Compossible Rights Must Restrict Speech

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> President Trump's January 6 Rally Speech was akin to telling an excited mob that corn-dealers starve the poor in front of the corn-dealer's home. He invited his supporters to Washington, D.C., after telling them for months that corrupt and spineless politicians were to blame for stealing an election from them; retold that narrative when thousands of them assembled on the Ellipse; and directed them to march on the Capitol building—the metaphorical corn-dealer's house—where those very politicians were at work to certify an election that he had lost. — Amit P. Mehta, United States District Court Judge[1]

John Stuart Mill qualified his expansive account of free speech with the corn-dealer exception.[2] It is not permissible for one to exercise their free speech to incite an excited mob to commit violence. However, this is by no means a unanimous position among liberal philosophers, many of whom have argued that free speech provides an unlimited domain of permissible actions to express oneself, even if the expression leads to harm and violence.[3]

This paper discusses why speech regulations are logically necessary for *any* account of a moral right to free speech. My argument for limiting the right to free speech (and more widely any right to freedom) will be grounded in compossibility.

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[1] Thomson v. Trump, 21-cv-00400 (APM) (D.D.C. Feb. 18 2022).
[2] John Stuart Mill, *On Liberty* (London: Penguin Classics, 1985).
[3] Kristian Skagen Ekeli, "Toleration, Respect for Persons, and the Free Speech Right to Do Moral Wrong', in M. Sardoč (ed.), *The Palgrave Handbook of Toleration* (Palgrave Macmillan, 2022), pp. 149-72. Thomas Scanlon, "A Theory of Freedom of Expression', *Philosophy & Public Affairs* 1 (1972), pp. 204-26. Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford: Oxford University Press, 1996), pp. 204-35.

Rights to freedom, formally speaking, are claims by an agent that other people not interfere with them; a compossible set of rights is one where the domains of permissible actions–permitted by each claim (and its correlative duty) within the set–do not contradict one another across claims. I will argue that in order for claims to be coherent, they cannot generate contradictory domains, and that for a claim to non-interference to not generate contradictory domains across multiple people with the same claim, the claim must be restricted. This account as it currently stands can at least generate conclusions on the permissibility of incitement.

My argument will draw equally from the more general literature on rights theory and that on free speech. I will argue that existing positions in support of speech regulations by Jonathan Quong and Steven Heyman[4] get the nature of rights wrong. As I believe the argument for speech restrictions will apply to *any* form of a right to free speech, I will try not to make assumptions about the features of rights, in particular their functional concept (between choice and interest theory) and their justification. Where necessary, I will establish why certain features of rights must be true, contrary to rights theorists that claim otherwise. In that regard, I will argue that rights are absolute and can be specified. I will also stipulate that freedom is moralized and derived solely from rights. Therefore, not all increases in interferences constitute infringements.

Before I proceed, I should take stock of what my paper omits. First, as mentioned, I will only apply my account of logically necessary restrictions to the case of incitement. The reasons for doing so are that (i) it is relevant to ongoing, real-life political disagreements and that (ii) incitement raises interesting questions about

[4] Jonathan Quong, *Liberalism Without Perfectionism* (Oxford: Oxford University Press, 2011), pp. 290-317. Steven Heyman, *Free Speech and Human Dignity* (New Haven: Yale University Press, 2008).

speaker's responsibility that I will also try to resolve. This means I cannot cover different but related classes of controversial speech, most notably threats, hate speech, disinformation, or defamation. As I will dedicate much of this paper to the analysis of rights at large rather than hate speech, I also cannot cover prominent arguments offered against psychological harm and offensive speech, such as the works of Jeremy Waldron and Joel Feinberg.[5] Though I will not argue this, if I am correct that rights are absolute, then there should be no reason to restrict free speech for offense reasons.

Second, the arguments I will offer for restricting the right to free speech are not sensitive to whether the content expressed is a form of political expression or not. Some theorists ground free speech in its value to a democracy or hold that there are more compelling reasons against regulating it when the speech is politically motivated.[6] This should not apply to my account as it is derived from certain features of moral rights, which do not change depending on whether the right-holder's expression is political. Finally, my account can generate conclusions on what actions must fall outside the domain of one right. It does not resolve instances where the domains of two different rights are ostensibly contested by each other.

The structure of the paper is as follows. Section 1 defines the right to free speech, examines a broad account of this right that I will argue against, and delves into what constitutes a right infringement. Section 2 examines arguments offered by Quong and Heyman for infringing or restricting speech and rejects them. In the process, I will also defend the notion that rights are absolute. Section 3 fully develops my account of logically necessary restrictions for free speech, rejects the argument that speakers are

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[5] Jeremy Waldron, *The Harm in Hate Speech* (Cambridge: Harvard University Press, 2012). Joel Feinberg, *The Moral Limits of the Criminal Law: Volume 2: Offense to Others* (Oxford: Oxford University Press, 1988).

[6] For an example of the former, see Alexander Meiklejohn, *Political Freedom* (New York: Harper, 1960). For the latter, see Heyman, *Free Speech and Democracy*, p. 112.

not responsible for the violence they incite, and notes several features about this account. Section 4 concludes.

1. What free speech is and cannot be

1.1. The right to free speech as a right to non-interference

The right to free speech, or indeed any right to do something, is as Jeremy Waldron argues,[7] a right to non-interference from others. I will refer to such a right to non-interference as a right to freedom. Under Hohfeld's framework of rights as bilateral relations,[8] a right to freedom gives the right-holder a claim to non-interference, which correlates to a duty imposed on all others (possibly including the right-holder) that they do not interfere with the right-holder. (I will use right and claim interchangeably from here on.)

I should be clear that I am merely characterizing the concept of a right to negative freedom, and not its justification. Adina Preda has helpfully noted this distinction:[9] discussing the concept of a right–that is, its definition–is different from discussing its justification, or why the right should exist. Waldron grounds the right to do *D* without interference in autonomy,[10] or more precisely in the importance to an agent of being able to make consequential choices for themselves. This justification or any justification grounded in interests is not necessary in two ways: one, a right to freedom can be justified in other ways, for example as a right that naturally exists or as a title ascribed to one party when there is a moral disagreement, as H. L. A. Hart

[7] Jeremy Waldron, "A Right to Do Wrong', *Ethics* 92 (1981), pp. 21-39.
[8] Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', *Yale Law Journal* 23 (1913).
[9] Adina Preda, "Rights: Concept and Justification', *Ratio Juris* 28 (2015), pp. 408-15.
[10] Waldron, "A Right to Do Wrong', pp. 34-5.

and Hillel Steiner respectively have argued.[11] Two, as I will argue, it is the concept of a right to freedom that requires it not be unqualified. This argument will be justification-insensitive.

My argument takes no position on the two theories of the function of rights. Choice theory argues that the necessary condition of a right is that its holder has the power to enforce or waive the fulfilment of its correlative duties. Whether the right to do *D* comes with a corresponding power is not relevant to my account of rights restrictions. Though as Preda argues,[12] if an interest theorist were to accept that rights to freedom are grounded in autonomy, they plausibly should also require that the right to do *D* come attached with the power to relinquish any correlative duties. In any case, I will operate under the definition that an agent's right to free speech is simply a right to not be interfered with regardless of what an agent expresses or thinks. Conclusions derived from this starting point should be compatible with both choice and interest theories of rights.

