Taking Freedom Seriously: A Pre-Legal Model of Freedom, Interferences, Rights and Duties.

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Abstract

Freedom, liberty and rights are terms that long have suffered from vagueness that allows a host of differing interpretations, most of them ideological and overly simplistic. Good, serious modeling descriptions of those terms would not overlook the necessary complexity involved in these social interactions. MacCallum’s idea of (political and social) triadic freedom is here extended to include resources, ability, externalities, benefits to the exerciser, and reasons for non-interference. Interference is described as a subset of freedoms with significant externalities. A right is then described as a compound of a freedom protected by interferences. This provides a basis for the analysis of the game-theoretic economics of rights and when they will be produced.

Keywords

Freedom, liberty, rights, game theory, model, economics, externalities, philosophy.

Introduction

It is important to cut through the Gordian knot of prior philosophy on freedom and rights, an enormous “mud moat” in the words of Noah Smith (2017.) Unorganized text-only consideration of large numbers of competing vague concepts and terms is the typical Calvinball methodology of such philosophy, producing ideologically biased preference statements about (at best) incomplete models with concealed assumptions disguised by scholasticism. There are rare nuggets of value in that literature, but they primarily consist of refutations of other scholars: showing that the real situation is more complicated or that there are important refutations to the ideas of others.

Hohfeld’s (1913) admirable system explaining 8 types of rights (including liberties) helps solve these problems, but suffers from an abstract legal viewpoint: it is concerned primarily with how modern law treats interpersonal relationships between two legal individuals. From a scientific or sociological point of view, that ignores many things going on in rights: starting with the unanalyzed presumption of legal institutions, and then the abilities of the individuals, their resources, communication, economics, etc. The same problem exists in philosophy, which also mostly ignores law, economics, and sociology.[[1]](#footnote-2) Economics and sociology likewise have their own blind spots. This analysis will attempt an interdisciplinary, pre-legal, positive approach based on philosophy, law, economics, and sociology. Moral assertions about liberties or rights are deliberately avoided: this is also a pre-moral, non-normative model.

In chemistry, elements are combined to form molecules. In law and some philosophy, the eight Hohfeldian rights serve as “atomic” incidents (elements) that make “molecular rights” (or bundles) as in Honoré’s (1987) analysis of property. But unlike chemistry, there doesn’t seem to be any unified model of the subatomic natures of these elemental rights. What are the equivalents of particles and forces? This is an attempt at a start in such an understanding for freedom and rights.

This model concerns only enforced rights rather than natural rights, rights which are merely claimed, or moral rights. That will be explained further in the discussion.

In addition, this model provides some game-theoretic economic reasons to create or not create particular rights based on the economic benefits and especially harms, which include opportunity costs, enforcement, and the costs of enforcement.

**For the purposes of clarity, I am going to use freedom for my ideas and liberty for the ideas of others (principally libertarians), because the terms are essentially synonyms.**

Freedom

Most discussions of liberty consist largely of elaborations on particular liberties that are desired by the authors and apologetics explaining why they are “true” liberty or of particular interest. The liberties they dislike are denounced as “sin”, “evils”, or some such; seldom with coherent explanation of why they would not be liberties, even though many others might hold them to be liberties. Slavery for example. The nature of liberties themselves is seldom discussed.

MacCallum’s idea of (political and social) triadic freedom was a major advance in the analysis of liberty because it unifies seemingly disparate particular liberties under one framework, unifying positive and negative liberty, for example.

J. C. Lester made a useful advance in analysis of liberty by calling for “An abstract theory of interpersonal-liberty-in-itself that is independent of any type of property (i.e., ownership), or normativity.” (Lester 2020). His description of liberty is: “the absence of interpersonal proactively-imposed constraints on want-satisfaction.” But his theory is a monistic example of greedy reductionism: it bases liberty entirely on current interpersonal non-interference and ignores past interference that created the current environment in which liberties are to be identified. In addition, how can we say liberty exists unless there is also personal ability to exercise the liberty and external resources to exercise the liberty? The ability and resources currently available are products of past interference. We also know that people exercise liberty in spite of some interference, and that beneficial interference can enable liberty. His paradigm ends up describing his libertarian priors, rather than the nature of freedom itself.

This political and social model of freedom (like Lester’s theory) is independent of property and normativity, but also relies on unblinkered observation of many actual human practices, not just interpersonal interference. Freedom does not occur in a vacuum: it is a product of society because society dictates many of the factors of freedom.

