations. The synthesis between freedom and value represented in these choices provides the basis for good faith engagement with the pre-moral context for human action. In situations involving open choice, the agent is able to construct relationships between value-significant events.

It should be noted that all the types of choices discussed above have some value for human self-realization. Choices that are difficult, but not ethically significant—"coffee or orange juice" choices—allow subjects to "play" with their freedom in the world, ordering their preferences to facilitate enjoyment and aesthetic self-expression.[87] Choices that are significant, but not difficult, while problematic in their collective impact upon ontological self-knowledge, also serve to sharpen our awareness about the dialectical interchange underpinning our self-image, thus preparing the ground for a resolution between the two elements. Progress in our ontological self-understanding, however, depends on choices that are both significant *and* difficult. Such choices allow us to embrace

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[86] Binary choices are choices between a single value-significant event and its negation.

[87] Most people would readily grasp that Oliver Wendell Holmes's well-known comment equating moral decisions with the choice whether or not to have sugar in one's coffee rests upon a serious ontological mistake. It is hard to dispute Richard Epstein's characterization of Holmes's position as "a determined form of moral blindness open only to the totally inept or the devilishly brilliant." *See* RICHARD A. EPSTEIN, SKEPTICISM AND FREEDOM: A MODERN CASE FOR CLASSICAL LIBERALISM 78, 83 (2003).

both freedom and value at the same time, thus laying the foundations for moral engagement.

B. DIVERSITY AND EXCLUSION

We are now in a position to see how the ontological principle provides the normative ground for both prima facie claims to non-interference and prima facie claims to positive assistance within political discourse. Ontological freedom cannot be embraced without choices that are both significant and difficult. It follows that human communities—in the full sense involving reliance upon shared, basic values—depend upon such choices. Institutional structures where closed choices dominate are anathema to shared human ideals. Importantly, it is impossible to have open, significant choices without negative freedom. A choice is not open if it is predetermined by external forces, even if it is the same choice one otherwise would have made by oneself.

Furthermore, the social judgments of ethical significance upon which the realization of value depends arise through a dynamic process of what we might call "moral evolution."[88] The social institutions in question reflect the experiences, accreted over generations, of many diverse individuals seeking to realize their ethical responsibilities and explore the possibilities of moral freedom. It would clearly be misguided for one individual or group to attempt to redesign the prevailing framework for expressing moral value.

As Nozick remarks,[89] given the diverse "desires, aspirations, impulses, talents, mistakes, loves, [and] sillinesses" possessed by different people, given "the complexity of interpersonal institutions and relationships," it is "enormously unlikely that, even if there were one ideal pattern for society"—which, on the present account, there is not—it could be worked out by humans in advance. More fundamentally, though, such an enterprise would fail to acknowledge that true community arises through shared experience. While

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[88] Important insights concerning the role of evolutionary processes in the development of social morality can be found in ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (Oxford Univ. Press 1976) (1759). For a useful contemporary discussion of Smith's moral theory, see JAMES R. OTTESON, ADAM SMITH'S MARKETPLACE OF LIFE (2002).

[89] NOZICK, ANARCHY, STATE, AND UTOPIA, *supra* note 3, at 313.

the law may play a role in shaping social attitudes, the underlying judgments of value must ultimately be affirmed at the individual level.

What, then, is the best way to facilitate the evolution of a rich, stable and accessible framework for ethical expression at the community level? I would suggest the answer lies in recognizing a basic set of general, end-independent rules concerning such matters as the protection of private property, the enforcement of contracts, the inviolability of the physical person, and the sanctity of key areas of personal expression. It is true that, as G. A. Cohen points out,[90] enforcing such rules involves restricting the negative freedom of everyone within the community, insofar as it interferes with their ability to commit the prohibited actions. However, the creation of such general rules also has wide-ranging benefits: it provides a structure within which individuals can potentially participate in a wide range of different value-significant activities, without the need for ongoing, complex discrimination between these diverse objectives at the community level.

Cohen's point was not overlooked by F. A. Hayek, who emphasizes in *The Constitution of Liberty* that "in defining coercion we cannot take for granted the arrangements intended to prevent it."[91] Hayek argues that, in order to prevent arbitrary coercion, it is necessary first to enable "the individual to secure for [herself] some private sphere where [she] is protected against such interference."[92] Later in the same passage, he notes that "only in a society that has already attempted to prevent coercion by some demarcation of the protected sphere can a concept like 'arbitrary interference' have a definite meaning."[93]

Hayek goes on to argue that the best way to delineate the private sphere of each individual, in order to forestall arbitrary coercion, is to institute a system of general, end-independent rules, the range and content of which is not subject to the will of any one person or group and is not dependent on the continuing, deliberate assignment of particular items or privileges to particular people. He adds that "the solution that [people] have found for this problem

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[90] G. A. COHEN, SELF-OWNERSHIP, FREEDOM AND EQUALITY 55–56 (1995).