1.2. Against a Broad Right to Free Speech

K. S. Ekeli has argued for the doctrine of viewpoint neutrality, which stipulates that "all persons, including unpopular and radical extremist dissenters, have a right to express, hear, and consider any political and religious viewpoint, idea, or doctrine within public discourse."[13] Viewpoint neutrality is alternatively characterized by Ekeli as a free speech right to do moral wrong. The right is still a claim-right against interference when an agent does, and more commonly says, something morally wrong. Contrary to what the name suggests, however, the claim against interference also

[11] Hillel Steiner, *An Essay on Rights* (Oxford: Blackwell, 1994), pp. 208-20. H. L. A. Hart, "Are There Any Natural Rights?', *The Philosophical Review* 64 (1955), pp. 175-91.
[12] Preda, "Rights: Concept and Justification', p. 410.
[13] Ekeli, "Toleration, Respect for Persons, and the Free Speech Right to Do Moral Wrong', pp. 159-60.

applies when an agent is not committing a moral wrong. For this reason I think it is better referred to as a right to free speech, even when the speech is wrong. For brevity, I will refer to Ekeli's conception from here on as a *broad right to free speech*.

Ekeli grounds his account of a broad free speech right in our capacities as thinking (understood as autonomous) agents, which he argues commands respect *from the state* in the form of basic rights.[14] Despite Ekeli's calling this a right grounded in the status of persons and drawing contrast to interest-based theories of rights,[15] he is nonetheless proposing an interest-based theory of rights. The difference between choice and interest theories of rights are not in their justification, but rather their definition of a right. Ekeli's attempt of generating rights from what we being autonomous agents require fits squarely within interest-based approaches.[16] Even if the two rights protect different actions, Ekeli's *ground* of a right is not distinguishable from that of Waldron's original "right to do wrong."

Ekeli at times qualifies his account by stating that the right-holder is "subject to the exception clause that their speech acts do not directly and demonstrably violate the basic rights of other persons."[17] However, he also argues that the state need not necessarily intervene even if Neo-Nazis are using expression to violate the rights of others; he has also argued that even if some citizens form extremist religious communities that "violate the basic rights of persons both within and outside these communities," state intervention in opposition to these communities would be

[14] Ekeli, "Toleration, Respect for Persons, and the Free Speech Right to Do Moral Wrong', p. 161, p. 163.
[15] ibid, p. 163.
[16] Properly articulated, Ekeli's "status-based theory of rights" is simply a theory of rights that is justified by our interests given our statuses as autonomous, or thinking, agents. Calling it status-based does not make it any less grounded in interests. Choice theories of rights do not take the "because we are X, we have rights Y" feature. This classifying distinction between choice and interest theories is taken from Preda, "Rights: Concept and Justification'. Even though Ekeli claims to place his right "on a different plane from any aggregative calculus of interests" (p. 164), the claim does not make the right not an interest-based right.
[17] Ekeli, "Toleration, Respect for Persons, and the Free Speech Right to Do Moral Wrong', p. 160.

impermissible.[18] Ultimately, he is inconclusive on whether the qualification is necessary for his account. He does, however, appear sympathetic to answering in the negative and offers an argument for why the qualification is unnecessary. I will briefly rebut the position in the following few paragraphs and a full, generalized rejection of this position is essentially the topic of this paper.

Ekeli argues that his broad right to free speech is, in Nozick's terms, a "deontological side constraint that prohibits the state from violating this constraint even if a violation would better serve freedom of expression overall in the society."[19] There is a lot to unpack in that proclamation. First, is every state intervention just an attempt to maximize the overall right in society? Second, suppose person *Q* is infringing (which I take to be synonymous with violating[20]) the right of person *P* by silencing P: if the state's regulation of person *Q*'s actions is constrained by person's *Q* right to free speech, then why is not person *Q*'s action also constrained by person *P*'s right to free speech? Third, is the state infringing the right to free speech when it prohibits rights infringements? And finally, can there be a coherent version of Ekeli's broad right to free speech, i.e. one without his exception clause? I will try to answer the first three questions briefly. It should become clear at the end of this section that omitting the exception clause is implausible. The retort offered against Ekeli here is important for two reasons: (i) I think this view by Ekeli that speech must be unconditionally free is common and therefore worth addressing. (ii) The following section offers a preview for my main arguments and shows why they're relevant.

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[18] ibid, p. 164, pp. 168-9.
[19] ibid, p. 168.
[20] Some, such as Judith Jarvis Thomson, have argued that violations are different from infringements. Specifically, that infringements are nonfulfillment of correlative duties that are permissible, whereas violations are nonfulfillment that are not permissible. I will show why this is incorrect in Section 2.1.1 by showing that Thomson's arguments against the idea–that correlative duties imply what we should do– are wrong. Thus, not fulfilling correlative duties is always wrong, and there is no distinction between infringement and violation.

First, is the state's motivation really to maximize the overall right in a society when it reins in rights infringements? We do not need to answer in the affirmative in order to ascribe a sufficient purpose to the state's role here. The state's purpose when it interferes with Neo-Nazis is not maximization. It is enforcement. The substance of a claim-right, as we will see in Section 3.1, is the duty. Put differently, a claim-right ascribes a person *P* the claim that a person *Q* show restraint in order for *P* to enjoy negative freedom. The relevant constraint is not whether someone else is gaining more freedom as a result of intervention–a state intervention will always result in a "transfer" of negative freedom. If the constraint against the state is that its actions can never result in a transfer of freedom, then rights enforcement will always be impermissible.

This leads nicely into the response to question two: how can we say *P* has the right to free speech if person *Q* can infringe *P*'s right any time they want? In order for either person's right to mean anything, violations by either party against the other must be prevented ex-ante or redressed ex-post. Even if the state's intervention is a rights violation, how could an account of a free speech right prohibit the state's violation but somehow act indifferent towards the same violation committed by an individual person? The relevant constraint is not whether the violator is a state or an individual. Neither parties should be permitted to infringe another's right.

So what is the state doing when it intervenes? This brings us to the third question. What the state does when it prevents the Neo-Nazi from terrorizing other groups from speaking is not a rights infringement. Again, it is an enforcement. Specifically, it is an enforcement against an action that falls outside of the domain of permissible actions generated by the Neo-Nazi's right to free speech. (I assume the state is permitted to enforce rights. I believe this is uncontroversial; for example, Nozick stressed the importance of protection and enforcement of property rights for

everyone by the state.[21]) The action is not within the Neo-Nazi's domain of permissible actions because the right to free speech cannot accommodate speech that violates the same right in others, as otherwise the right would generate indeterminate evaluations of some action's permissibility. This is the compossibility requirement. Excluding such speech is a logically necessary right restriction, rather than a right infringement. This is why when a state acts against person *Q* (or the Neo-Nazi), it is enforcing person *P*'s (or the Neo-Nazi's victim's) same right, and not infringing that of *Q* or the Neo-Nazi.