FREEDOM:

A person (**P**) is free to do or be a thing (**T**), achieving a net value (**V**), using an ability (**A**), with a resource (**R**), despite externalities (**E**) to others (**O**), when interference (**I**) from others is not too high, because of reason (**B**).

This is extended from MacCallum’s ideas of triadic freedom (MacCallum 1967). “A subject, or agent, is free from certain constraints, or preventing conditions, to do or become certain things” (Carter 2019.) Thus it is not positive or negative freedom in the sense of Berlin. Nor is it the legal privilege (or liberty) of Hohfeld. It makes explicit three possible groups of preventing and enabling conditions (ability **A**, resource **R**, interference by others **I** which were mentioned by MacCallum[[2]](#footnote-3)), adds the idea of economic values both to the person **P** (net value **V** and interference **I**) and to others **O (**externalities **E**), and adds reason **B** for why the interference from others is not too high. This is describing an exercised freedom (to be explained below.)

For the purposes of this model, a person (**P**) could be:

* a natural person
* a corporation
* a government
* any group
* perhaps animals or natural objects such as rivers.

That makes the scope of this model greater than mere freedom of an individual.

To do or be a thing (**T**) could be:

* to make something
* to live
* to create an identity
* to act politically
* to be free from something
* to interfere with others somehow (addressed further on as externalities (**E**).)

A net value (**V**) is a person’s subjective value which is fungible, ie. exchangeable in some common unit with others.[[3]](#footnote-4) It is derived from the subjective values of the thing and the costs of doing or being the thing, but excluding the costs or benefits of interference (**I**) from others.

An ability (**A**), here considered resources internal to the person, could (for example) be:

* vision
* strength
* education
* any combination of multiple internal resources.

Ability is a social product of interference (**I**) from others in the past: humans only develop within society, starting with gestation, nursing, language acquisition, education, etc. We cannot pretend that individuals leap forth full grown from the brow of Zeus.

A resource (**R**), here considered resources external to the person, could (for example) be:

* any natural resource (land, air, water, etc.)
* for developing ability
* capital
* employees
* any combination of multiple external resources
* managed commons: social institutions, biological commons, etc.

Resources are socially distributed. Resources for developing ability are distributed by society in a variety of different ways. The other resources are all socially controlled in normal circumstances.

There may not be a sharp dividing line between ability and resource: perhaps something could fulfill both categories. Both are always limited and/or enhanced by interference by others: that is a minimal result of living in a society where children are reared and there is economic scarcity.

Commons, including managed commons, are very important resources. Markets, for example, are usually social commons. Even more important (but often overlooked) are biological commons such as the microbial environment. Sen (1992: 65) gives the example of living in an epidemic-free atmosphere which requires health policies on a national or even international level.

Others (**O**) means all other persons. Because all others are not a homogenous grouping, various subsets will have to be considered separately. Some subsets can be ignored in cases when the interference is not significant, such as others who are too far away to care or be affected.

Interference by others (**I**) will be considered below, but could impede or assist. Here it is considered a total of the values of the interference by the others. Interferences (and non-interferences) by others are obviously social choices: there can be no baseline presumption of non-interference as a “natural state” because we always live in society. We cannot presume restraint from interference by others simply because there is no reason all others would restrain themselves from their own liberties to interfere.

Externalities (**E**) to others means costs and benefits from the exercise of the liberty which are born by other people (**O**). (Much as in economics.) These will include (for example):

* opportunity costs from options foreclosed (or prices changed) to others by the exercise of a liberty
* harms, direct and indirect
* benefits, direct and indirect

These externalities are actually interference *with* others (instead of *by* others), but a different term is used here to avoid confusion.

This is not a novel idea. Berlin (1969) wrote: “In so far as I live in society, everything that I do inevitably affects, and is affected by, what others do. Even Mill's strenuous effort to mark the distinction between the spheres of private and social life breaks down under examination. Virtually all Mill's critics have pointed out that everything that I do may have results which will harm other human beings.” At the very least, the most insignificant private act can have opportunity costs to the person and to others because another act could have been chosen that created greater value for the person or externalities that are of greater value to others. (Greater value here doesn’t necessarily mean positive, it could mean smaller negative values too.)

