# Moralised conceptions of liberty

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## 1    Introduction

One of the key questions regarding liberty[1] is the question whether liberty is a descriptive/value-neutral concept or one that is essentially normative/moralised. Are descriptive facts sufficient for determining whether x is free to $\phi$, or is it necessary to also bring in moral facts for understanding and applying the concept of liberty?[2,3] This question is of central importance because it determines whether liberty has intrinsic normative significance, thereby determining what role liberty can play in moral and political theorising.[4]

   Value-neutral theories consider liberty to be a purely descriptive concept. This kind of approach does not presuppose any moral judgements, but it cannot underwrite them either. This is because the resulting concept will not have intrinsic

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[1] 'Liberty' and 'freedom' will be treated as synonyms.

[2] Whether x is free to $\phi$ will ultimately be fixed by descriptive facts. This follows from the supervenience of the normative on the descriptive and is not denied by the proponent of a moralised account, who rather argues that which descriptive facts are relevant is something that is determined by normative principles. Liberty thus classifies as a normative concept, according to moralised accounts, because they consider it to be necessary to bring in normative notions to explain why the descriptive facts in virtue of which x is (un)free to $\phi$ make it the case that this is so.

[3] Analogous questions arise when it comes to analysing other notions, such as harm, coercion and voluntariness. In the case of the concept of harm, for instance, one needs to specify the baseline with respect to which the actual outcome is to be compared to determine whether an agent has been harmed or benefitted. Can this baseline be characterised in descriptive terms, for instance via counterfactual, statistical, temporal, or normalcy baselines? Or is the baseline essentially normative, specified for instance in terms of rights, interests, or reasonable expectations?

[4] In addition, it is important to get clear on this issue since much theorising proceeds on the basis of implicit moralisations, which is problematic for two reasons. First, it leads to a situation in which people are prone to talk past each other. In particular, different implicit moralisations ensure that the concept of freedom is used in different ways, where disagreement is due not to the analysis of freedom, but due to differing underlying moralisations. Second, an implicit moralisation brings with it the risk of question-begging arguments, whereby one argues that p is the case on the basis of a moralised concept c, but where c ultimately relies on p being the case, rendering such an argument dialectically ineffective. Nozick's Wilt Chamberlain argument is probably the most famous instance of this problem, insofar as the conflict between (moralised) liberty and patterned theories of justice that he identifies simply seems to presuppose the capitalist property rights that he is trying to establish (cf. Ryan: 1977).

normative significance and will be too thin to do any justificatory work by itself. It will merely be a "flat description that carries, in itself, no suggestion of endorsement or complaint" (Dworkin: 2000, p. 125). This should be clear insofar as assigning intrinsic significance to freedom (where this is construed in a non-moralised manner) amounts to considering being free to $\phi$ as mattering in itself, such that any constraint on $\phi$-ing would thereby be pro tanto problematic, no matter what $\phi$-ing consists in. If no restrictions are placed on $\phi$-ing, such that, say, the freedom to torture, to rape and to murder are classified as genuine freedoms, it is evident that considerations of freedom do not as such constitute pro tanto reasons. There will be some freedoms that are not to be infringed, whereas others are to be restricted, which implies that freedom will not have intrinsic normative significance, i.e. freedom as such will not be of significance.

A moralised notion, by contrast, builds morality into the very concept of liberty, thereby ensuring that it is intrinsically normatively significant and that it can, consequently, play a central justificatory role in moral and political theorising. Liberty then matters in its own right and its significance is not to be reduced to the value of the actions that one is free to do. Accordingly, constraints on freedom are problematic as such and there is a pro tanto reason not to restrict liberty, which allows us to underwrite the "presumption that humans should not obstruct one another's activity" (Miller: 1983, p. 69).[5],[6]

This chapter will be concerned with rights-based conceptions of liberty.[7] Section 2 will elucidate how exactly rights-based accounts moralise liberty, identifying two ways in which rights enter into the analysis of freedom, namely (i) by determining which courses of action an agent can be free or unfree to perform, and (ii) by determining which obstacles classify as constraints on freedom. Section 3 distinguishes moralised negative conceptions of liberty from positive conceptions of liberty, thereby showing that moralising liberty is not tantamount to adopting a positive conception. Section 4 contrasts rights-based conceptions with the moral responsibility view, showing that the latter does not constitute a

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

[6]The flip-side of the moralisation is that the concept does not really add anything. In particular, there is no fundamental justificatory work that it can perform, given that everything can be said in terms of the more fundamental moral notions in terms of which the concept is understood. The moralised notion then turns out to be nothing but a convenient shorthand that allows us to describe things in a perspicuous manner, but that is not capable of performing any substantive work of its own and is in that sense dispensable. We thus seem to be faced with the dilemma that the concept is either too thick (if it is moralised), or too thin (if it is merely descriptive). For arguments to the effect that this dilemma is to be resolved in favour of a moralised notion, cf. "Moralising liberty" (Bader: manuscript).

[7]This kind of moralisation is espoused by Locke: 1689, Kant: 1797, Nozick: 1974, and Dworkin: 2000, amongst others.

viable alternative and that a rights-based approach is the only acceptable way in which liberty can be moralised.

