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An Explanation of the Formal-Substantive Freedom Distinction (and Why it  
Matters)

by

Jake Sweet

Under the Direction of S.M. Love, PhD and Andrew Jason Cohen, PhD

A Thesis Submitted in Partial Fulfillment of the Requirements for the Degree of

Master of Arts

in the College of Arts and Sciences

Georgia State University

2022

## ABSTRACT

The notion of a distinction between merely formal freedom and real, substantive freedom is common in both philosophy and civil rhetoric. However, Ian Carter contends that this distinction faces coherence and usefulness problems. Contra Carter, I argue that it is coherent, meaningful, and clarifies significant philosophical disagreements about the right to freedom. I define the formal-substantive freedom distinction by outlining a non-univocal conception of each term, then explain why the distinction so conceived is both philosophically and practically significant. I review Carter's arguments, extract two potential objections to my account, and offer my replies.

INDEX WORDS: Freedom, Formal freedom, Substantive freedom, Ian Carter, Liberalism, Rights

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August 2022

## **DEDICATION**

I dedicate this thesis to my loving family: my mother, my father, my brother, my sister-in-law, and my four amazing nieces. They have supported and encouraged me every step of the way, and they have my gratitude and love forever.

## ACKNOWLEDGEMENTS

I wish to acknowledge and thank my co-advisors, Dr. S.M. Love and Dr. Andrew Jason Cohen. Without their guidance, this thesis would not have been possible. I could not have asked for better mentors. I also wish to acknowledge Dr. Christie Hartley, whose encouragement, advice, and instruction was invaluable. I must also acknowledge the many excellent professors of philosophy I learned under as an undergraduate at the University of Cincinnati, especially Dr. Lawrence Jost, Dr. Vanessa Carbonell, Dr. Robert Skipper, and Dr. Timothy Allen.

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## 1 INTRODUCTION

In political discourse, people commonly draw a distinction between formal and substantive freedom, where substantive freedom is understood as the 'true' freedom in contrast to formal freedom, which is 'freedom in name only.' In philosophy, the distinction is invoked to critique proposals, institutions, and theories that are purported to make us free but fail to effectively do so for some set of people. More importantly, activists and social movements have invoked the formal-substantive freedom distinction throughout history, deploying it to draw attention to areas where the real scope of freedom for oppressed or marginalized groups is restricted despite their formal freedom. For instance, the Black Convention Movement of the 19th century invoked the concept of formal freedom to describe the state of civil liberties for Black Americans in the Northern 'free' states, where they still faced structural obstacles to acting as free citizens despite the abolition of legal slavery (Fox 319, 342-344). The socialist tradition has also long made use of this distinction; for example, Rosa Luxemburg argued that socialists have "always revealed the hard kernel of social inequality and lack of freedom hidden under the sweet shell of formal equality and freedom – not in order to reject the latter but to spur the working class into not being satisfied with the shell" (Luxemburg 220). More recently, scholar and activist Keeanga-Yamahtta Taylor describes the struggle for racial justice for Black Americans thusly: "We talk about wanting Black people to be free, so we have to think through what that means,

which involves understanding what limits Black freedom and what Black freedom — beyond statutory, formal freedom — could look like” (Taylor).

Despite the ubiquity of this distinction, some have suggested that it is fundamentally, conceptually flawed. Most notably, Ian Carter has challenged “socialist and egalitarian” thinkers who use the distinction in their arguments (486), questioning its coherence and usefulness in “The Myth of ‘Merely Formal Freedom.’” If Carter is correct, it would mean that the arguments of both the philosophical views and social justice movements that use this distinction are grounded in conceptual confusion.

In what follows, I argue that the formal-substantive freedom distinction is a coherent, meaningful distinction that clarifies significant disagreements about freedom. In section 1, I define the distinction and establish its coherence in a way that accounts for differences in its usage. I argue that ‘formal freedom’ and ‘substantive freedom’ are non-univocal terms that refer to legal permission and exercisability, respectively, then provide some examples of various senses the terms can have within different contexts. In section 2, I argue that the distinction is useful both philosophically and practically. Philosophically, I suggest the distinction clarifies points of divergence in our evaluations of political policy proposals and philosophical views as they relate to freedom. Practically, I note the usefulness of the distinction in explaining and justifying the demands of oppressed people for greater freedom. In section 3, I reply to some of Carter’s main criticisms of the formal-substantive freedom distinction. I begin by reviewing Carter’s arguments.