Reason (**B**) means different reasons interference or non-interference for the different subsets of all others. Sometimes multiple reasons for any one subset. (**B** is a shorthand for “because”.) The reasons could (for example) be:

* ignorance
* unforeseen usage
* insignificance
* coercive threats
* costs
* agreements
* payments
* counters to your attempts at interference
* desire for beneficial externalities

This model of freedom is quite different than most libertarian notions of liberty. Under most libertarian ideas, as long as you are not “aggressed” or have “no proactively imposed costs”, you have (negative) liberty.[[4]](#footnote-5) But you still cannot “do or be a thing” without an ability and a resource. Because those are socially produced, controlled and distributed, they are a result of interferences by others as well. For example, libertarians would claim that if you have fallen into a pit, you still enjoy liberty even if you want to be outside and are too injured to climb out (lack of ability) or need a ladder (lack of a resource). Unless somebody is responsible for you being in the pit; then you lack liberty because they are interfering or coercing. This is very confusing for the person in the pit: if that person doesn’t know if somebody is responsible, then she doesn’t know whether she has liberty or not, even though she cannot escape either way. For those libertarians, I recommend my story of “The libertarian and the genie.”[[5]](#footnote-6) It would be interesting to see how many of them would be satisfied with their perfect negative liberty while floating naked in the middle of the ocean. They probably would want some ability or resources to have some more useful liberty: otherwise the only liberty they have is to drown.

This model is only for a single freedom for a single person. It does not represent a single universal freedom that applies to all individuals or a collection of all freedoms for a single individual or all the freedoms of all people. Models for those could possibly be constructed from this model.

There are available freedoms, unavailable freedoms, and exercised freedoms. Available freedoms are when ability, resources, and non-interference are available. Unavailable freedoms are when one or more of those three are unavailable. Exercised freedoms are when you “do or be” the subject of the freedom.

An available freedom would be written similarly to the exercised freedom initially presented except for changing the tenses from the present to the conditional:

A person (**P**) *would be* free to do or be a thing (**T**), achieving a net value (**V**), using an ability (**A**), with a resource (**R**), despite externalities (**E**) to others (**O**), when interference (**I**) from others *would not be* too high, because of reason (**B**).

An unavailable freedom would be written:

A person (**P**) *would not be* free to do or be a thing (**T**) if an ability (**A**) or a resource (**R**) are unavailable, or when interference (**I**) from others *would be* too high.

Exercise of an available freedom of a person always conflicts with an available freedom of other persons, making some freedom unavailable. The classic conflict would be between my available freedom to swing my fist into your nose, and your available freedom to keep your nose intact. The exercise of one freedom interferes with the other, making it unavailable.[[6]](#footnote-7) Freedoms are always zero-sum that way (ie. they always create an interference – see below.) Even if the unavailable freedom is simply for others to be free of you exercising your freedom. As if there were a law of conservation of freedom: freedom cannot be created or destroyed, only redistributed.[[7]](#footnote-8)

Since exercised freedoms always conflict, then either a social choice will be made between conflicting available freedoms or they will both be unavailable (which is again a social choice.) It is not simply a personal choice, because all others are choosing how much to interfere. Short of unrealistic desert island scenarios, freedoms are products of social choices, not things intrinsic to individuals.

“Maximization of liberty” is a common refrain, but how would that work? How would such a social choice be made? Coercively? And what are you maximizing? Are you maximizing available freedom or exercised freedom? If you are maximizing the number of liberties, and the number is infinite, adding or subtracting, multiplying or dividing to maximize doesn’t make sense. If every freedom interferes with another freedom, you cannot maximize by choosing one over another. There has been some very bad philosophy on this subject.[[8]](#footnote-9)

“Maximization of liberty” then may mean maximizing the VALUE of exercised freedom. But this leads to a further question: maximizing the value to whom? That is why the model has “a value **V**” to the person and “externalities **E**” to others. The “externalities **E** to others” (opportunity cost or economic externalities) of an exercised freedom may be insignificant if I breathe some air or very significant if the resource is scarce: but there is always some cost, even if it is only resenting that you exercise that freedom. If you are maximizing for the person (the selfish solution), you only count the value **V – I**. If you are maximizing for society, you would need to calculate **V** – **E – I** to choose which liberty to prefer. But the problem is that **V**, **E** and **I** are subjective values, which are not directly comparable unless they are fungible in the same units. (Mere rank ordering by preference will not work for interpersonal comparisons because subjective costs and values will differ between people.) It may also be that you want to maximize under some notion of equal freedom, which would likely produce yet another different result.