It should have become clear that even the broadest accounts of free speech rights require restrictions of some kind. In the next section, I want to further demonstrate why interferences as a result of the state's enforcement action cannot be considered as rights infringements.

1.3. Rights restrictions, not infringements

The fundamental misconception–that leads advocates of broad rights to free speech to think that an enforcement against individual infringements is its own infringement–is a descriptive (aka non-moralized) conception of freedom. The point of this section is to show that the only coherent way to analyze freedom (i.e. whether one is being free) is through a moralized conception. In other words, we must think of freedom as solely derived from what our rights entitle us. The arguments here are drawn from Ralf Bader's work on moralized freedom.[22] With a moralized understanding of freedom, it will become clear why state enforcement–against individuals that infringe the rights of others–does not trade one instance of infringement for another. Nor is it some form

[21] Robert Nozick. *Anarchy, State, and Utopia* (Oxford: Blackwell, 1974), p. 27.
[22] Ralf Bader, "Moralising Liberty', in D. Sobel, P. Vallentyne, and S. Wall (eds.), *Oxford Studies in Political Philosophy Volume 4* (Oxford: Oxford University Press, 2018), pp. 141-66.

of utilitarianism-of-rights where we maximize rights instead of respect their inviolability.

We start with MacCallum's decomposition of freedom into three parts (and focus on the latter two). We can think of every freedom as an instance where:

> [an] "agent x is free from constraints y to do/be/become z."[23]

This decomposition helps distinguish moralized and descriptive conceptions well. According to moralized conceptions of freedom, freedom has two necessary conditions: that (i) an agent has the y-freedom to do what (ii) they have the z-freedom to do. *Interferences* are reductions in y-freedom. *Infringements* (or *violations*) refer to reductions in y-freedom to do an action A despite an agent's having the z-freedom to do A. Meanwhile, *restrictions* refer to reductions in z-freedom, i.e. a reduction of the domain of permissible actions under a claim. (I will use z-freedom and domain of permissible actions interchangeably from here on.) A moralized conception of freedom believes there are no justified infringements, while restrictions can be justified or unjustified. Because of the second distinction, an agent cannot be infringed (i.e. lacking the y-freedom to do something that one has the z-freedom to do), if they never had the z-freedom to do that thing in the first place.[24]

In contrast, a descriptive conception does not consider the z-freedom dimension. Freedom is solely (i) being true. Though, as we have seen in Ekeli's case,

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[23] Gerald C. MacCallum Jr, "Negative and Positive freedom', *Philosophy Review* 76 (1967), pp. 312-34.
[24] Under a moralized conception, one where (i) is false and (ii) is true can be described as unfree. Whereas, one where (ii) is false can be automatically considered as not-free (i.e. not having the freedom in the first place, and therefore cannot be unfree). And where (i) is true but (ii) is false, one is considered to have a license. I avoid referring to the unfree/not-free distinction and the concept of license for clarity.

those who argue for non-moralized freedom cannot avoid the qualification of rights. When they happen, they are purely considered as infringements, with the distinction that infringements can be justified or unjustified. The permissibility of the infringement depends on the presence of justification.

The main implication of the moralized view can be illustrated with the example of imprisonment.[25] Enforcement that leads to a reduction in y-freedom is not an infringement of moralized freedom. Infringement (or unfreedom), again, is not having the y-freedom to do something that an agent has the z-freedom to do. A moralized conception of freedom necessitates more specific uses of the word "freedom" that deviates from its ordinary use. Although the freedom of movement of a prisoner is interfered with, we should not think of the freedom of the prisoner as infringed. This is because leaving the prison is not within the prisoner's z-freedom, i.e., their domain of permissible actions. In the same way, a speaker who is interfered with for attempting to interfere with someone else does not have their claim infringed. Rather, they are being subject to enforcement against their infringing the same claim in someone else.

Let us now see why descriptive notions of freedom are implausible. From the start, descriptive conceptions err by assuming that freedom can exist independently of rights. But no coherent understanding of freedom can precede rights, as otherwise, we would have no way of distinguishing whether an agent's freedom is the result of a negative claim, a liberty, or a license, and more importantly, whether interference with the agent's action is permissible. Relying on descriptive freedom alone, we would actually have no way to distinguish between the freedom to expression versus the freedom to murder. This is because descriptive freedom has no normative information

[25] Bader, "Moralising Liberty', p. 158.

built into it despite the latter's importance. In response, the descriptive theorist could refer to a justification that grounds the former but not the latter as a claim. But this is precisely how moralized conceptions operate. Alternatively, the descriptive theorist could justify the former as a claim by referring to the opportunities that it would bring *P* to express themselves, which would not be true for murder. But to derive the value of freedom solely from the value of their consequences is contrary to the intrinsic role freedom plays.

Suppose the descriptive theorist goes the former route and establishes the freedom to express oneself but not that to murder as a (claim-)right with some justification. Could they nonetheless deny that this freedom is solely to be understood in terms of y-freedom? This would not succeed either. The simple way to show this is that defining the z-freedom is unavoidable: we would not think *P*'s freedom to express oneself allows one to do something completely unrelated, such as squat in *Q*'s home. From this we can see that there must be a permissible domain of actions that defines freedom. But perhaps this is too benign; we know that the freedom to express oneself only concerns expressive acts, but within expressive acts, the freedom can purely be understood in terms of not being interfered with. But this argument would not work either. This is because, as we saw with Ekeli's theory, one must eventually grapple with the need to interfere with certain uses of the right. In the case of free speech, one example is the use of speech to incite violence against others. A descriptivist account must refer to this interference as an infringement. Yet, the notion that we can occasionally infringe claim-rights contradicts the view that they are absolute, i.e. that claim-rights impose constraints that have special status and whose violation is fundamentally wrong. This position is shared by theorists including Nozick, Ronald

Dworkin, Joseph Raz, Hillel Steiner, and Ekeli as well.[26] The descriptivist view of freedom fundamentally misunderstands what rights are.

Of course, the state cannot just arbitrarily restrict the z-freedom, i.e. proclaim that certain actions are outside of the permissible domain of actions, and then claim that their interference now therefore does not concern z-freedom, and therefore the interference is now justified. This is also why z-freedom depends on what rights an agent has, rather than what they want to do (i.e. desires) or what they can do (i.e. ability).[27] If the former is true, one could brainwash the agent and restrict their z-freedom in order to justify an interference. If the latter is true, one could incapacitate the agent and restrict their z-freedom. It is precisely the normative meaning that rights have that allow us to distinguish between justifiable restrictions (i.e. those required by the right) and unjustifiable ones (i.e. those not); whereas desire nor ability can perform this classification role as both concepts are descriptive. Here, the right could define z-freedom in two ways. First, the right could play a buckpassing role here which points further back to the ground of the right for solutions on why and how to restrict the right. The second possibility is the strategy of this paper, which is to take the ground of free speech as given and devise some necessary feature of all rights to freedom, so as to generate a z-freedom that is logically necessary. If this is possible, the freedom granted to a person *P* under the right would be subject to restrictions that are a function of these necessary features and also the ground.