## 2    Moralising liberty

Negative conceptions of freedom, which consider freedom to consist in the absence of constraints, are primarily divided with respect to the question as to which obstacles or interferences classify as constraints on freedom and which ones are not freedom-infringing. Rights-based conceptions provide a distinctive answer to this question by considering only rights-violating interferences as infringements of liberty. A rights-violating interference is an interference with an action that (i) an agent has a right to perform and that (ii) violates this right. This implies that rights-based accounts involve moralised characterisations of both the y- and the z-parameter in MacCallum's triadic schema, giving rise to restrictions with respect to the type of action that is being interfered with as well as with respect to the source of the obstacle.

   According to MacCallum, any freedom claim takes the form: agent x is free from constraints y to do/be/become z (cf. MacCallum: 1967). Differing conceptions of freedom disagree about the specification of the domains of these parameters, i.e. to which subjects freedom is to be attributed (= x), which obstacles classify as constraints on freedom (= y), and which actions an agent can be free or unfree to perform (= z). Using this schema, we can distinguish between an agent being free, unfree and not free to $\phi$.[8] In particular, an agent x is free to $\phi$ iff $\phi$ is in z and nothing in y is preventing x from $\phi$-ing. By contrast, x is unfree to $\phi$ iff $\phi$ is in z and something in y is preventing x from $\phi$-ing. Finally, x is not free to $\phi$ iff $\phi$ is not in z. This means that there are two ways in which x can be prevented from $\phi$-ing without this being inimical to x's freedom, namely insofar as (i) though x is prevented from $\phi$-ing, the action in question is not in z, in which case x was not free to $\phi$ in the first place, and (ii) though x is prevented from $\phi$-ing, what is doing the preventing is not in y, in which case x is unable to $\phi$ yet still free to $\phi$.

   The restriction to rights-violating interferences gives rise to both of these possibilities. On the one hand, the agent in question can fail to have a right to $\phi$, such that preventing the agent from $\phi$-ing does not classify as a rights-violating interference and hence does not infringe liberty. This amounts to moralising the z-parameter by restricting its domain to normatively possible courses of action, i.e. permissible actions that the agent has a right to perform, thereby excluding certain obstacles from classifying as infringements of liberty, namely those that prevent actions that are merely part of licence and not of liberty. On the other hand, the agent can be prevented from $\phi$-ing without the agent's right to $\phi$ being violated, thereby failing to be inimical to liberty. This moralisation of the

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[8]An agent being free simpliciter can be understood in terms of being free to $\phi$ for all $\phi$ in z.

y-parameter appeals to the notion of a rights-violating interference in fixing the precise conditions that an obstacle must satisfy, in particular the kind of causal origin that it must have, in order to classify as a constraint that restricts liberty. (Discussions in the literature have so far exclusively focused on the rights-based moralisation of the z-parameter, i.e. the contrast between liberty and licence, and have not considered the moralisation of the y-parameter.)

## 2.1 Liberty v. licence

The domain of the z-parameter specifies the possible actions that an agent can be free or unfree to perform. Any action that is not in this domain is not in the relevant sense a possible action in the first place and is hence not one to which freedom is applicable, which ensures that an agent can neither be free nor unfree to perform such an action. The distinction between freedom and unfreedom is only applicable within the domain of the z-parameter, i.e. amongst 'possible' actions, where the notion of possibility could be, for instance, that of logical, nomological, technological, or moral possibility.

This means that anything that defines the domain of possible actions and that is constitutive of the relevant type of possibility cannot classify as a constraint on freedom, even if it renders certain actions impossible with respect to a more encompassing notion of possibility. This is because to be a constraint is to be something that renders a possible course of action (i.e. one that is in the domain of the z-parameter) physically impossible for the agent in question (or, possibly, merely ineligible). For instance, the laws of nature make it the case that certain types of actions are nomologically impossible, without in any way being detrimental to freedom (given that the relevant modality is not broader than that of nomological possibility). Likewise, anything that renders something impossible that is not in the relevant sense possible is also not a constraint. For instance, if the relevant type of possibility is that of normative possibility, then something that renders an action physically impossible is not a constraint on freedom if the action in question is not normatively possible. Given that the action is not a member of the domain of possible actions, it cannot be one with respect to which an agent can be rendered unfree.

Rights-based conceptions draw an important distinction between liberty and licence when it comes to characterising the domain of the z-parameter (cf. Locke: 1689, §6). In particular, according to such moralisations this domain only consists of legitimate courses of actions, i.e. one is only free to do things one has a right to do. That is, the relevant notion of possibility that specifies which actions an agent can be free or unfree to perform is that of normative possibility. Actions that are not normatively possible, i.e. impermissible actions, are not ones that one is free to perform (where one is not unfree to perform them either, but where one is rather neither free nor unfree to perform such actions). As such, they are not in the domain of the z-parameter and are not part of liberty, but instead belong

to mere licence.