In order to take maximization of the value of all freedoms seriously, we must also consider that new and more valuable available freedoms can be created by increasing ability or resources available to a person. Education and capital, for example. In a world of diminishing marginal returns, this is a strong argument for redistribution of resources for the highest marginal returns if you want to maximize the value of all freedoms. Creating these new freedoms results in destroying some freedoms for others: in that respect there is a zero-sum conservation of freedom. But if the freedoms created and destroyed are not of equal value, then there is no conservation of value and the values of freedoms can be maximized.

How is the social choice to maximize the value of freedom made, in whose favor, and how is the value of freedom maximized? There is no agreement. Liberty for me and not for thee is a common desire (as we see from history), as is some sort of “equal liberty” for example. Equality of freedom and maximization of value of freedom will conflict, except in wishful thinking. But these are normative concerns that will not be further discussed here.

Freedoms are widely considered to be weak, because others could interfere with them, removing the freedom. You could exercise a freedom one day, it could be an unavailable freedom the next, and an available freedom the day after depending on who wants to interfere (let alone your ability and resources which also vary over time.)

INTERFERENCE

The list of possible things to do or be in a freedom included interference, which may have raised some eyebrows. Here is the explanation.

INTERFERENCE:

A person (**P**) is free to *interfere with some others* (**S**), achieving a net value (**V**), using an ability (**A**), with a resource (**R**), despite externalities (**E**) to others (**O**), when interference (**I**) from others is not too high, because of reason (**B**).

In short, an interference is a freedom: a freedom to interfere with some others (**S**), and those some others (**S**) have a liability to interference. It is merely a subset of freedoms because the “thing” is to “interfere with some others”. This is not the same as the Hofeldian concept of a power because while it could create a right or a duty, it might only disrupt an exercise of a freedom.

Libertarians and others might protest that interference (especially coercion) is not a genuine liberty. But interfering with some others IS doing a thing. It may not be a liberty that libertarians want, but they could not restrict liberty to their desires without themselves interfering.[[9]](#footnote-10)

For the purposes of this paper, the interference itself is comprised of the externalities (**E**) to some others (**S**), a subset of others (**O**). There is no sharp division between externalities to some others (**S**) and externalities to others (**O**). All freedoms are interferences because all freedoms have externalities (**E**). Interference is simply a convenient term for identifying when the externalities (**E**) are significant (in fact or intention) to some others (**S**). Interference can assist or impede.

Examples:

* Nozickian coercion (Nozick 1969). Making or carrying out threats.
* Disrupting a needed ability (**A**). Distracting, harming, jailing, killing, etc.
* Making resources (**R**) unavailable. Consumption, destruction, blockading, etc.
* Assisting by helping, protecting, providing resources, training, etc.[[10]](#footnote-11)

A freedom to interfere would require:

* abilities such as being able to hit, use tools or weapons, or order others
* resources such as the body, a rock, other tools or weapons, henchmen or money
* non-interference by others due to fear, cost, because the interference is secret, or other reasons.

Thus, there will be plenty of freedom to interfere. A libertarian might protest that the idea is absurd (because they are opposed to coercion), but in actuality most (if not all) libertarian ideas of rights and property depend on the liberty to coerce. They usually just won’t call it coercion: they prefer different value-laden terms such as retaliation or rectification. And how can they coerce, retaliate or rectify without freedom to do so by interfering?

The freedom to interfere is the foundation both of rights (as we shall see in the next section) and politics (though politics will not be discussed here.) When social choices must be made between conflicting freedoms, ultimately this freedom of interference will be needed to create and enforce the choice, including meta choices among freedoms of interference such as who gets to interfere how and when.

RIGHTS AND DUTIES

RIGHT:

A person (**P**) is free to do or be a thing (**T**), achieving a net value (**V**), using an ability (**A**), with a resource (**R**), despite externalities (**E**) to others (**O**), when interference (**I**) from others is not too high, because of *threatened Interference to the others (****IT****) produced at a Cost (****C****) by an Enforcer (****En****) paid Fees (****F****)*.

In short, a right is a liberty created or enforced by an interference, creating or enforcing a duty for others to not interfere. The only difference from a liberty is that the “reason” is replaced with “threatened Interference”*.* Thus, even an atomic right is compound, a liberty combined with an interference liberty. This is a much more complex relationship with 12 terms. In addition, unlike freedoms and interferences, it requires communication between parties. That’s too much to visualize without a diagram.