I have argued that rights nor freedom are infringed when the state enforces against an agent's actions that are outside of their z-freedom. I rejected an

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[26] Nozick, *Anarchy, State, and Utopia,* pp. 29-31. Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), pp. 364-5. Joseph Raz, *Practical Reason and Norms* (London: Hutchinson, 1975), pp. 35-48. Hillel Steiner, "Moral Rights', in D. Copp (ed.), *The Oxford Handbook for Ethical Theory* (Oxford: Oxford University Press, 2007), pp. 466-8. Ekeli, "Toleration, Respect for Persons, and the Free Speech Right to Do Moral Wrong', pp. 163-4.
[27] Bader, "Moralising Liberty', pp. 147-9.

understanding of freedom that is solely a function of interference, which I believe is what drives the misconception that the state infringes freedom when it takes enforcement actions. Under a moralized view of freedom, one can be interfered with and still be free if the action they are prevented from doing is not within their z-freedom. Since freedom is derived from rights, whether a reduction of z-freedom is justifiable depends on the justifications and features of rights. Before I argue what these features that are relevant to restricting free speech are, I would like to examine why other approaches for regulating speech are problematic.

2. Approaches to Regulating Hate Speech and Their Problems

2.1. Treating Rights as Non-absolute

Quong provides two arguments for interfering with the right to free speech. The first is grounded in maintaining the stability of liberal society. The second depends on examining whether an exercise of speech is compatible with an "overall moral ideal" which the right is supposed to uphold. The two approaches are different. The first strategy is what I would classify as "to treat rights as non-absolute." Rebutting it will be the aim of this section.

I should begin by mentioning that Quong does not explicitly provide a stability-based argument against a broad right to free speech. However, after arguing for containing doctrines that aim to undermine the existence of a liberal state in education, he notes that "if the argument for containment works in the case of educational choice, it will prove even stronger in the case of restricting hate speech or literature."[28] The "unreasonable doctrines" being contained are those that reject liberal values–

[28] Quong, *Liberalism Without Perfection,* p. 311.

including freedom, equality, and fairness[29]–which although have Rawlsian-specific meanings, are assumed here to be broadly shared by liberal theorists. The question, then, is whether speech can be regulated when it is intended to subvert and/or overthrow the liberal state.

Let me first rule out the argument that the existence of moral rights depends on the state. It is true that the state codifies moral rights into law (with the rights thereby becoming legal ones) and enforces them; it may well be that some rights depend on the mutual assurance provided through the state to function. But many justifications of free speech depend either on equality or some aspect of human existence that seems at most correlated with but not derived from the state. Thus, I do not think actions that hinder the state's existence necessarily assault rights themselves, let alone the right to free speech. The next best reason for why stability matters for rights is that the state is the sole institution that enforces rights. Undermining the state would also undermine the right's enforcement, which would increase its future infringements. Or suppose that stability is valuable for its own sake. There are good reasons to avoid the cost of regime change. And more specifically, liberal stability seems valuable as we would want to further the regime whose creation codified the rights in question.

These arguments do not work. Regardless of exactly how stability is valuable, stability-based arguments nonetheless fail as they violate the idea that rights are absolute. Interfering with an agent's speech in order to preserve the institution that minimizes future infringements of free speech[30] is the essentially what Robert Nozick

[29] ibid, p. 299.

[30] One could perhaps argue instead that the state has a *duty* to enforce the free speech right. Or that we have a duty to respect the enforcer of the right to free speech that shapes the free speech right itself. I cannot offer a full treatment to either arguments. Here I should note that the duty correlative to a claim and further duties that are implied by the claim are different. Even if we grant that there is a implied duty to enforce or a twice-removed, implied duty to not undermine the institutions that enforces the right, if this implied duty contradicts the correlative duty to not interfere with speech, it is unclear to me why it would override the duty directly correlative to the claim. For differences between correlative

has called and rejected as "utilitarianism of rights"; rights, in his view, should be viewed as absolute constraints on actions that should not be violated, whatever one's ends are.[31] This is the view that rights are absolute or peremptory.[32] Steiner has also called this the primacy of moral rights.[33] Ronald Dworkin has called rights "trumps."[34] This relationship of rights between rights and other moral values is as follows: suppose that one of morality's foundational values is altruism and that there is a general right against non-interference towards an agent's use of their own property. That the right affords the agent non-interference from others does not exempt the right-holder from moral sanctions when they fail to transfer their resources to those most in need. The only thing the right entails is that it would be the gravest and most fundamental type of wrong to force the right-holder to make a transfer, than their not making one voluntarily. As Steiner writes:

> [M]orality's assigning such primacy entails that the following three alternative are listed in descending order of desirability: (1) my choosing to transfer my resources to the needy; (2) my withholding those resources; and (3) my attempting to withhold those resources but being forced by others to transfer them. It is outcome (2) that represents having (i.e., exercising) a right to do wrong.[35]

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and implied duties, see Adina Preda, "Are There Any Conflicts of Rights', *Ethical Theory and Moral Practice* 18 (2015), pp. 677-90, particularly p. 679.

[31] Nozick, "Anarchy, State, and Utopia', pp. 29-30.

[32] Hillel Steiner, "Working Rights', in M. Kramer, N. Simmonds, and H. Steiner, *A Debate Over Rights* (Oxford: Oxford University Press, 1998), pp. 233-301. The relevant passage is on p. 257.

[33] Steiner, "Moral Rights', p. 466.

[34] Dworkin, *Taking Rights Seriously*, p. 365.

[35] Steiner, "Moral Rights', p. 467. I also presume that desirability is used in a moral sense (as in something that accords with our sense of morality), without any consequentialist connotation.

I presumed, as Quong does, that the stability argument offers a justification for why the right to free speech can be *infringed*. Let us suppose instead that stability provides the justification for reducing the z-freedom of free speech so as to exclude subversive speech. Since this did not appear to be Quong's intent, I will keep my remarks brief. My first objection to this formulation would be that stability has nothing to do with the ground Quong offers to the right to free speech, which is the interest in expressing themselves that citizens in the original position determine themselves to have. Not *any* reason can be incorporated into the limitation of a right; eligible reasons likely must "proceed via the more basic notions in terms of which the moralised notion is defined."[36] A more plausible strategy might be to argue that there is a right to stability that overrides the right to free speech (more on inter-right specification will be discussed later). But in this case my objection would be that it is unclear who would have this right, let alone what its justification would be and what the justification for overriding that of free speech would be.

This understanding of the status of rights as absolute indicates why it is principally problematic to limit rights by referring to other values, such as stability. Regardless of how rights to freedom are justified, if it is not afforded this absolute status, then it seems confounding what the purpose of characterizing a specific duty of non-interference as correlative to a right would be. If a duty that is correlative to a right can be easily infringed or overridden by other values, then it is simply any other duty within a pluralistic arena of values and non-correlative duties; there would be no point in calling that duty as correlative to a right.

2.1.1. Thomson against rights absoluteness

[36] Bader, "Moralising Liberty', p. 162.