[91] F. A. HAYEK, THE CONSTITUTION OF LIBERTY 139 (1960).

[92] *Id.*

[93] *Id.*

rests on the recognition of general rules governing the conditions under which objects or circumstances become part of the protected sphere of a person or persons."[94] The political claims associated with the notion of negative freedom may then be understood as appealing to an underlying prima facie right not to be subjected to interference beyond the minimal framework of general rules that defines the limits of the private sphere. As Hayek puts it, "[negative] freedom does mean and can mean only that what we may do is not dependent on the approval of any person or authority and is limited only by the same abstract rules that apply equally to all."[95]

A framework of general rules of the type suggested above is conducive to both individual moral expression and the continuing evolution of social judgments on ethically significant forms of action. Within such a framework, social institutions for moral expression tend, generally speaking, to be accessible across the community. People normally need no further assistance to partake in religious practices, political activities, economic transactions and personal relationships. Where specific groups are institutionally excluded from such activities, community action may be needed. Given a system of end-independent rules, however, such targeted community intervention may be marginal, rather than pervasive.

There is likely to be a limited range of specific services without which people cannot engage in morally significant choice at a reasonable level. Medical care is an obvious example; poor health may greatly reduce one's ability to participate in the moral community. Education, to take a more complex case, tends to significantly expand both the student's actual choices in moral arenas and her awareness of the options open to her. There is a strong argument, on the present account, for recognition of a weighty prima facie right on the part of each individual to positive assistance in attaining what represents a reasonable level of education by reference to prevailing community standards.[96]

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[94] *Id.* at 140.

[95] *Id.* at 155.

[96] A full consideration of the issue of education would also require a discussion of the rights of children. For present purposes, it suffices to note that parents ought to be legally obliged to educate their children to a certain level. If they cannot do so without genuine hardship, assistance should be available. A similar analysis also applies in respect of medical care.

It bears noting, however, that the above argument does not clearly necessitate pervasive government ownership or control over educational institutions. Many people are able to access education on the free market. (If they could not, education providers would lower their prices.) The underlying point is that nothing in the present account entails that morally significant activities should be *costless*. Indeed, making such choices costless reduces the incentive for people to weigh their value reflectively against competing options.

The weight of the prima facie claim to assistance outlined above therefore diminishes in proportion to the ability of the individual to achieve her educational goals without targeted community support. It also seems reasonable to suppose there is a diminishing return in the range of additional moral options made available to students as a result of each successive qualification, particularly at the post-secondary level. There will therefore come a point where the prima facie claim to further assistance is outweighed by the claims to non-interference of other members of the community. The exact point where this occurs is properly resolved through the political process.

It follows that, in principle, community assistance with respect to educational opportunities should be limited to those who genuinely could not afford to pay the market price. In practice, however, a range of complex considerations may arise in determining the level of community involvement required to ensure an open and accessible education system that meets the overarching requirement of respect for ontological freedom. Relevant considerations include: (a) the need to ensure diversity within educational environments in order to preserve the foundations of the ethical community; (b) the need for some degree of equality in outcomes to avoid excluding certain groups from key social opportunities; and (c) the need to minimize institutional disincentives for those with limited resources to improve their economic positions. There are, undoubtedly, also other factors. It is a good question whether targeted community intervention would secure significantly better outcomes with respect to these issues than a market-based arrangement. It is appropriate for present purposes to leave the issue open.

The role played by economic exchanges in facilitating meaningful moral expression by individual agents is frequently overlooked. Economic exchanges within a framework where negative freedom is generally respected tend to give rise to a price system that reflects both the relative difficulty of supplying items and the value placed

upon those items by participants in the market. It therefore presents individuals with a wide range of choices about how to live their lives, while also requiring them to weigh their preferences reflectively against other options, taking into account the quantity of scarce resources required to fulfill each alternative.[97] Such a system not only allows people a wide latitude of moral choice, but also tends to ensure that the range of available options is dispersed throughout the community.