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The reason (**B**) from a liberty is replaced by the interference, but the interference is actually a supplement: there may well remain other reasons besides the interference. It was only written this way to emphasize the addition and keep the wording simple.

Threatened Interference (**IT**) in this model refers to a negative subjective value held by the others (**O**), a cost for non-compliance or defection. There might be many threatened interferences.

The Enforcer (**En**) is a third party (usually.) It could also be that there are multiple enforcers: for example yourself, private guards, police, and soldiers to enforce against different or escalating challenges to a right.

Enforcement is not free: there is a Cost (**C**) to the Enforcer. It is presumed to include detection of defectors and administration of penalties.

Nor will Enforcers accept costs without payment of Fees (**F**). (Though they might if they are threatened with interference themselves.) Fees can come from the Others, the Person, or the Thing.

The Value from the Thing in the diagram is not the net Value (**V**) until you subtract the Fees from the Person (**FP**). We can call the Value in the diagram (**VT**) It will vary depending on the Others defecting.

Communication is essential to a model of rights: messages from the Person to the Enforcer of what to enforce, messages from the Person to the Others about their duty to observe the right, and messages from the Enforcer to the Others of the penalties for non-compliance.

This is a simple form of the model. It can get more complex: for example, Others could be divided into cooperators and defectors. Ability and Resources could be added to the diagram, either in the Person or the Thing or independently. The messages could emanate from different parties: for example the threat could come from the Person.

Degenerate forms of the model could also work in some cases. For example, the rightholder and the enforcer could be the same party. Rights that are enforced by the rightholder could be called allodial rights. The word “allodial” is historically associated with the legal term allodial title: ownership of land by occupancy and defense, without a superior landlord. There might be some relationship to the legal term “holdings”.

DUTY:

An other (**O**) has a duty to not interfere with a person (**P**) doing or being a thing (**T**), despite externalities (**E**), because of threatened Interference (**IT**) produced at a Cost (**C**) by an Enforcer (**En**) paid Fees (**F**).

This is a Hohfeldian correlate to a right. It is an opposite to an available interference (by the Other), an unavailable interference. It is not necessarily an opposite to a freedom, since there are freedoms which are not interferences.

Rights privatize liberty and socialize duties. Thus they are always “Liberty for me, but not for thee.”

DISCUSSION

Why is a positive model important? It is called facing reality, allowing a science-like agreement and convergence, something badly lacking in most philosophy. (Bourget et al. 2010) Stating only prescriptive (philosophically normative) descriptions of what you want as liberties ignores the conditions needed to create them and the side effects of those liberties. That also ignores the fact of different, incompatible prior desires. A model helps reveal what is implicit in a freedom. That can have enormous practical consequences. This model, for example, shows why freedoms cannot be unlimited: because of competition for limited external resources (R) and because of the need for reasons (B) for others not to interfere (which restricts the liberty of those others.)

FREEDOM:

This model likely cannot account for all of Berlin’s “more than two hundred senses of this protean word” (p. 121), but it definitely can account for Berlin’s ideas of positive and negative liberty. Most discussions of liberty focus on particular liberties that are desired, and systematically dismiss other ideas of freedom by omitting or denying the significance of the other parts of this model. Notably, Berlin points out historical rejection of ability and resources as being essential to liberty: “If my poverty were a kind of disease, which prevented me from buying bread, or paying for the journey round the world or getting my case heard, as lameness prevents me from running, this inability would not naturally be described as a lack of freedom… This is what the classical English political philosophers meant when they used this word.” (pp. 122-3) When Berlin says “In other words, this use of the term depends on a particular social and economic theory about the causes of my poverty or weakness” (p. 123), he seems to be deprecating theories that pay attention to actual factors of freedom in favor of glossing over such inconveniences to a theory of negative liberty. In addition, the externalities of exercised freedoms are commonly ignored. Berlin and many others commonly provide lip service mentioning such things, but then disregard them. Indeed, it might be possible to create a classification of theories or types of liberty by the factors (enumerated here) that they gloss over or overlook. That’s exactly what MacCallum does for the positive/negative division, but this more extensive model allows for more characters in a classification. This sort of classification could be a useful shorthand for identifying false argument by omission.

Freedoms are necessarily strategic, since externalities (**E**) to others (**O**) and interference (**I**) from others because of reason (**B**) can be negotiated by the person (**P**).