Judith Jarvis Thomson has argued against rights being absolute, or more specifically the idea that what we have a duty to do is automatically what we should do. She offers two arguments in the form of two thought experiments. The purpose of this brief section is to refute the challenges to the idea that rights are absolute. Only then does the criticism against the stability argument stands. The structure of her first argument is as follows:[37]

1. We can make promises that generate correlative duties.
2. We should not do what we cannot do (ought implies can, cannot implies not ought).
3. Promises are sometimes unfulfillable.
4. Therefore, what we have duties to do is not automatically what we should do.

The hypothetical events are as follows. Suppose I promise person *P* to deliver a banana, then person *Q* to deliver a banana, and finally am able to secure only one banana. Since ought implies can, if I cannot give both *P* and *Q* a banana, it cannot be true that I should give both of them a banana. (Note that "I should give them each a banana" here is different from "I am committed to giving them each a banana.") Therefore, correlative duties and their claims are not absolute.

Thomson is incorrect and the reason is that (3) is not true. Ex-ante of the delivery time (which I denote *T*), promises insofar as they exist must be fulfillable. Ex-post, it is clear that my promise to *Q* (the subsequent one) was unfunded and thereby did not generate a compossible claim or duty. Ex-ante of *T*, at the time of my promising *P* (and *Q*), we must both know that it is possible (with some degree of uncertainty) for me to secure one (then two) banana(s). Technically speaking, this is because promises must be compossible and compossible promises must be vested (i.e. fulfillable). In practice,

[37] Judith Jarvis Thomson, *The Realm of Rights* (Cambridge: Harvard University Press, 1990), pp. 82-93.

it is unclear if either *P* or *Q* would take me seriously if I were to promise an impossible task (say, deliver a spaceship).

Ex-post of *T*, we retrospectively know that securing more than one banana was impossible (perhaps because supermarkets were swamped by panic buyers). Only would we then know that my duty to *Q* was unvested and not compossible–but we do not know this ex-ante. Thomson could counter that the second promise was incompossible ex-ante of *T* due to its uncertainty. But this counterargument would not succeed. We generate promises with uncertainty all the time. If certainty were a necessary condition to promises, most ordinary promises would be void. To illustrate the nonviability of certainty, suppose I were to enter into a futures contract with a third-party *R* so that *R* would deliver me the two bananas for a fixed price in order to make delivery certain. Even then, I would be bearing a risk that *R* would go bankrupt before *T*. The point is that there must be uncertainty before *T*, and so long as it is not certain that the duty is unfulfillable, the duty is fulfillable and I should fulfill it. An ex-ante unfulfillable claim and duty could not have been created. And when an ex-ante fulfillable claim becomes unfulfillable ex-post, it is no longer compossible and therefore void. So long as duties exist, an agent can and should fulfill them.

Thomson's second argument involves the hypothetical that I own land and have the claim that person *P* stay off my yard. Suppose *P*'s child is in an urgent condition and *P* must cross my yard to reach the hospital. Intuitively, we would think *P* should infringe my claim and run through my yard. This does not match the conclusion that *P* should not do so if rights were absolute.[38] Therefore, Thomson argues, rights are not absolute. But I would argue that this example fails to demonstrate that rights are not absolute because it could very well be that we all have a general positive claim-right

[38] Thomson, *The Realm of Rights,* pp. 98-104.

that others provide what they can to aid us when we are at an acute and severe risk of death. We could further revise this claim so that the correlative duty only applies if one is in proximity and if the rescue would not endanger the duty-holder. It appears to me that what was truly at work in the second hypothetical was *P*'s claim to aid of this variant overriding my property right. I must emphasize: I am not arguing that my property right can be justifiably infringed. Rather, I am arguing that when properly specified, my property right must respect *P*'s right to aid if the latter right is more significant. Preda has also argued that rights conflict of this kind does not exist due to specification,[39] though a crucial assumption which she does not mention is that there must be sufficient reason for the positive-claim's correlative duty to precede and affect the domain of my negative property right. But with a duty to aid those in proximity and at risk of death, providing those reasons certainly seems possible, though this task is beyond the scope of this paper. What Thomson merely showed is that property rights do not have unlimited domains, and that they can be specified in a way which forebears other, more important correlative duties. Nonetheless, no right has been infringed, nor has it been shown that one is permitted to not follow duties.

2.2. Inter-Right Restrictions

Having defended why rights are absolute and therefore that the stability argument fails, I will now examine Quong and Heyman's various arguments against a broad right to free speech. Both strategies rely on some form on what I call an *inter-right restriction*, which is the reference to a right different from a right to free speech and using it to argue that the domain generated by the right to free speech should respect this other right (similar to what I hypothesize was occurring in Thomson's dying child example).

[39] Preda, "Are There Any Conflicts of Rights', pp. 677-90.

I will begin with Quong's second argument for restricting rights. I will first focus on the example of competing domains between the rights to religion and property. Though this example is not related to speech, the mode of argumentation used to restrict the right to religion can be applied to speech as well, which is what we see later in Heyman's writing. Returning to the example, the right in question is whether one can steal another's laptop for religious reasons. He argues that to determine whether an action is within the z-freedom of a right, we must examine "whether the particular act that is alleged to be protected by a right is consistent with the overall moral ideal which the system of rights is meant to uphold."[40] For Quong, this ideal is "society as a fair system of social cooperation for mutual benefit amongst free and equal citizens."[41] Quong then *repeatedly* stresses, without sufficient justification, that while private property is compatible with the stated ideal, a right to religion which permits religiously motivated theft is not.

The preliminary issue here is that it is unclear how this ideal would generate this answer. The ideal has multiple components that can generate rights with contradictory domains. Even if we clarify that the ideal here is the interests of citizens in the original position that devised this system of fair cooperation, it would still be hard to see why laptop thefts can be ruled out. After all, in Rawls's justice as fairness, principles of justice relating to liberty has priority over those to economic distribution. It could very well be that religious exercise overrides our entitlement to a fair share in property. Although it would seem absurd to us that sects can run around stealing laptops, we beg the question if we were to incorporate this intuition into our reasoning on z-freedom. Deriving a coherent solution to this this inter-right competition of domains is not the task of this paper. What this discussion serves to illustrate is that

[40] Quong, *Liberalism Without Perfection*, p. 308.
[41] ibid.

inter-right restrictions are difficult to justify, which as we will see is also the issue with Heyman's strategy for restricting the right to free speech. I will discuss Heyman's work before I proceed to Quong's second example regarding the moral ideal.