Despite substantial differences between his conception of the distinction and mine, I extract from his arguments two objections that might still be raised against my account and contend that my account survives both.

In this paper, I am restricting my arguments to defending the formal-substantive freedom distinction from that it lacks meaningfulness, usefulness, or relevance to philosophical differences. I am not defending any particular view of what kinds of rights to freedom we do or ought to have.

## 2 THE MEANING OF THE DISTINCTION

In this section, I give a conceptual account of formal and substantive freedom and explain how these concepts can be distinguished. This section aims to establish the distinction's meaning and coherence in a way that simultaneously accounts for different usages of the terms while still maintaining the distinction's conceptual core.

### 2.1 Formal Freedom and Legal Permission

'Formal freedom' is best understood as having multiple meanings, all of them referring in some way to *legal permission*.<sup>1</sup> While various definitions of 'legal permission' have been proposed in the philosophical literature,<sup>2</sup> here, 'legal permission' simply refers to bilateral non-prohibition by the state, meaning the state neither forbids (nor commands) an individual to perform a given action.

We can distinguish two main categories of legal permission to which 'formal

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<sup>1</sup> For a slightly different view of formal freedom-as-legal permission, see: Van Parijs 4; 22-23.

<sup>2</sup> For a few examples, see: Von Wright 85-92; Moore; Eleftheriadis 86-106; Ross; 120-124.

freedom' typically refers. This distinction hinges on whether an enacted legal permission is, in fact, respected and protected by the state or not. That is, 'formal freedom' may refer to *nominal legal permission* – legal permission that is *not* respected or upheld – or *actual legal permission* – legal permission that *is* generally respected or upheld.

Where formal freedom refers to nominal legal permission, it means that one has legal permission to  $\Phi$  according to the law, yet nonetheless systematically suffers from interference by (state or non-state) actors or a failure of the government to enforce the claims and protections necessary for the law's effectiveness. This sort of legal permission is sometimes called a 'right in name only.' Conversely, formal freedom *qua* actual legal permission consists of legal permissions that the state does respect and uphold, yet where people still in some way lack the means to carry out those permitted acts.

I postulate that, depending on context, 'formal freedom' may refer to *either* kind.<sup>3</sup> We can infer which sense of 'formal freedom' is being used from the context of utterance.<sup>4</sup> For example, consider this statement:

In significant areas – speech, press, religion – the people only had formal freedom.

Imagine this is said during a discussion about Soviet history between well-informed

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<sup>3</sup> Carter, by contrast, presents these two kinds of legal permission as mutually exclusive conceptions of formal freedom (487-489).

<sup>4</sup> The presupposition that 'formal freedom' must have a single meaning is an apparent example of what Dirk Geeraerts calls the *monosemic bias*: the assumption that terms *must* be interpreted as having one meaning rather than multiple meanings (Geeraerts 149-150). This can have a deleterious effect on conceptual analysis, as it lends itself to *ignoratio elenchi* (and, ultimately, confusion) rather than a clarification of meanings.

people about the history of human rights under the Stalinist regime. According to its constitution of 1936, the U.S.S.R. protected these civil liberties, but the purported liberties were not reliably respected in practice. The state routinely practiced censorship and control within these domains and, hence, these rights were extant in name only.<sup>5</sup> Accordingly, we can translate this statement as follows:

In significant areas – speech, press, religion – the people only had formal freedom [in the sense of nominal legal permission].

There are many similar situations where the state constructs or allows obstacles that frustrate agents' attempt to do what they are nominally permitted to do. Various thinkers and activists have referred to such conditions as “merely formal freedom.” For instance, the concept has been invoked to describe laws that make procuring an abortion difficult, as when the United States Supreme Court argued that restrictions on the availability of abortion can constitute an “undue burden” on the right to an abortion, effectively making it a right in name only, and therefore ruled that such restrictions must be removed (Persad 296; *Planned Parenthood of Southeastern Pennsylvania v. Casey*). This sort of usage of the term ‘formal freedom’ refers to nominal legal permission.

In contrast, consider this statement:

You have only the formal freedom to buy housing.