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

The restriction of the domain of the z-parameter that is due to the contrast between liberty and licence thus explains why only some interferences classify as constraints, insofar as it implies that only rights-violating interferences restrict liberty, whereas those that do not violate rights are not inimical to freedom but are only inimical to licence.

## 2.2 Rights-violating interferences

Once the domain of possible actions is fixed, the next step is to determine which obstacles and interferences infringe an agent's liberty and render an agent unfree to perform an action, and which obstacles simply make a possible course of action less desirable or constitute cases of mere inability, without being detrimental to the agent's liberty. This issue splits into two questions.

On the one hand, there is the question as to the strength of the constraint. Here the question is whether the obstacle has to render the action (physically) impossible or whether it suffices to render it ineligible. Whereas a pure negative conception, such as the one espoused by Steiner: 1994, will consider actions that are ineligible as a result of an interference (such as a threat) as merely being rendered undesirable but still ones that the agent is free to perform, other theories will consider this ineligibility to amount to unfreedom. Rights-based conceptions as such are neutral with respect to this question and can be combined both with an impossibility view as well as with an ineligibility view.[9]

On the other hand, there is the question of the source of the constraint. Various restrictions can be imposed that specify the kind of causal origin that an obstacle or interference has to have in order for it to be a constraint that restricts

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[9]There is a distinctive way in which moralised accounts can address the impact of threats, though not via a distinctive characterisation of the y-parameter but rather of the z-parameter, which allows for the possibility of considering threats to be inimical to freedom whilst retaining an impossibility view regarding the strength of constraints (cf. "Liberty, threats, and ineligibility" Bader: manuscript).

liberty. Given that one is concerned with freedom insofar as it features in political philosophy and as such regards social and political relations amongst agents, it is plausible to require obstacles to involve human agency.[10] That is, constraints on freedom have to be due to or at least removable by human agency. This means that constraints that are due to nature and not alterable by human agency can be set aside, i.e. such obstacles do not restrict freedom but merely make it the case that the agent is unable to perform the action in question.

The restriction that the obstacle has to be attributable to human agency still leaves open a number of possible restrictions on sources of constraints. One might, for instance, restrict freedom-infringing interferences to those for which someone is causally responsible, those that are intentionally brought about, those that are the result of actions rather than omissions, those the eventuation of which is foreseen or foreseeable, or those for which someone can be held morally responsible.

Purely descriptive approaches face the problem of either being too broad or too narrow, both with respect to our intuitive judgements concerning freedom and with respect to generating a notion of freedom that can have a plausible claim to being normatively significant.[11] Moralised accounts, by contrast, allow us to address the source question in a satisfactory manner, by providing a distinctive understanding of the y-parameter.

On a moralised account, freedom is restricted by rights violations that render actions impossible (or ineligible). This means that, in the context of a rights-based account, the specification of the relevant restriction simply becomes a question as to what kinds of interferences with an agent's possible actions classify as rights violations. By determining what constitutes a rights violation, one determines which obstacles that render possible courses of action impossible (or ineligible) are ones that restrict liberty. For instance, in order to determine whether a particular obstacle, such as an obstacle that is due to a negligent (in)action, infringes liberty, one has to determine whether this (in)action classifies as a rights violation. If negligently bringing about an obstacle amounts to a rights violation, then it is an unjustified form of interference that constrains liberty.

The fact that the y-parameter is restricted in this manner means that it is possible that $\phi$-ing is impossible/ineligible for x (as a result of someone else's agency) without x's freedom being infringed, even in cases where x has a right to $\phi$. The analysis of infringements of liberty thus cannot be decomposed into two separate conditions, such that x's freedom to $\phi$ is infringed iff (i) $\phi$-ing is impossible/ineligible and (ii) x has a right to $\phi$. The fact that a right is violated

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[10] It is this restriction that gives rise to a distinction between freedom and ability, ensuring that not all cases of inability classify as cases of unfreedom but only those that are (in the relevant way) attributable to human agency.

[11] Miller has put forward a number of convincing cases that suggest that fine-grained restrictions are necessary and has argued that value-neutral accounts will misconstrue the y-parameter (cf. Miller: 1983 & Miller: 1985, also cf. Shnayderman: 2013, sections 1-3).

(and hence that liberty is infringed) does not just amount to $\phi$-ing being rendered impossible/ineligible together with the agent having a right to $\phi$, i.e. an infringement of liberty is not just an interference with an action that an agent has a right to perform. That is, the moralised account does not simply supplement the value-neutral analysis by adding the condition that x has a right to $\phi$, but instead identifies distinctive conditions that interferences have to satisfy to classify as constraints. The impossibility/ineligibility needs to involve a rights violation, i.e. that which renders the action impossible/ineligible must amount to a rights violation in order for it to constitute an infringement of liberty.

A theory specifying what rights we have determines the contrast between liberty and licence, whereas a theory specifying the conditions under which these rights are violated will allow us to determine what causal origins an obstacle must have in order to classify as an infringement of liberty. The y-parameter is thus morally determined, insofar as the precise delimitation and explanation as to which interferences are classified as constraints is understood in terms of moral notions, in particular in terms of the notion of a rights-violating interference.