Heyman undertakes the expansive task of defining a right to free speech that does not accommodate morally objectionable speech, including revolutionary, hate, and incitement speech. The general form the strategy is to name various rights motivated by fundamental human interests; these rights include those to personal security, property, personality, self-realization, participation, reputation, recognition, and several more.[42] When a form of speech is said to violate one of these rights, Heyman usually argues the non-speech right prevails. To name one example, Heyman argues that anti-abortion activists, who published the names and addresses of reproductive doctors (as a way to incite intimidation and violence against them), were not acting within a domain of permissible actions as they threatened the right to personal security of the doctors.[43] A second example is his argument that hate speech violates the right to recognition, and therefore speech with hateful content against subgroups in society should be subject to more restrictions.[44] Finally, an example where free speech prevails over another right (in this case, the community's right to peace) can be found in the case of speech that advocates for the government's overthrow, which Heyman argues should not be regulated unless there is imminent danger as there is "a right to advocate political ideas."[45]

The examples I cite indicate a few problems. The first is common to interest-based approaches to rights, which Waldron has argued that most likely generates

[42] Heyman, *Free Speech and Human Dignity*, pp. 48-68, pp. 170-2.
[43] ibid, pp. 131-2, p. 135.
[44] ibid, pp. 167-71.
[45] ibid, pp. 104-8, p. 112.

incompossible rights,[46] i.e. rights that generate contradictory domains. For example, an individual's interest in personality and society's interest in free publication might generate contradictory permissible domains of actions for a newspaper press. This is problematic because the evaluation of the press's actions becomes impossible. Second, even if one holds my positions that the z-freedom of rights can be clearly specified when ostensible inter-right domain competition arises, that there are so many rights to weigh against each other generates both a complex task and seemingly leads to case-by-case weighing of rights that seems ad-hoc.

Finally, for speech to be restricted, the right to free speech must be overridden. But if one were to disagree about which of two values motivating two competing rights holds priority (e.g. between dignity and liberty), then citing the right to recognition to limit speech simply shifts the disagreement to the second-order. To justify why the first right overrides the second, one must refer to the underlying values. But if the argument about why dignity overrides liberty resolves the disagreement, then there would be no need for a second-order shift to boot. In his retort to Heyman, Ekeli generates an account of free speech grounded in autonomy that he argues overrides other concerns. But replacing the justification for free speech is simply yet another way of having the same disagreement. Though I do not want to argue in detail for Steiner's conception of rights as deadlock resolutions, I believe his following point is quite relevant here:

> "How are you ever going to get a right to do wrong out of a rule that distributes freedom according to moral priorities… If [you] could agree on one such rule, you wouldn't need it in the first place. You wouldn't even be in a deadlock… No

[46] Jeremy Waldron, "Rights in Conflict', *Ethics* 99 (1989), pp. 503-19.

> need to bother about who should have the freedom to act when you can both agree on which action it's better to do."[47]

I will return to the issue of avoiding value disagreements in rights in Section 3.3.

I now turn to Quong's second instance of an ostensible rights conflict that he solves with the "moral ideal" approach. I separate this discussion from that of the laptop example as (i) this is an instance of intra-, rather than inter-right conflict, and (ii) Quong's approach to devising a solution is different. He cites Waldron's example of Nazis trying to incite their supporters to interfere with the speech of some communists.[48] Instead of two parties invoking different claims, the two are claiming non-interference when speaking. One way to resolve this disagreement that would not work is to refer to each party's interests. Interests do not do the job here as both parties have the same interest in political expression. Instead, Quong argues that the Nazis are not exercising free speech at all as "[t]o count as a genuine exercise of free speech, a person's contribution must be related to that of his opponent in a way that makes room for them both."[49] Here, the idea is that rights must be restricted in a way that allows for their compatible and equal exercise. This is, contrary to what Quong claims, not analogous to his supposed solution to the laptop problem.[50] In fact, it is similar to the intuition behind my approach of deriving necessary restrictions from compossibility and universality. Fleshing this account out will be the task of the next section.

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[47] Steiner, *An Essay About Rights,* p. 215.
[48] The thought experiment can be found in Waldron, "Rights in Conflict', p. 518.
[49] The quote is from ibid, which Quong directly borrows in *Liberalism Without Perfection,* p. 309.
[50] Cf. ibid, 310.

3. Logically Necessary Restrictions to Free Speech: Derivation, Application, and Characteristics

3.1. Compossibility and Universality Require Rights Restrictions

In this section, I will illustrate (i) why a set of moral rights must be compossible and universal and (ii) how compossibility and universality generate logically necessary rights restrictions.

Suppose that there are two ongoing rallies by two extremist leaders, Red and Blue, which declare each other as sworn ideological enemies that must be destroyed.[51] Both leaders have roughly the same number of followers, who have illiberal inclinations and little to no tolerance for differences in opinions. Both Red and Blue incite their respective supporters to march towards the other leader and silence the heretic message of the other group by preventing their speech with any means necessary, including violence. In this scenario, are the speech of the two leaders protected by the right to free speech? Can the actions that obstruct the speech of others and therefore fail the actors' duty of non-interference in others be included within the domain of permissible actions that is generated by the actor's same right?

We know this would not be an acceptable solution immediately. Let us focus on the implication of Red having this broad claim: the broad claim's z-freedom would classify Red's prevention of Blue's speech as both permissible, as part of Red's broad claim to say whatever they want even if it interferes with others, and impermissible, as their duty correlative to Blue's right to non-interference should limit their z-freedom to actions that do not interfere with Blue. [52] The two claims are incompossible as they

[51] This is similar to the aforementioned situation that Waldron proposes, except neither group is sympathetic.
[52] Steiner, *An Essay on Rights,* p. 219.

generate contradictory domains. They would also generate indeterminate evaluations on the permissibility of an action. As mentioned in Section 1.2, enforcement of rights is necessary when agents act outside of the permissible domain of actions. But in this case, it is unclear whether Red's interference is within or outside of their permissible domain. We have only focused on the implication of Red having the broad claim. If both Red and Blue have this broad claim, as we will see below, their claims to non-interference become meaningless and their claim to speak freely would simply depend on the force of their supporters.

Having discussed why rights must be compossible, I would now like to argue that they must also be universal. That universality is necessary is quite benign. John Rawls and Gerald Gaus have argued that rights should be universal.[53] Heyman has written of "an equal claim to one's liberty or rights."[54] Steiner defines justice as the right to equal freedom.[55] Even Uwe Steinhoff, an anti-egalitarian, has not discredited the plausibility of equal basic rights.[56] More broadly, Preda has stated that equality can be the only justification under a choice theory of rights.[57] And Alan Gewirth has argued that an agent must find it in their interest to claim freedom,[58] and therefore must accept that others have the same claim to be consistent.[59] The notion of universal moral rules traces back to Kant's first Categorical Imperative–that we should only act in accordance with rules that can be made universal.[60] In conjunction with the second Categorical Imperative (treat others as means not ends), universality gives rise to

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[53] John Rawls, *A Theory of Justice Revised Edition* (Cambridge: Harvard University Press, 1999), p. 114. Gerald Gaus, *Justificatory Liberalism* (Oxford: Oxford University Press, 1996), p. 146.
[54] Heyman, *Free Speech and Human Dignity*, p. 68.
[55] Steiner, *An Essay on Rights*, pp. 208-20.
[56] Uwe Steinhoff, "Against Equal Respect and Moral Worth', in U. Steinhoff (ed.), *Do All Persons Have Equal Moral Worth?* (Oxford: Oxford University Press, 2015).
[57] Preda, "Rights: Concept and Justification', p. 414.
[58] I do not need to maintain Gewirth's first argument as my discussion about rights restrictions only comes into play after a claim is made.
[59] Alan Gewirth, *The Community of Rights* (Chicago: The University of Chicago Press, 1996), pp. 16-9.
[60] Steiner, "Working Rights', pp. 280-1.