Imagine this is said in the context of a discussion between Americans about rights in the contemporary United States. Americans not only have the legal permission to

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<sup>5</sup> For more on the 1936 constitution and how it exemplified this kind of formal freedom, see: Towe.

buy housing but that permission is generally upheld and respected.<sup>6</sup> Nevertheless, some face obstacles to buying housing such that they *cannot* buy housing despite their permission to do so, most obviously those who lack the money necessary – or even the means to acquire the money necessary – to purchase it.<sup>7</sup> Notwithstanding the state’s permission, an American does not necessarily have the means or capacities to actualize the objective of having housing. Furthermore, despite the permission, an American may not have any autonomy in choosing their housing, such as when discriminatory housing arrangements segregate them to specific housing facilities or neighborhoods, nor any say in choosing the exchange and property rights system that governs the rules of acquiring housing in the first instance.<sup>8</sup> The freedom to buy housing in the U.S., then, is still only a legal permission that many cannot realize. Consequently, we can translate the statement as follows:

You have only the formal freedom [in the sense of having actual legal permission] to buy housing.

Thus, ‘formal freedom’ may refer to either merely nominal or actual legal permission. This non-univocal construal of formal freedom captures the different usages of the term while at the same time accounting for the procedural, superficial character implied by the word ‘formal’ in all cases the distinction is invoked. It also

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<sup>6</sup> Importantly, legal permission to ‘buy housing’ of some sort is generally upheld and respected *only* in those very non-specific terms. The U.S. has a long, continuing history of housing discrimination. See: Rothstein.

<sup>7</sup> Amartya Sen invokes the formal-substantive freedom distinction in explicating his account of rights, listing poverty as a “major source” of substantive unfreedom (*Development*, 3).

<sup>8</sup> These obstacles reflect the properties of exercisability I discuss in 2.2.

clarifies the criticism implied by the term ‘merely formal freedom’: an agent who, in some sense, *cannot*  $\Phi$  may nevertheless have legal permission of the nominal *or* actual kind to  $\Phi$ , meaning *neither* type of permission gives rise to conditions where A *can*  $\Phi$  on their own. As Matthew Kramer states, “Permissibility and impossibility can coincide” (63).<sup>9</sup>

## 2.2 Substantive Freedom and Exercisability

In contrast, we are described as *substantively free* when some form of legal permission is instantiated in conjunction with *exercisability*: the capacity to do what we are legally permitted to do. In other words, substantive freedom is *exercisable* formal freedom. Like formal freedom, ‘substantive freedom’ is non-univocal. Here, I argue that this is a consequence of exercisability itself being a non-univocal term comprising a cluster of three possible exercisability criteria: *ability*, *opportunity*, and *self-direction*.

Differences in the usage of substantive freedom are based on which set of exercisability criteria a speaker takes to be necessary or sufficient for adequate exercisability to obtain and the degree to which one feels those criteria must obtain. Here, I do not argue for conceiving exercisability as any set of criteria over another; as I will argue later, each meaning captures an important philosophical

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<sup>9</sup> Kramer disagrees with the contention that legal permission is a necessary condition for ‘can.’ He argues an act can be illegal and possible simultaneously, even if the legal permissions are enforced, since “enforcement is usually post hoc” (63). Strictly speaking, this is true: we do not have legal permission to shoplift, yet many do. But lacking legal permission poses obstacles to actions even if they are ‘possible.’ For instance, the psychological threat of punishment prevents many from taking something from a store without paying; this obstacle keeps shoplifting to a minimum relative to the number of those who might like to steal.

disagreement. Rather, I will explain each criterion's relation to the exercisability of legal permissions and, thus, substantive freedom.

### ***2.2.1 Ability and Opportunity***

The first two criteria, *ability* and *opportunity*, are similar and often interrelated, but *not* identical. Indeed, as Matthew Dowding points out,<sup>10</sup> much of the literature on freedom conflates ability and opportunity into a single category of 'ability,'<sup>11</sup> – as in the expression “freedom-as-ability” – but these are, in fact, distinct properties (Dowding, “Capabilities” 324-325). Dowding defines ability as “what one could do *if* the right circumstances obtain” (324). Opportunity, on the other hand, describes the obtaining of ‘the right circumstances’; that is, opportunity obtains “if the means that are needed to perform [some] action are available to” an agent (Dowding and van Hees 6).