## 3    Moralised v. positive liberty

Theories of positive liberty identify freedom with self-realisation, self-mastery, self-determination or self-perfection, i.e. with acting/being/becoming a certain way, whereby that the doing, being or becoming of which liberty is taken to consist in is specified in moral terms. Freedom is thus seen to amount to behaving morally or achieving a certain telos and the domain of the z-parameter, accordingly, consists of rational, virtuous, or authentic actions.[12] As such, these theories also consider liberty to be essentially normative/moralised, rather than merely being a purely descriptive concept.

The fact that positive conceptions of liberty are moralised in this way has led some to consider a rights-based conception to be tantamount to a positive conception of liberty. Waldron, for instance, claims that the moralised account "transforms our conception of freedom into a moralized definition of positive liberty (so that the only freedom that is relevant is the freedom to do what is right)" (Waldron: 1991, p. 308). This he thinks is ironic given that "[i]t was precisely the identification of freedom with virtue (and the inference that a restriction on vice was no restriction at all) that most troubled liberals about theories of positive liberty" (Waldron: 1991, p. 307). The moralisation involved in a rights-based conception of negative liberty is, however, to be sharply distinguished from the type of moralisation involved in a positive conception of liberty.

According to positive conceptions of liberty, the concept of liberty is not an opportunity-concept but an exercise-concept (cf. Taylor: 1979). This means that

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[12]Frequently, this goes together with the x-parameter being a morally characterised entity/subject, such as a higher or true self.

liberty does not merely consist in having certain opportunities that can be left un-realised without liberty being in any way reduced, such that all that matters is that the relevant obstacles are absent. Rather, liberty consists in acting/being/becoming a certain way, i.e. the relevant opportunities do not just have to be available but actually need to be exercised. That is, to be free is to act/be/become a certain way and not merely to have the opportunity of so acting/being/becoming. Positive freedom is thus specified not in terms of a class of possible actions that one is free to do, but in terms of a class of actions that are required by the telos and that need to be performed in order to be free, i.e. actions the doing of which is that which freedom consists in.[13]

Anything that prevents the actual realisation of the elements in the domain of the z-parameter, accordingly, classifies as an obstacle. The absence of obstacles hence implies the actual realisation and not merely the opportunity of realising the elements in z. That is, insofar as anything that is incompatible with the reali-sation of the z-parameter is understood as a constraint, the absence of constraints necessitates the realisation of the z-parameter (whereas the absence of constraints merely makes possible its realisation in the case of negative conceptions). In this way, the opportunity is only present if it is in fact realised. Were the opportunity to be present without being realised, then there would be something preventing its realisation and this would accordingly also classify as an obstacle, ensuring that the opportunity was actually not present after all.[14] This holds independently of whether the relevant obstacles are internal or external, which explains why posi-tive conceptions problematise the relation between freedom and desires, as well as independently of whether the obstacles are due to human agency or due to na-ture, which explains why positive conceptions problematise the relation between freedom and abilities.

The key issue dividing negative and positive conceptions of liberty is thus that, whereas opportunity-concepts provide an independent specification of the y-parameter by identifying which obstacles classify as constraints and consider freedom as consisting in the relevant constraints being absent, i.e. x is free to $\phi$ iff $\phi$ is in z and one is not prevented from $\phi$-ing by the constraints in y, exercise-concepts understand freedom as consisting in the z-parameter being re-alised, whereby they specify the z-parameter by identifying the telos that is to be achieved, and then derivatively specify the y-parameter, i.e. constraints are simply understood as all those things that interfere with the realisation of the

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[13] This ensures that whereas negative theories are primarily divided with respect to the inter-pretation of the y-parameter, positive theorists disagree most fundamentally as to how one is to understand the z-parameter.

[14] It is worth noting that the telos can be disjunctive, such that the agent can choose as to which disjunct is to be realised. In that case, being free still consists in the disjunction being realised and the availability of a plurality of options between which one can choose is entirely incidental and freedom would not be reduced in any way if only one of them were available.

z-parameter.[15]

Given that the moralised notion of liberty only requires non-interference with permissible courses of action in order for one to be free, rather than requiring that one realise one's telos or the rational wants of a higher self, it clearly classifies as an opportunity-concept and, accordingly, belongs to the family of negative conceptions of liberty. The moralised notion does not require the performance of particular actions and does not require that one's freedom be exercised in any particular way. As a result, rights-based accounts are not concerned with internal obstacles, such as impulses and addictions, and do not problematise the relation between desires and freedom (for instance by imposing requirements of authenticity).[16] Likewise, inabilities need not amount to unfreedom on the moralised account, unlike in the case of positive theories which consider them to be detrimental to liberty.

Instead of requiring the performance of particular actions, merely having the relevant opportunities as a result of rights-violating interferences being absent is sufficient for freedom, independently of whether these opportunities are realised or not, as well as independently of whether the agent has the ability to realise them. All that is required for the agent to be free is that constraints are absent, such that it is possible for him to perform the actions that are in the domain of the z-parameter (where this need not imply that the agent is able to perform them). What is peculiar about the moralised account is simply that the opportunities that one must have if one is to be free are restricted to permissible opportunities and do not include those actions that are part of mere licence.