Kant's Universal Principle of Justice, which stipulates that "[a]ny action is right if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law."[61] We will soon see that this is the general solution to compossibility and universality.

Because of universality, it cannot be the case that Red's speech receives protection but Blue's does not, considering how both are trying to obstruct the other's speech. Insofar as one person claims non-interference, they must recognize the same claim from others. Earlier, we have ruled out incompossibly defining the z-freedom of Red and Blue's claims so that incitement is permitted. This would generate contradictory domains and indeterminate evaluations of permissibility. Thus, the only conceivable solution we are left with is to have claims that generate a domain that only includes actions that does not violate the duties to others that is correlative to the same claim from others. These claims would respect compossibility and universality.

To be more precise, suppose there are two people, *P* and *Q*, and let us denote the domain of actions that violates *P*'s claim to non-interference *!P*. Then, *Q*'s domain of permissible actions generated by *Q*'s same right to non-interference must exclude *!P*. Reciprocally, P's domain of actions must exclude *!Q*. The shared domain of permissible actions is all actions that do not constitute violation for either *P* nor *Q*, i.e. $\sim!P \cap \sim!Q$. Each person's specific domain must contain only actions that do not constitute violations for the other. The domain can either contain self-interfering actions as well, or not.[62]

[61] Kant quoted in ibid, p. 277.
[62] Suppose the right to free speech here comes with a power to waive the right: then if we look at *P*, *P*'s specific domain would be actions that do not constitute violations for *Q*. This means that actions that are considered self-violations is within either person's own domain. This is because an inability to waive the claim would be denoted as a disability with a correlative immunity, whose waivability must be

The domain of claims must be defined in terms of duties. In other words, an agent's respecting of their duties to right *D* in others must come before their exercise of right *D*. This is because the substance of rights comes from the right-holder's enforcement of others' conduct. A duty is an action, but a right is a declaration. Without a correlative, a right is meaningless; it is just a declaration by a person to themselves. Whereas, without a correlative, a duty can very well stand on its own. We have duties that do not correspond to rights, such as a duty to participate in public affairs. This shows that the bilateral duty is what substantiates a right. In the case of rights to non-interference, they must be "funded" by something, and that is forbearances by duty-holders from actions that constitute interference. In this sense, the content of one's claim is entirely substantiated on its correlative duty imposed on others. For two people claiming the same thing to have any meaning, their own claim must respect their duty to the other, which is the same duty they ask from the other.

Steiner has similarly argued that *P*'s right assigns them the pure negative freedom to curtail *Q*'s pure negative freedom; Glanville Williams has similarly noted that "[n]o one ever has a right to do something; he only has a right that some one else shall do (or refrain from doing) something. In other words every right in the strict sense relates to the conduct of another."[63] As mentioned at the end of our discussion about Quong, Waldron has stipulated that the right to free speech must be exercised in a way that allows for others to also exercise it.[64] If everyone has the same right to do everything even if it interferes with others, then no one has any right. Whether Red or

disempowered with another disability, and so forth. Ultimately, for a disability to not be generated, a waivable immunity must rest somewhere. Thus, under choice theorist conceptions of rights and autonomy-based interest conceptions–both of which should require that the claim-holder have the power to waive their right, the domain afforded by the claim to non-interference must permit self-violations. If power were not a necessary condition for a claim, then there would be no need for a disability to start. Both right-holders would just have the same domain of $\sim!P \cap \sim!Q$.

[63] Steiner, *An Essay on Rights,* p. 74.

[64] Waldron, "Rights in Conflict', p. 518.

Blue can exercise their claim to non-interference would solely depend on the force of their supporters–but that is just a state of nature and is no right at all.

I believe this argument, that consistent rights must have limits, is the most complete reasoning behind the stipulation that liberty "must be bounded by a duty to refrain from interfering with the equal liberty of others."[65] Even ardent libertarian theorists on free speech, such as Ekeli, admit that actions that fail reciprocity may be excluded from the protection of their broad right of free speech, though only as a seeming afterthought. My theoretical account shows why the right to free speech must restrict classes of expression that constitute interference.

3.2. Applying Logically Necessary Restrictions to Incitement: Listener's Autonomy, or Speaker's Responsibility?

Let us return to the examples of Red, Blue, and their respective supporters, and focus on Red's inciting speech. Do logically necessary restrictions mean that Red's incitement of their supporters was not an act that was within Red's z-freedom to start? There is one objection to restricting speech that results in interference. I have established that interfering with Blue is not within the z-freedom generated by anyone's right to free speech. But one might doubt why Red's speech should be subject to restriction. Specifically, an opponent to speech restrictions would point out that it is Red's supporters–third parties–who interfere with Blue, and not Red themselves. The relevant section of Thomas Scanlon's Millian Principle of Free Expression states the following:

[65] Heyman, *Free Speech and Human Dignity*, p. 38.

> There are certain harms which, although they would not occur but for certain acts of expression, nonetheless cannot be taken as part of a justification for legal restrictions on these acts. These harms are… harmful consequences of acts performed as a result of those acts of expression, where the connection between the acts of expression and the subsequent harmful acts consists merely in the fact that the act of expression led the agents to believe (or increased their tendency to believe) these acts to be worth performing.[66]

Anticipating this, in his account for why incitement speech should be restricted, Heyman argues that this type of speech causally (i) stirs hatred, (ii) provides reasons for violence (i.e. interference), (iii) activates rudimentary reasons that the listener held for performing violence, and/or (iv) provides encouragement to the listener who ex-ante desired but had not committed to performing the interference.[67] I think the causal relationship, that is, without the speech, the interference would have either not immediately happened or been delayed, is relatively uncontroversial. This is necessary for establishing the speaker's responsibility. But I am skeptical that it is sufficient. One account is provided by C. Edwin Baker, who argues that it is the listener who processed what they heard and became convinced to ultimately commit the harm; Red is not responsible and their speech should not be enforced against.[68]

I believe Baker's attempt to absolve the speaker is wrong. But I will first explore a couple strategies against Scanlon and Baker that would not work. The first is to claim that if we can prove the speaker's intent in driving third-party listeners to create their desired outcome, we can establish the impermissibility of the speech and justify the

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[66] Scanlon, "A Theory of Freedom of Expression', p. 213.
[67] Heyman, *Free Speech and Human Dignity*, pp. 128-9.
[68] C. Edwin Baker, "Harm, Liberty, and Free Speech', *Southern California Law Review* 70, pp. 989-92

restriction. Referring to intent invokes the doctrine of double effect and all of the arguments against it. Rather than explore the topic in-depth, I will provide two examples as to why intent does not play a morally necessary role.