It is important to distinguish between ability and opportunity because some may regard one property as politically relevant but not the other. For a simple illustration of the difference, Dowding offers the example of a proficient darts player whose skills are such that she hits the bulls-eye 90% of the time. Even if trapped on an island with no darts or boards, the player has the *ability* to hit the bulls-eye, even though she lacks the *opportunity* to hit a bulls-eye because, in the

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<sup>10</sup> Dowding, who draws from Peter Morriss's work on power, makes a compelling case that the property often referred to as “ability” in political philosophy is actually “ableness”: the *combination* of ability and opportunity (“Capabilities” 324). See also: Dowding and Van Hees 5-7; Dowding, *Power*; Morriss. Ableness is arguably the primary concern in Sen's usage of ‘substantive freedom.’ See: Sen, *Development* 4-5, 8, 18-19.

<sup>11</sup> For example, Carter uses the term “ability” as an all-encompassing description of “the absence of material constraints *of all kinds*” (492-493) – a definition which Dowding would consider semantically dubious.

circumstances, she lacks the resources (darts and boards) to do so (Dowding 324).<sup>12</sup> Ergo, an agent may have the ability to  $\Phi$  but not the opportunity to  $\Phi$ , or vice versa. Nevertheless, *both* of these properties are connected to the exercisability of our legal permissions: where one has the ability or opportunity necessary to  $\Phi$ , the capacity to exercise their legal permission to  $\Phi$  is increased.

First, ability refers to what one is able to do through their personal capacities given the proper circumstances. For the ability to  $\Phi$  to obtain, an agent must have, among other things, the skills and socioeconomic resources needed to exercise the legal permission to  $\Phi$ ; for example, one must have the necessary education, welfare, healthcare, and so on. To illustrate, imagine a society where a person, Simon, has legal permission to read political literature. Simon also has access to books and newspapers through a local library, meaning the proper circumstances exist for him to read political literature. Nevertheless, Simon does not have the ability to read because, in his society, people do not have a right to a basic education where they are taught to read. One could argue in favor of such a right because it will make Simon's formal freedom to read political literature in this sense exercisable and, hence, substantive.

Second, opportunity describes the *circumstances* an agent needs to exercise a legal permission, which has practical implications for entitlements to material resources necessary for those circumstances to arise. To demonstrate, imagine Kim lives in a country that constitutionally guarantees her freedom of movement.

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<sup>12</sup> Dowding and Van Hees offer a more thorough illustration of the distinction with the example of a piano player's ability to play the piano versus opportunity to do so (5-8).

However, Kim's town is located in an area where landslides are common, frequently obstructing her capacity to transport to those places she wishes to go. The issue could be solved by constructing retaining walls or some other infrastructural improvement, but neither Kim's government, nor the private sector, has shown any interest in allocating resources to address the issue. Kim has the formal freedom to travel in and out of her town, but she often cannot exercise her legal permission due to environmental obstacles and a lack of the material means to overcome them.<sup>13</sup> Here, one might argue in favor of proposals that give rise to the circumstances necessary for Kim to exercise her legal permission to travel, transforming her formal freedom into substantive freedom.

### ***2.2.2 Self-direction***

The third criterion of exercisability is self-direction. Self-direction broadly refers to the capacity of agents to direct their own will: if I cannot direct my own will, then I cannot act freely.<sup>14</sup> Self-direction is a social, relational property that is constrained by agential obstacles.<sup>15</sup> In order for an agent to possess self-direction, at

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<sup>13</sup> As G.A. Cohen notes ("Structure"), Harry Frankfurt expounds upon how human intervention and environmental intervention are *effectively* the same in that they hinder an agent's action (Frankfurt 44-45). Nevertheless, some argue that *allegedly* natural, circumstantial obstacles are, in fact, agential or structural, particularly in contemporary capitalist society. To a large extent, this seems true. For instance, it is a virtual truism that world hunger is not due to a scarcity of food but rather the consequence of our socio-economic and political systems, a truism borne out by the evidence (see: Lappé; Lappé, et al.; Holt-Giménez, et al.). Still, it seems difficult to deny that *some* factors not generated by the choices of human agents can and do constitute obstacles to our actions. For many, those factors cannot be simply dismissed as politically irrelevant.