The fact that the moralised conception involves an opportunity-concept can be brought out by considering what happens if an agent fails to realise the opportunities that open up as a result of the absence of the relevant constraints. While someone who, for instance, acts irrationally will be unfree according to a positive conception, someone who is not constrained but acts impermissibly will be free according to a moralised negative conception. Acting impermissibly, i.e. doing something that one is not free to do, does not result in unfreedom. In other words, there is no need to realise the z-parameter in order to be free, i.e. no need to take a legitimate course of action. All that is required to be free is the absence of the constraints specified by the y-parameter, which in this case is restricted to the absence of rights-violating interferences.

Moralising freedom simply has the consequence that restricting people from acting impermissibly will not count as an infringement of their liberty, but it does not require them to act permissibly if they are to be free. The difference between the accounts is thus that performing an action that is not in the domain of the z-

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[15] The fact that they are to be distinguished in terms of which of the parameters is prior and independently specified is precisely what Nelson's critique is missing (cf. Nelson: 2005).

[16] Relatedly, the subjects to whom freedom is attributed are ordinary individuals (and possibly also groups and nations), rather than some sort of higher, true or rational self.

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parameter amounts to doing something that one is not free to do on the moralised negative conception, whereas it amounts to doing something the doing of which makes one unfree on the positive conception.

It is true that moralised conceptions have the consequence that restrictions on vice will not count as infringements of liberty.[17] Yet, contrary to Waldron, this does not seem to be what 'most troubled liberals about theories of positive liberty'. What was troubling them was that positive conceptions allow that one can be restricted in the name of freedom, that one can be made free by coercion. This, however, is not possible on the rights-based conceptions. One cannot force people to be free in the name of moralised negative liberty.[18] Rather than allowing for the possibility of being forced to be free, these conceptions allow for the possibility that one is free despite being forced. People can be restricted from doing certain things, namely from doing what they do not have a right to do, without undermining their freedom. It is, however, not possible to force people to be free by making them do something that is viewed as the realisation of their telos.

## 4   Rights v. moral responsibility

In addition to rights-based conceptions that understand constraints as those interferences that violate rights, it is usually held that there is a different type of moralisation that is concerned not with rights but with moral responsibility. More precisely, the moral responsibility view considers an interference to be an infringement of liberty iff there is someone who is morally responsible for the obstacle in question,[19] whereas obstacles that are not due to human agency or for whom no one is morally responsible do not classify as constraints on freedom.

The moral responsibility view likewise renders claims about liberty dependent on the background moral theory. In the same way that one needs to specify what rights people have and under what conditions they are violated in order to determine what people are free to do and which interferences restrict liberty, one needs to specify what moral responsibility consists in so that one can determine

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[17] It is important to note that restrictions on vice only fail to count as infringements of liberty if vice is understood as the violation of an enforceable duty. Put differently, restricting someone from violating a non-enforceable duty, such as a duty of beneficence, will be an unjustified restriction of liberty and will accordingly classify as an infringement of freedom even on the moralised account. Being free to $\phi$ thus has to be understood in the sense of $\phi$-ing being a permissible course of action, not in the sense of the agent being blameless for $\phi$-ing.

[18] The only way in which force can be used in the name of freedom is when it comes to restricting people from interfering with the freedom of others. However, one cannot be forced in the name of one's own freedom.

[19] It is worth noting that one can be responsible for intentionally as well as negligently putting in place an obstacle, letting it come into existence, failing to remove it, or preventing it from going out of existence.

for which obstacles someone can be morally responsible.[20]

Rights-based and responsibility-based approaches differ in two respects. On the one hand, they would seem to disagree as to which obstacles classify as infringements of liberty that render an agent unfree rather than merely unable to perform a course of action. On the other, they characterise the domain of the z-parameter differently insofar as the moral responsibility view, unlike the rights-based approach, does not moralise the z-parameter by drawing a contrast between liberty and licence.[21]

## 4.1    Constraints and rights violations

The two types of theory would seem to differ in terms of how they understand the y-parameter. According to the moral responsibility view, an obstacle classifies as a constraint on freedom iff someone is morally responsible for the obtaining of the obstacle, whereas the rights-based approach considers constraints to be all those obstacles the obtaining of which classifies as a rights violation.

Whether these criteria diverge and lead to different classifications and, if so, which of them is more plausible depends on the particular account of moral responsibility/rights that is under consideration. Only once the details of the respective accounts are fixed can one evaluate whether someone is morally responsible for an obstacle iff the obtaining of this obstacle classifies as a rights violation. Accordingly, it might appear that not much can be said in the abstract.

However, we can see that rights-based views are preferable over responsibility-based accounts, on the grounds that the notion of moral responsibility by itself risks being too broad, ensuring that any plausible moral responsibility account will have to be restricted in such a way that it collapses into a rights-based theory. In particular, in order to provide a plausible characterisation of the y-parameter, a moral responsibility view needs to impose a number of restrictions.