Notice that there is nothing in the present account that demands exactly the same range or number of opportunities for moral expression should be available to everyone.[98] Rather, what is entailed is that everyone should have access to a sufficient range of choices in key areas to sustain a satisfactory moral life. Since economic gifts and exchanges are a widespread social outlet for moral expression, a wealthy person will have more open choices available to her than someone less well-off. However, there is no case here for radical equalization of wealth; as Nozick observes, "life is not a race in which we all compete for a prize which someone has established; there is no unified race, with some person judging swiftness."[99] Rather, there are different people living different lives; in order to do so satisfactorily, only a sufficient range of significant, open options is needed.[100]

Two important qualifications to the preceding point are necessary. First, institutional structures that disproportionately restrict the practical choices available to particular individuals or groups may well prevent even the above condition from being satisfied, insofar as they give rise to a social environment in which the individuals or groups in question are unable to engage effectively in the

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[97] *See* Allan Gibbard, *What's Morally Special About Free Exchange?*, 2 SOC. PHIL. & POL'Y 20, 20–21 (1985).

[98] As Michael Levin rightly points out, such an egalitarian distribution of positive opportunities would be impossible to achieve in practice. *See* Michael Levin, *Negative Liberty*, 2 SOC. PHIL. & POL'Y 84, 88–92 (1984).

[99] NOZICK, ANARCHY, STATE, AND UTOPIA, *supra* note 3, at 235.

[100] I do not mean to deny that poverty represents a potentially serious barrier to participation in the moral community. However, the *mere fact* that my neighbor earns more than I do does not mean that I lack adequate means to express my moral preferences.

moral community. [101] Furthermore, there may be some types of choices that are so prominent in a given social context that to institutionally deny a particular person or group the capacity to engage in them is tantamount to denying their ethical personality. Both these types of cases may give rise to weighty prima facie claims for positive assistance in overcoming social and economic barriers to moral participation. The basic presumption, however, remains in favor of negative liberty.

IV. CONCLUSION

My aim in this article has been to suggest one possible framework for understanding the notion of natural rights, as it figures in moral, political, and legal debates. I began with the explanatory question: how is it or could it be possible that humans have natural rights? Nozick provides some hints in this direction; I argued that his approach could usefully be developed through reference to the notion of ontological freedom. This idea seeks to capture the simultaneous sense of freedom and responsibility that accompanies human engagement with certain types of morally significant choices. It provides a rich and illuminating explanatory context for making sense of the shared concern people hold with the concept of natural rights.

I turned next to the analytical question: what is the clearest or most useful conceptual framework for understanding rights claims? I argued that our everyday view of moral rights is best captured by a conceptual framework that incorporates both absolute rights and prima facie rights, but omits *pro tanto* rights. The notion of *pro tanto* rights is inconsistent with the force rights are normally taken to hold in moral and political debates; furthermore, it adds little conceptual power to the framework provided by the absolute and prima facie conceptions. I then examined the connection between these conceptions of rights and the idea of political freedom. I suggested that political debates about freedom are usefully understood as invoking rights to non-interference and positive assistance in respect of particular actions.

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[101] For further discussion, see Jonathan Crowe, *Reinterpreting Government Neutrality*, 29 AUST. J. LEGAL PHIL. 118 (2004).

The last part of the article turned to the normative question: what understanding of natural rights is the most morally desirable? My aim in this section was to show how the explanatory and analytical frameworks could be integrated to yield some illuminating, if modest, normative conclusions. I argued in particular that political discourse involves balancing strong prima facie rights to non-interference against a range of narrower, but potentially more significant rights to positive assistance. The presumption is in favor of negative freedom; however, positive freedom also has an important role to play. The prima facie character of political rights leaves a range of issues impacting on moral choice for resolution at the community level, but the proper scope of community action is certainly not unlimited.

I have argued that political discourse is usefully understood as a process of weighing prima facie rights. The overarching aim is to uphold the natural right of all individuals to be respected in their ontological freedom. This is not the only way of understanding natural rights, but it is a fruitful and enlightening one. It is in the interests of every member of the legal community that this principle is observed; in this respect, the theory holds the potential to cast light on the notion of the common good, as featured in natural law political philosophy.[102] It also promises to add, by extension, to our understanding of the concept of law. Law that is adapted to the social objective of respecting ontological freedom may be regarded as law in the fullest sense of the term: law that furthers the normative purpose of the legal community. However, a full exploration of that issue must wait for another article.

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[102] *Cf.* Jonathan Crowe, *Natural Law in Jurisprudence and Politics*, 27 OXFORD J. LEGAL STUD. 775 (2007).