<sup>14</sup> This property (or something like it) is also referred to as, *inter alia*, autonomy, independence, self-determination, or self-governance. My points here primarily draw from Kantian and Rousseauian conceptions of true freedom. For more, see: Ripstein, *Force* 14-16; Forst 536; Neuhaus 365, 392; Fatić 66. A similar notion of substantive freedom can also be found in African philosophical traditions; see: Ikuenobe 1020.

<sup>15</sup> Self-direction can also be infringed upon, though, by collectively choosing to enact social conditions that are inconsistent with it. Ergo, some argue the right to take part in making laws also

least two conditions must be present.

First, for one to have self-direction, their choices cannot be controlled. As Rafeeq Hasan argues, to make choices autonomously, an agent's choices can neither be subject to "the direct control of the choice-making capacities of another" nor "asymmetrical influence in a power relationship" (Hasan 914). This means self-direction requires that our choice-making capacities are free from coercion: we must be in a position to govern our own wills.

Second, since one's will may come into conflict with the will of others, the upholding of one's capacity to direct their own will necessitates institutions and norms that protect each agent's capacity to do so. For me to direct my own will, others' wills cannot infringe upon my direction. Likewise, for others to direct their wills, my will cannot infringe upon theirs. Such an arrangement can only be actualized through institutional and normative forces that can ensure the equal autonomy of all agents within a society. Moreover, following the classic Rousseauian arguments, a right to the governance of one's self within a society entails a right to participation in governance generally (Neuhouser 365, 391-392).

We can test the tenability of the proposition that self-direction can be construed as a criterion of exercisability by considering the consequences of a *lack* of self-direction. A person lacking the right to self-direction might face obstacles that obstruct her capacity to influence or participate in the construction of her society's

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requires a right to the entitlements and material resources necessary to take part in the making of laws *effectively*, and so there is arguably significant overlap between the conditions for ability or opportunity and self-direction. See: Srinivasan 467-471; Bohman 321-346.

rights (and, thus, her *own* rights), despite possessing formal freedom – of the nominal legal permission kind – to engage in the political system. Such a lack of self-direction is exemplified in the ‘white primary’ cases of the late 19<sup>th</sup> to early 20<sup>th</sup> centuries, where Black citizens in the Southern United States were formally free to vote but forbidden by state Democratic Party leaders to participate in the primaries. Since winning the Democratic primary essentially ensured a candidate’s victory in the “one-party South,” this meant that Black voters effectively had no voting power (Klarman). In such scenarios, it can be said that an agent’s formal freedoms lack exercisability: she cannot exercise choices outside of those that have been externally arranged for her without her consent or participation.

### 2.3 Summary

Again, the concept of substantive freedom gets deployed in various ways in political discourse. Given the various forms of exercisability, it is unsurprising that we find this variance across discursive contexts. Any one person might view just one criterion as the most politically salient exercisability property and, thusly, the property that best characterizes substantive freedom.<sup>16</sup> Conversely, others might view all three properties as *necessary* conditions for exercisability.<sup>17</sup>

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<sup>16</sup> For example, one might argue that self-direction is the true determinant of substantive freedom, and that the state has no duty to assure opportunity and ability. Likewise, one might argue the opposite.

<sup>17</sup> Karl Marx, for example, seemed to affirm the radical notion that “true freedom” requires all three of these properties to the greatest degree possible – a sort of *exercisability maximalism* view of substantive freedom. Marx speaks of a conflict between “physical need” and “necessity” versus “the true realm of freedom” for human beings; maximal self-direction, ability, *and* opportunity would seem to be the only means to the complete abolition of the sort of freedom-constraining “necessity” Marx is referring to (*Capital* 1340; *Manuscripts* 76, 84). Put differently, for Marx, an agent’s true freedom to  $\Phi$  obtains – that is, humans enter the realm of true freedom – iff *all* exercisability criteria

The crucial point is that formal freedom and substantive freedom, approximately conceived as I have outlined, are distinct: formal freedom consists of legal permissions that are not exercisable, while substantive freedom is exercisable legal permission.