RIGHTS:

For those who want shortcuts to classify this model, this is a positive, functionalist, non-normative, monistic, analytical, interest model of rights. (Frydrych 2017)(That also implies that it is pre-legal and amoral.) In addition, it is not necessarily individualist nor anthropocentric.

This model deals with enforced rights rather than natural rights, or rights which are merely claimed or moral rights. Legal and customary rights are enforced. Any unenforced claims of rights can be rhetorically challenged by an infinite number of conflicting claims simply because claims are essentially costless. Thus, rights that are only claimed can be ignored because equal or conflicting rights can be claimed. For example, divine rights of kings were challenged by natural rights. It cost nothing to make either set of claims. Making enforced rights from those claims was costly, and that is one of the major purposes of governments.

One of the primary advantages of this model is that it details the economics of having rights, which may suggest (from a pre-normative economic viewpoint) why particular rights are created. Surprisingly, the field of Law and Economics doesn’t seem to have anything like this model, which casts suspicion on any of their discussions of rights. If you search the literature enough, you can probably find all these factors. For example, some scholars (Holmes and Sunstein, 1999) have addressed the fact that all legal rights have costs of enforcement, but this is only a part of the economics. The other parts include costs of interference to others and opportunity costs to others, and they all need to be quantitative. Where is the Law and Economics model that integrates all these?

Costs and income for each of the three parties allow study of rational maximization for each party.

| Party(blue circles) | Income (black arrows)Costs (red arrows for negative values) |
| --- | --- |
| Person | * VT, Value from the Thing
* FP, Fees to Enforcer from the Person
 |
| Enforcer | * F=FP+FO+FT, Fees from Person, Others, and Thing
* CE, Costs to Enforcer of enforcement
 |
| Others | * IT, costs of interference from Enforcer
* FO, Fees to Enforcer from Others
* E, Externalities from use of the Thing
 |

Value from the Thing (VT), Externalities (E), Interference (IT), Enforcement Cost (C) and Fees (F) are all assumed to be values (expressed as magnitudes) that are fungible in some manner. That doesn't require the form of modern markets: indeed, tit-for-tat and other strategies that work with a simpler form of fungibility can serve to exchange life, labor, time, or other values.

Others can be divided into cooperators and defectors who have different incomes and costs.

|  |  |  |
| --- | --- | --- |
| Costs (negative values) | Cooperators | Defectors |
| IT, costs of interference from Enforcer | IC | ID |
| FO, Fees to Enforcer from Others | FOC | FOD |
| E, Externalities from use of the Thing | EC | ED |

For an individual Other, when IC+FOC+EC>ID+FOD+ED, then it is rational to cooperate. In simpler English, when cooperators have lower costs than defectors. Enforcers would rationally want to make this inequality hold because it would reduce the magnitude of C, Costs to Enforcer of enforcement. Enforcement is not likely to be perfect, assuming diminishing marginal returns to enforcement at some point, and there is likely an optimum profit (to the enforcer) F-C at some level of defection.

Others could be further divided into known and unknown cooperators and defectors, complete with an information cost for determining who is which.

The Person would be willing to pay increased Fees FP to Enforcers until V is maximized by reduction of Others defecting.

Rights can be sustained when three inequalities hold:

* VT > FP (Value from the Thing is greater than the Fees from the Person, ie. the Person profits.)
* F > C (Fees total more than Costs to the Enforcer, ie. the Enforcer profits.)
* IC + FOC + EC > ID + FOD + EC (cooperators have lower costs than defectors.)

Some modern ideas of "good" or "moral" or "economically efficient" rights also meet the constraint:

* VT - F > E + IT (Value of Thing to Person minus Fees to Enforcer is greater than Externalities plus Interference Costs to Others, ie. a net social benefit.)

This could be very important depending on Externalities. For a right about an external resource such as land (which pretty much anybody could use the same way), the Externalities (opportunity costs) would be very similar to the Value of Thing, resulting in a net deadweight loss of F + I (Fees to Enforcer plus Interference Costs to Others.) That might be characterized as rent seeking. For a right where VT is mostly personal and subjective in value and E is small by comparison, there can be a net social benefit.

This model can be applied to explain why rights vary so much between and even within cultures and across time. The economics changes with changes in:

* norms
* the prices of resources
* abilities
* the technologies of interference, monitoring and communication
* subjective values of benefits and harms.