1. ASYMMETRY

One can be morally responsible both for what is praiseworthy and what is blameworthy. For instance, it is equally possible to be morally responsible for offers as for threats. Moreover, both of them can render actions ineligible by changing the relative desirability of the available options, such that certain options no longer constitute reasonable alternatives. Yet, threats

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[20]This has the implication that on either approach debates about freedom cannot be settled independently of debates about rights/moral responsibility. On the one hand, this ensures that the real issue of contention will be not about freedom but will be located elsewhere. On the other hand, it ensures that normative significance is built into freedom and that a presumption of freedom follows straightforwardly.

[21]This, at any rate, holds for extant moral responsibility accounts, all of which try to distance themselves from the rights-based specification of the z-parameter. (There is nothing in principle that precludes characterising the y-parameter in terms of moral responsibility whilst accepting a rights-based distinction between liberty and licence.)

and offers differ in terms of whether they infringe liberty and hence need to be treated asymmetrically. This can be achieved by being concerned with moral responsibility only insofar as it involves the violation rather than fulfilment of a duty, i.e. one only considers those cases in which questions of blame but not of praise are applicable, thereby ensuring that constraints are essentially problematic (in at least some respect) and that we have (at least pro tanto) reason to avoid them.

## 2. DIRECTEDNESS

In order for the duty that explains the agent's moral responsibility to be connected in a suitable manner to the person whose freedom is infringed, one has to restrict the relevant cases to those involving directed duties that are owed to particular individuals, rather than undirected duties that are not owed to anyone. That is, the agent who is morally responsible for the obstacle affecting the person in question must be accountable to that particular person on the basis of owing a duty to that person, i.e. it is that person to whom he needs to address himself in providing the justification for putting in place or failing to remove the obstacle. Otherwise, the account will misclassify cases in which there are indirect effects. For instance, if x has a duty towards y, though not towards z, to remove a certain obstacle but negligently fails to do so, then x is morally responsible for this obstacle. However, x only owes a justification to y but not z, and the obstacle only classifies as a constraint with respect to the former and not the latter.

## 3. ENFORCEABILITY

Intuitively, liberty can be defended and upheld, such that one can use force to prevent or remove constraints on freedom (at least those that are unjustified). In order for freedom-claims to have the requisite normative strength, the duties need to be in principle enforceable, i.e. they need to be strict/perfect duties rather than wide/imperfect duties for which agents are also morally responsible.

Obstacles that classify as constraints on an agent's freedom thus need to involve 1. the violation of a duty, whereby 2. this duty is directed towards the agent in question, and 3. is a perfect duty that is in principle enforceable. This amounts to nothing other than the violation of a duty that is correlative to a right. Accordingly, one can explain why an obstacle that is due to x's (in)action restricts y's freedom in terms of x's (in)action violating y's right to $\phi$ by rendering $\phi$-ing impossible or ineligible. Such a rights-based account underwrites the asymmetry between threats and offers, since threats involve rights violations whereas offers do not. Moreover, rights are held against particular people, which ensures that an obstacle facing y is a constraint on y's freedom if it involves a violation of y's rights, such that if x puts in place an obstacle that prevents both y and z from $\phi$-ing, whereby only y but not z has a right to $\phi$, then x only infringes y's but not z's

freedom. Finally, it is plausible to hold that all rights are in principle enforceable, in that one can use force to prevent unjustified infringements of rights.

The y-parameter is thus fundamentally to be characterised in terms of rights-violating obstacles. Infringements of liberty are restricted to violations of enforceable obligations that are owed to individuals, i.e. to violations of perfect obligations that are the correlates of rights. Facts about rights violations rather than about moral responsibility are thus ultimately doing the work, and concerns about moral responsibility can be seen to drop out from an account of constraints in terms of rights violations. This is because y's right to $\phi$ is violated by x iff x is morally responsible for the existence of an obstacle that makes the exercise of y's right to $\phi$ impossible or ineligible. Moral responsibility accounts thus collapse into rights-based conceptions as far as the y-parameter is concerned.[22]

## 4.2   Prisoners, licence, and the presumption of liberty

The moral responsibility view is usually differentiated from rights-based conceptions on the grounds that only the former view is able to distinguish unfreedom from unjustified unfreedom (cf. Miller: 1983, p. 72 fn 10), and that it is consequently not susceptible to the standard objection to rights-based conceptions, namely that they have the seemingly unpalatable implication that the freedom of a justly imprisoned prisoner is not infringed (cf. Cohen: 1995, p. 60).

This is taken to be the case because the moral responsibility view implies that all constraints are such that a justification needs to be given, without implying that this demand cannot be met. "To be responsible for something is to be answerable for it; it is not necessarily to be blamable. ... Responsibility, one might say, opens the door to questions of praise and blame without deciding them. In the same way, showing that an obstacle is a constraint on someone's freedom raises the question of its justifiability but does not resolve it" (Miller: 1985, p. 313). By contrast, a rights-based view is seen to connect constraints with culpability.[23]

However, pace Miller et al., being able to distinguish unfreedom from unjustified unfreedom is not suffcient for distinguishing an account of freedom from a rights-based conception. According to such a conception, the fact that an obstacle involves a rights violation implies that the agent's liberty is infringed, but it does not necessarily imply that the rights violation is unjustified. This means that the claim that constraints on freedom imply wrongness does not apply to rights-based conceptions as such. More precisely, this only holds for theories that consider all rights violations to be wrongful, but it does not hold in the case of theories that accept that rights can be justifiably infringed.