### 3 THE USEFULNESS OF THE DISTINCTION

Having explicated the formal-substantive freedom distinction, I now aim to prove the distinction's usefulness in this section. I begin by arguing that the distinction is useful in understanding philosophical disagreements about political proposals involving freedom. Then, I posit that, in the practical realm, the distinction provides a helpful conceptual framework for describing the actual scope of freedom enacted by political proposals and institutions as well as formulating demands for greater freedom.

#### 3.1 Philosophical Significance

The formal-substantive freedom distinction is philosophically useful in that its concepts can help clarify disagreements concerning proposals that purportedly provide or protect 'freedom' as such, but in practice, uphold only formal freedom for some set of agents. This is important since different philosophical views include disagreements about the necessary or sufficient conditions for political freedom. For any particular proposal, some hold that mere legal permission (or formal freedom) to  $\Phi$  is insufficient to merit the designation 'freedom' in at least some circumstances, while others hold that legal permission *is* sufficient for considering

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obtain and to the greatest extent possible. See also: Arnold 6.b. For a somewhat similar view to Marx's, see: Van Parijs 22-23.

one politically free to  $\Phi$  even if that permission is not accompanied by exercisability for some. Hence, the distinction clarifies the divide between those advocating different kinds of rights and their differing evaluations of how 'free' a proposal renders its subjects.

Take healthcare as an example. Some philosophers hold that merely granting legal permission – formal freedom – for all citizens to acquire healthcare is not sufficient to classify all citizens as 'free' to acquire healthcare. This is because some economically-disadvantaged people will not be *substantively* free to acquire healthcare: they cannot exercise their legal permission to do so since they cannot afford (private) healthcare. Accordingly, some advocate enacting a *right* to healthcare. Amartya Sen, for example, advocates publicly-funded universal healthcare, arguing that lacking an exercisable right to healthcare constitutes an "unfreedom;" Sen even considers a lack of healthcare an obstacle to the "freedom to survive" (*Development*, 4, 15, 41-49; "Universal"). In general, most egalitarians and socialists will agree with Sen that the law in question does not deliver substantive freedom, though their reasoning and motivations vary. Some Rawlsian egalitarians argue that one must be substantively free to access healthcare, either as a primary social good or as a precondition for freely engaging in the primary political liberties of a just society (Ekmekci and Arda 232-235). Alternatively, as Pablo Gilabert demonstrates, socialists within the Marxian tradition argue that guaranteeing the substantive freedom to acquire healthcare and satisfy one's health needs is a critical component of fulfilling the distributive principle of "from each according to their

abilities, to each according to their needs” (Gilbert 209). But while their particular motivations vary, all of these views coalesce around the position that mere legal permission cannot be said to make at least a portion of the population ‘free,’ as it does not provide substantive freedom for all.

Conversely, others hold that the formal freedom to acquire healthcare is a foundational right but reject the notion that the state should be involved in making that formal freedom exercisable for all. Particularly, laissez-faire liberals<sup>18</sup> will oppose this further step of using the power of government to provide the substantive freedom to acquire healthcare. For instance, Robert Nozick argues that the “distributional facts” of medical services, no matter how unequal, do not justify state intervention with the holdings of agents in order to provide adequate healthcare to everyone so long as the “processes yielding these [distributional facts are] legitimate” (233-235). In other words, the government cannot justifiably interfere with the property or finances of others – through taxation, for example – to implement the substantive freedom to acquire healthcare for the poor. This is not to say that laissez-faire liberals categorically *oppose* the substantive freedom to acquire healthcare for anyone (or even everyone), but rather that they oppose ratifying that substantive freedom as a political right. However, on the laissez-faire liberal view, this does not render any individuals politically ‘unfree’ to acquire healthcare. A laissez-faire liberal might argue that the redistribution of resources is outside the proper scope of state authority or responsibility, and thusly, the fact

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<sup>18</sup> In using the term ‘laissez-faire liberals,’ I follow Carter, who uses the term to encompass “classical liberals or libertarians” (486).

that some agents lack substantive freedom to acquire healthcare is simply not a political problem, meaning the formal freedom enshrined by the healthcare law is sufficient for considering all its citizens politically ‘free’ to acquire healthcare.

The dispute between laissez-faire liberals and egalitarians or socialists regarding healthcare hinges on a more fundamental disagreement over whether the right to political freedom as such includes substantive freedom.<sup>19</sup> It is not my objective to resolve this disagreement over rights to substantive freedom in this paper, but merely to show it *is* a real and important disagreement.