Thus, we would not expect rights to be absolute, uniform or eternal. They will not extend over all aspects of a resource, they will not be equal where factors listed above vary, and they will change dynamically. Nor would we expect rights to be perfectly enforced because of diminishing marginal returns of enforcement.

Ideas such as “spheres of rights” are greatly misleading descriptions of actual rights: there are so many carve-outs and exceptions due to economics and conflicting rights that a moldy, runny, irregular blob of Swiss cheese might more accurately convey the nature of the rights. Rights cannot be absolute or ideal: we are incapable of such real-world enforcement. Domain (rather than sphere) might be a better idea (though it gives a false mathematical aspect), but an ecological niche might be the best metaphor for a right.

Rights are necessarily strategic, first because the freedom involved is strategic and second because their interference/enforcement is necessarily strategic.

This model conflicts with ideas of natural rights. Nozick wrote “Individuals have rights, and there are things no person or group may do to them (without violating their rights.)” (Nozick 1974, pg. ix.) All rights in this model are contingent on successful enforcement, and thus have no necessary presence. Others who defect can be said to violate rights, but a state enforcer may exempt itself (limiting the right), and that would not then be a violation of a right. Rights do not have to be universal, as the Hohfeldian concepts of privilege, disability and liability show, and probably cannot be universal in the real world.

Equality of rights is a fine aspirational goal, perhaps, but has no existence in real, enforced rights. For a start, we would expect the better the equality, the more it would cost to achieve it. We certainly don’t see it in any society: every bit of private property is an inequality, for example. Of course, you can attempt to generalize, abstract, or otherwise get vague to claim there is equality of rights, but those are sophistical arguments.

Because most rights such as property are actually bundles (molecular rights), the economics rapidly becomes very complex. With rights such as property, the composition of the bundles often vary: that might be because the individual elements could differ economically from each other greatly depending on the kind of property and the social circumstances. Rights are too complex economically to be simply planned: they evolve through variation, selection, and copying to fit local conditions of technology, environment, power, etc.

Another inference from this model can be (contra Locke) that rights (including property) are not created by mixing labor, but rather by mixing coercion (or other interference.)

This is not the first attempt to create a positive description of rights: David Friedman (1994) wrote, "A Positive Account of Property Rights". Unfortunately, it does not present a theory: it presents a story. Friedman’s reliance on Schelling points is based on false assumptions of difficult communication and roughly equal threats of coercion. For all that he speaks as an economist, he relies entirely on prose and not at all with equations or diagrams, failing to create an explicit model. However, two sentences within it partly inspired this theory: “This way of looking at behavior provides a way of understanding rights that depends on neither law nor morality, although it might be reinforced by either… More generally, my rights are whatever I am successfully committed to defend, where success depends in part on other people recognizing my commitment and having no commitment of their own that directly clashes with it.”

This paper’s model could probably be improved in a number of ways.

* Through better marginal economic analysis. The economics here is a first approach by an amateur.
* Through enumeration of the different sets of Others, Enforcers, and breakdown of Opportunity Costs and Interference Costs for the different sets of Others and Enforcers.
* Transaction costs can be identified in the model.
* Power might be defined as a right to interfere.
* The full set of Hohfeldian incidents might be made compatible with this model, though that could be a Procrustean exercise.
* The relationship of interferences and enforcement to transaction costs could be clarified.
* The relationship of this model of freedom with Sen’s uses of “capability”, “effective freedom” and “substantive freedom” could be clarified.
* A more precise terminology that distinguishes different conceptions of freedoms and rights within the model could be introduced. (In addition to Frydrych’s classification of theories in general.)

CONCLUSION

This model of freedom and rights is much more complex than preceding models (and vague usages), because it does not ignore or gloss over economics, interferences, or what it takes to do or be something. The vast majority of writings about freedom and rights treat them much too simplistically. Recognition of the real complexity of freedom and rights will probably engender new theory about them, as well as endless attempts to defend, salvage or rehabilitate past writings.