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[22] It is worth noting that the case-based motivations for adopting a responsibility-based view are subsumable by a rights-based view. For instance, the cases that Miller takes to motivate the moral responsibility view (cf. Miller: 1983) can be explained by means of a rights-based conception.

[23] Cf. "A moralised account (such as Nozick's) links constraints on freedom with moral wrongness or culpability" (Kristjánsson: 1996, p. 32, also cf. p. 20).

Although moralised accounts are sometimes understood as distinguishing between justified and unjustified interferences, only classifying the latter as infringements of liberty (in which case constraints on freedom would indeed be connected with culpability), one should rather distinguish between those interferences that involve rights violations and those that do not. Given that one countenances the possibility of justified rights violations, there is then room for interferences that violate rights and hence restrict liberty but that do so in a justified manner. In this way, a rights-based account can countenance the possibility of justified infringements of liberty, i.e. of unjustified unfreedom. Defenders of rights-based conceptions are, accordingly, likewise able to distinguish between unfreedom and unjustified unfreedom, as long as they do not consider all rights violations to be unjustified.

Moreover, being able to draw a distinction between unfreedom and unjustified unfreedom is not by itself sufficient for rendering a conception of freedom immune from the prisoner objection. This is because it is possible for a view to allow there to be justified unfreedom, without making room for cases in which no rights are violated but in which the agent is nonetheless unfree, thereby underwriting the judgement that the liberty of a justly imprisoned prisoner, none of whose rights are violated, is not infringed. This should be readily apparent, given that standard rights-based conceptions can make this distinction if they allow for justified infringements of rights but are nonetheless still susceptible to the prisoner objection because of their moralisation of the z-parameter.[24]

In fact, the prisoner problem would seem to apply equally to the moral responsibility view. This is because it would seem to not only be the case that the gaoler is not blameworthy for putting someone into prison (who is justly imprisoned), but also that he does not even have a (pro tanto) obligation not to do so (cf. Kristjánsson: 1996, p. 72). Yet, for Miller at least, moral responsibility presupposes moral obligation (cf. Miller: 1983, p. 86). The gaoler is, accordingly, not morally responsible for the obstacles facing the prisoner, which implies that the prisoner's freedom is not constrained. As a result, Miller's version of the moral responsibility view would seem to imply that the prisoner is merely unable to leave the prison rather than being unfree to do so.

Kristjánsson tries to solve this problem by requiring, not the existence of a moral obligation for suppressing the obstacle, but merely the existence of an "objective *reason*, satisfying a minimal criterion of plausibility, why ... a normal, reasonable person could have been expected (morally or factually) to suppress [the obstacle]" (Kristjánsson: 1996, p. 74). However, even if there should be such

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[24]Once one allows for justified infringements, one could claim that the prisoner has a right to, say, move about freely but that this right can be justifiably infringed such that imprisonment is justified whilst nevertheless violating rights and infringing liberty, rather than classifying this as a situation in which the prisoner forfeits this right and hence is no longer free to move about (or rather than saying that the right is conditional in nature, e.g. a right to move about freely unless justly imprisoned, and hence not infringed by imprisonment).

a reason as to why the gaoler can be expected to not imprison the convicted prisoner, a closely related variant of the prisoner problem arises. This is because physically preventing someone from performing a highly repugnant action that he has every reason not to perform will not be classified as a constraint, despite the fact that this kind of situation, like imprisonment, would seem to constitute a paradigm case of unfreedom.

Moreover, as Shnayderman has pointed out, Kristjánsson's account has the bizarre implication that, whilst physically preventing someone from performing such an action does not classify as a constraint, threatening someone with imprisonment for engaging in this sort of behaviour does restrict liberty, since the various threatened consequences might well be such that there is some reason why one might be expected to suppress them (cf. Shnayderman: 2013, p. 729).

Thus, unless one is willing to posit various obligations or reasons not to prevent people from performing repugnant and impermissible actions, physically preventing people from engaging in such behaviour will not be classified as a restriction of liberty, thereby ensuring that the moral responsibility account has analogous implications as the rights-based account and is likewise subject to (some variant of) the prisoner objection.

In order to circumvent these problems, Shnayderman includes praise along with blame when specifying the conditions of moral responsibility. "Someone is morally responsible for an obstacle when she is appropriately considered susceptible to either blame or praise for creating it or for not preventing its creation or for not removing it" (Shnayderman: 2013, p. 730). This criterion avoids the prisoner objection and classifies restrictions of repugnant behaviour as constraints.