Suppose *P* knew that the word "xylophone" is a command which activates their sleeper agent friend into a killing spree.[69] Despite this, *P* mentions the word to give a genuine praise of an album they heard. Even if the intention were not malicious, I think it is clear that the agent's use of the word is impermissible. Conversely, suppose a lecturer teaches the fascist works of Julius Evola, while secretly hoping that the oh-so-persuasive writing would indoctrinate their students. Even if the lecturer's intent is manipulative, that would not make the educational teaching of illiberal writers to be impermissible. Scanlon argues elsewhere that intent only plays a role insofar as we are evaluating an agent's decision, but not whether their action is permissible, which depends on the relevant moral principles for each case.[70] From the second example, we can conclude from the lecturer's intent that they are a morally bad person; this is separate the permissibility of his exposing students to contrarian writing.

A second strategy that circumvents intent entirely is to argue that all speech that leads to violence from its listeners are impermissible. But this also would not work. To see this, suppose the right-wing provocateur Charlie Kirk gives a non-inciting speech about the vitriols of academic left-wing bias to an audience at a university campus. Now suppose an already-unstable audience member becomes inspired and subsequently commits violence on the faculty. We would be hesitant to argue that therefore Kirk should be prosecuted for his speech. The second strategy only highlights

[69] I owe the conception of this scenario to David Birks.
[70] Thomas Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Cambridge: Belknap Press of Harvard University Press, 2008), pp. 22-7.

the separate autonomy of speaker and listener that Baker cites to argue against restrictions of free speech.

I will now offer two additional intuitive arguments. First, we would hold a military commander who ordered genocide accountable even if they never left their outpost for the duration of the genocide to physically facilitate it. Why should Red or Blue's incitement of their supporters be treated differently? Second, agents act all the time given the choices of others. Investment decisions are partly functions of how other market participants will act. Yet, we do not say that because gains from the agent's investment depend on the actions of other agents, that the first agent therefore morally should not be entitled to their gain. If other-dependency does not absolve gain, then why should it absolve blame?

A more promising strategy starts with Scanlon's example of poison-buying. Suppose that an agent's neighbor requests that the agent purchase rat poison for them, and the agent is quite certain that the poison is to be used for a murder. The procurement of rat poison would only be impermissible "if not buying it is the only way [the agent] can avoid facilitating a murder."[71] We can infer from this the moral rule that Act 1 is impermissible if Act 1 is a necessary condition to Act 2, which we take as given as impermissible.

In the case of Red's incitement speech, if without Red's speech, their supporters would have no other reason to interfere with Blue (as the supporters are simply interested in carrying out Red's commands), then Red's speech is a necessary condition to the subsequent violence and therefore impermissible. It is the necessity of Red's speech in inciting the subsequent violence that makes it impermissible. I believe this account accommodates our intuition about commands and investment

[71] Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame*, p. 43.

gains. I also believe this is a high bar to clear that will leave most instances of speech unrestricted but ensures that everyone's rights to free speech are compossible with one another.

3.3. Characteristics of Logically Necessary Restrictions

This account, as the language suggests, has the benefit of being neutral, as it does not rely on any account of morality that could ground a right to free speech. I started my argument by presuming that a moral right to free speech exists. In other words, moral norms that justify rights are taken as given as it were. This starting point is advantageous for two reasons. First, this paper is addressing why someone, insofar as they are invoking a right, must accept limits to them that are more stringent than conventionally understood in some jurisdictions such as the United States or by some writers. It is not sensitive to how this right is derived. Second, an argument that is insensitive to a right's justification has greater versatility in its application, and could potentially be applied to moral debates beyond the right to free speech, from the right to political participation to the parental right to direct their child's education, for example.

Furthermore, the account is advantageous in terms of being compatible with both choice and interest theories of the functions of rights. Compossibility and universality do not ground the regulation of speech on certain interests, such as interests in personality, reputation, or recognition. It further relates to interest and choice theories in additional ways. First, the compossibility account is best thought of as an alternative to inter-right restrictions that Heyman and Quong have offered. There is the first issue that this solution usually violates the primacy of one right for another, though for interest theorists the prospect of conflicting rights may not be unsettling. The second and graver issue, however, is that the use of interests to justify

or denounce speech regulation is what leads to an irresolvable debate. For it is easy for supporters of restricting speech to argue it is in the human interest, while opponents to argue that it is in the agent's interest to express themselves freely regardless of the vitriol that one expresses. This is the dynamic between Ekeli and Heyman I described previously. This suggests we should view the function of rights as a deadlock resolution,[72] to resolve disagreements about values by giving one of the parties the right to prevail (and the other the duty to abide). Giving one side the right to choose to prevail if they wish to is compatible with choice theory's understanding of rights. Yet, to an interest theorist who does not hold this view of the function of rights, the compossibility account can still be accepted as the argument that is the strongest in support of enforcement against incitement speech, as it deems the regulation not only right but logically necessary. Even in a world where no other rights exist (in which the inter-right restrictions approach to restricting free speech would not work), my account of logically necessary restrictions still requires that the right to free speech be restricted.

Another advantage of moralized freedom is that a state of complete (y-)freedom (i.e. no infringements) is possible. Because unavoidable restrictions of freedom are defined as infringements by descriptive accounts, "[i]t will in principle not be possible to arrive at a situation in which everyone is free. At most, one can end up with everyone being equally (un)free."[73] This is where the role of this paper, compossibility, and moralized freedom comes together. The role of this paper is to find the necessary features of a right–no matter how it would be specified–that would lead to justified restrictions. Those necessary features are universality and compossibility. The link

[72] Steiner, *An Essay on Rights,* pp. 208-220. Also see Hillel Steiner, "Rational Rights', *Analyse & Kritik* 17 (1995), pp. 6-7.
[73] Bader, "Moralizing Liberty', p. 163.

between the compossibility requirement and moralized freedom is this: compossible rights generate a consistent system of z-freedom, under which it is possible for everyone governed by this system to have their freedom uninfringed.

4. Conclusion

It might be helpful to take stock of the various arguments I have offered in this paper. To justify my account of logically necessary restrictions, I stipulated that a few features of rights must be true. (1) I argued that freedom is moralized and derived from rights, and therefore an agent being interfered with for doing what is not within the domain of permissible actions given by their rights do not have their rights infringed. (2) I maintained that rights are absolute; that existing accounts for restricting rights fail to recognize this point leave them flawed. I held that rights must be compossible or else they generate contradictory evaluations on the permissibility of an action. I then argued that a compossible right to free speech cannot include actions that constitute interference within its domain of permissible actions. I showed that speakers can be held responsible and therefore enforced against if they incited third-party listeners to physically interfere with others. Finally, I noted that under my conceptions of freedom (as moralized), claims, and duties, it is possible for everyone to be free (as in not have their freedom infringed).

I hold that this account of restrictions is unavoidable for any right to freedom, let alone any right to free speech. However, I have only demonstrated its application in the case of incitement. It is admittedly a significant but narrow case that excludes important controversies I mentioned at the beginning. One also cannot rely on my account to determine which rights should prevail, despite how legal and moral rights do contradict. Finally, one might ask if the duty to not interfere with others under free speech can be more broadly extended towards all rights to non-interference. This

would make a duty of not inflict physical interference internal and necessary to any right to freedom and essentially give the right-holder an implied claim to physical safety. I hope to revisit these important questions another time.

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