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1. See the story of the blind men and an elephant. As in the story, reality requires a far more complex model than any of the blind men provide or than philosophers, lawyers, economists or sociologists provide. [↑](#footnote-ref-2)
2. "Taking the format 'x is (is not) free from y to do (not do, become, not become) z', x ranges over agents, y ranges over such 'preventing conditions' as constraints, restrictions, interferences, and barriers, and z ranges over actions or conditions of character or circumstance." MacCallum 1967 p. 314. [↑](#footnote-ref-3)
3. Economists can claim subjective values are fungible by seeing what price is put on them. Now that we know what they are, we are only haggling over cost. [↑](#footnote-ref-4)
4. It is sad that most libertarian authors have not progressed beyond the false negative/positive liberty distinction that MacCallan so clearly demolished: “Consequently, anyone who argues that freedom from is the 'only' freedom, or that freedom to is the 'truest' freedom, or that one is 'more important than' the other, cannot be taken as having said anything both straightforward and sensible about two distinct kinds of freedom. He can, at most, be said to be attending to, or emphasizing the importance of, only one part of what is always present in any case of freedom.” p. 318. [↑](#footnote-ref-5)
5. A libertarian finds a magic lamp, and when he mixes his labor with it a genie appears. The genie tells him he can have three wishes.

His first wish is for an end to government and coercion, and the genie says "It shall be so!". Immediately people start non-violently taking everything they desire because nobody can coerce them to stop. The libertarian's car is taken and he is upset to find people living in his house and taking his stuff.

His second wish is to make the world a capitalist utopia; for everything to be property and all people to respect property without coercion. The genie says "So be it!" and poof, everything is property: but the libertarian finds that he is a slave, property of somebody else.

Unhappy about his slavery, and not wanting to undo his wishes, the libertarian's third wish is for his own perfect liberty, to be uncoerced by anybody. The genie says "You didn't really need me for that!" and drops him naked in the middle of the ocean. [↑](#footnote-ref-6)
6. The shepherd drives the wolf from the sheep’s throat, for which the sheep thanks the shepherd as a liberator, while the wolf denounces him for the same act as the destroyer of liberty, especially as the sheep was a black one. Plainly the sheep and the wolf are not agreed upon a definition of the word liberty; and precisely the same difference prevails today among us human creatures, even in the North, and all professing to love liberty. Hence we behold the processes by which thousands are daily passing from under the yoke of bondage, hailed by some as the advance of liberty, and bewailed by others as the destruction of all liberty.

-- Abraham Lincoln, in a speech at a Sanitary Fair in Baltimore, MD, on April 18th, 1864 [↑](#footnote-ref-7)
7. A previewer claimed that there are exceptions to conservation of freedom: Woody Allen's example of a law requiring everyone to wear underwear, and to wear it outside so we can check. Supposedly everyone has less liberty and no one has more. But now everyone is free from exposure to nudity (or free from the presence of non-underwear wearers), a liberty they didn't have before. It's not really any different than property (requiring people not to steal), which reduces EVERYBODY's access to the goods of the world with the arguably beneficial freedom from theft. Or, in these times, a requirement to wear a mask which provides more freedom from infection. Anything that “destroys” a liberty creates a new one (like a contrapositive) in turn. If we fail to imagine what the new liberty is, it is probably because we value it so little that we don’t think hard enough about it. Freedom from non-underwear wearers has enormous numbers of analogies in social prohibitions, such as public nudity, public drunkenness, restrictions on language, behavior, and subjects in front of children, etc. [↑](#footnote-ref-8)
8. Kramer (2003) is particularly egregious. He does not define what kind of “range” he is talking about for measuring freedoms. If it is countable numbers, fine. But if it is a set, you cannot square a set. If he is counting members of a set, but it is an infinite set, division is meaningless. He does not specify what dimensional units is he using. If he is doing dimensionless calculation, why not cube (or any other power) instead of square? Is he a lumper or splitter when counting freedoms? In his examples supporting squaring, he assumes freedoms are equal for counting purposes, which is laughable. He writes “Practical obstacles to the implementation of systematic measurements are not addressed herein.” (382) He doesn’t seem to have heard about scientific notation, which makes the size of the units irrelevant. Nor does he seem to have heard about the mathematical concept of limits. (383) [↑](#footnote-ref-9)
9. Most obviously, you can have a freedom to restrict other people's freedoms. For example, freedom to enslave means no freedom from slavery and freedom from slavery means no freedom to enslave. Don't kid yourself that either of these are not real and desired freedoms: major wars have been fought over them. Requiring equal freedoms means restriction of the freedoms of those who want unequal freedoms, and vice versa. [↑](#footnote-ref-10)
10. Here lies the freedom as development versus freedom as abandonment dichotomy, redistribution versus status quo. [↑](#footnote-ref-11)