However, this proposal neither satisfies the asymmetry nor the enforceability condition and overgenerates cases in which freedom is infringed, for instance misclassifying offers. There will be cases where it will be good to restrict liberty, where this is not simply a situation in which doing so is good all-things-considered, i.e. where the constraint is justified and the presumption of liberty is overridden, but where the constraint is good qua being a constraint on the freedom in question, i.e. the freedom to $\phi$ is itself bad, thereby making it good and praiseworthy to constrain it. In this way, the account is not able to preserve the intrinsic normative significance of freedom and there will not be a pro tanto reason not to constrain liberty, which implies that the presumption of liberty is lost.

More generally, we can see that in order to ensure that liberty has intrinsic normative significance, certain interferences cannot be classified as constraints. This is because intrinsic normative significance implies (at a minimum) that there is a pro tanto reason not to restrict liberty. Yet, certain objectionable and impermissible actions are such that there is no reason whatsoever not to restrict them, i.e. there is no presumption in favour of letting people engage in such behaviour. In fact, quite the opposite is true, in that there are plenty of reasons to prevent people from performing these actions. Interferences with such actions thus can-

not constitute constraints on freedom. This, however, ensures that (some variant of) the prisoner objection will be applicable, insofar as there will be situations in which a person is prevented from performing such actions without thereby being rendered unfree. In short, an account of liberty can accord intrinsic normative significance to freedom and can underwrite the presumption of liberty iff it is subject to the prisoner objection.

In order to defend the presumption of liberty, one thus needs to ensure that certain interferences do not classify as constraints on freedom. As we saw above, this can be achieved in two different ways, namely by restricting the y-parameter such that only obstacles originating from certain sources classify as constraints, or by means of a restriction of the domain of the z-parameter.

A moral responsibility view that eschews the contrast between liberty and licence, will have to adopt the y-parameter option and classify such cases as involving mere inability. This, however, is rather counterintuitive since these obstacles seem to have all the requisite source features to classify as constraints, i.e. they are clearly attributable to human agency and are intentionally brought about by means of an action rather than an omission in order to prevent the agent in question from engaging in morally objectionable and impermissible behaviour.

Moreover, establishing that restricting such behaviour does not infringe liberty is not enough. In particular, there is the problem that considering such freedoms to be genuine freedoms conflicts with attributing intrinsic normative significance to freedom, since this would imply that they are worth protecting. Rather than claiming, as the moral responsibility theorist does, that such restrictions give rise to mere inability and that the agent is still free to perform such actions, one should favour the approach of the rights-based theorist who claims that the person is neither free nor unfree to perform these actions. This means that one needs to restrict the domain of the z-parameter, such that it does not include mere licence. Doing so allows one to explain why these interferences do not infringe liberty, despite being deliberately imposed by human agents, on the basis that the agent is not free to perform the action in the first place. The presumption of liberty thus turns out to be only defensible if liberty is distinguished from licence.

Furthermore, the distinction between liberty and licence enables one to address the prisoner objection. Although many have taken the prisoner problem to constitute a decisive objection to moralised conceptions of liberty, this problem can be solved once one distinguishes the range of action-types as well as action-tokens that a person is free to do, i.e. the size of the domain of the agent's z-parameter, from the question to what extent a person's freedom is infringed, i.e. the extent to which an agent is prevented from doing things that he has a right to do. This is because one can then explain how a prisoner is less free in the sense that he is free to do fewer things, without his liberty being infringed (cf. "Moralising liberty" Bader: manuscript). This explanation presupposes that the domain

of the z-parameter is identified with liberty as opposed to licence, since it explains the way in which the prisoner is rendered less free (rather than unfree) in terms of the size of the z-parameter, i.e. in terms of the number of action-types/tokens that the prisoner is free to perform in the sense of having a right to perform them (rather than in terms of a change in ability).

The moral responsibility approach thus faces a dilemma. Either it will be subject to the prisoner objection (without having the requisite resources to address this objection) and will effectively collapse into a rights-based conception with respect to the y-parameter. Or it will imply an account of constraints that is too broad and that ensures that the notion of liberty lacks intrinsic normative significance and is hence unable to underwrite the presumption of liberty. Accordingly, it would appear that the only viable moralised approach is a rights-based conception and that the moral responsibility approach does not constitute a plausible alternative.

## 5    Conclusion

Thus, we have seen 1. that rights-based conceptions distinguish liberty from licence, characterising the domain of the z-parameter in terms of legitimate courses of action, thereby ensuring that restrictions of illegitimate courses of actions do not infringe liberty, 2. that the source of constraints is to be understood in terms of the notion of a rights-violating interference and that obstacles that do not involve rights-violations do not classify as constraints, even when they prevent an agent from $\phi$-ing who has a right to $\phi$, 3. that moralised conceptions consider liberty to be an opportunity-concept and, as such, are to be sharply distinguished from positive conceptions of liberty that treat it as an exercise-concept, and 4. that moral responsibility views do not constitute a viable alternative since, on the one hand, the characterisation of the y-parameter collapses into a rights-based view, and, on the other, one needs to distinguish between liberty and licence if one is to assign intrinsic normative significance to freedom and defend the presumption of liberty.[25]

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