Furthermore, the disagreement is not necessarily a simple consequence of differences between those who uphold negative liberty theories and those who uphold positive liberty theories.<sup>20</sup> Isaiah Berlin famously defines negative liberty as “the area within which a man [sic] can act unobstructed by others” (Berlin 169) and positive liberty as “freedom which consists in being one's own master” (178). The former is typically associated with the laissez-faire liberal tradition, while the latter is typically associated with the egalitarian and socialist traditions. However, there are exceptions to this rule. For instance, the socialist philosopher G.A. Cohen outlines a negative liberty view which nevertheless accommodates rights to substantive freedom, since Cohen considers the obstacles to action posed by private

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<sup>19</sup> There are also a variety of different theories of freedom informing the differences here, namely republican freedom (Pettit), positive freedom (or capabilities freedom) views (Sen, *Development*), and hybrids of the two (Gilbert), versus negative liberty views (Nozick). Nevertheless, I maintain that the formal-substantive freedom distinction cannot be neatly reduced to a difference between positive and negative liberty.

<sup>20</sup> Berlin famously defines negative liberty as “the area within which a man [sic] can act unobstructed by others” (Berlin 169) and positive liberty as “freedom which consists in being one's own master” (178).

property owners at least on par with those posed by governments, and thusly, holds that government interference is necessary to minimize interferences overall (Cohen, *On the Currency* 166-193).<sup>21</sup>

I will further discuss the formal-substantive freedom distinction's larger philosophical relevance in section 3.

### 3.2 Practical Significance

The formal-substantive freedom distinction also has practical significance. It can be particularly helpful for explaining and justifying the demands of marginalized and oppressed social groups within political discourse. From the perspective of people who cannot exercise their legal permission to  $\Phi$ , the worth of their formal freedom may seem questionable,<sup>22</sup> motivating a desire for increased exercisability. The distinction enables disempowered groups to describe why they are not satisfied with their 'freedom': since they cannot exercise their formal freedom, they seek political measures that will make them 'free' in the substantive sense.

To demonstrate, imagine a nation-state that takes itself to be a free society enacting legal permission for all adults to run for political office, but in practice, allowing significant obstacles to most people exercising that permission. People who do not meet certain criteria – such as specific income levels, formal education

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<sup>21</sup> For more on Cohen's view of freedom, see: Cohen, "Structure."

<sup>22</sup> John Rawls reaches a similar conclusion but argues that inequalities in the worth of liberty are justified so long as they are "compensated" by meeting the Rawlsian difference principle (179). Of course, whether this argument is correct remains debatable, and even more debatable is the proposition that modern liberal capitalist societies meet (or even *can* meet) the difference principle. For an argument that proper Rawlsian reasoning leads to anti-capitalist conclusions, see: Edmundson.

backgrounds, attractiveness to the society's elite class, and so on – are effectively excluded from running. Suppose someone wishing to run for office petitions to rectify this problem, pointing out that many citizens face insurmountable obstacles to acting as representatives in their government. However, the politician who holds the seat which the would-be candidate wishes to challenge writes a newspaper op-ed rebutting this assertion. The politician insists that there is no real injustice against the would-be candidate: they are 'free' to run for office since it is perfectly legal for them to do so. Imagine the would-be candidate writes a response arguing that while they may be *formally* free to run, they are not *really* free to do so.<sup>23</sup> Here, the distinction not only has descriptive power, but also helps show that the politician's ascription of 'freedom' *simpliciter* to those who are only formally free could be considered deceptive since the politician's conception of 'freedom' in this instance involves only formal freedom.

This scenario illustrates the utility of the formal-substantive freedom distinction in drawing attention to the potential hollowness of merely formal freedom and articulating arguments for greater freedom, particularly for disempowered people.

#### 4 CARTER'S ARGUMENT AND TWO OBJECTIONS

I will now review Carter's arguments against the formal-substantive freedom distinction. Though Carter's interpretation of the distinction differs from my own, I

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<sup>23</sup> This is relevant to current discussions about the merits of public financing of elections. See: Miller.

will extract some objections from his arguments that could be potentially be leveled at my account and offer my replies.<sup>24</sup>

#### 4.1 Carter's Argument

Against those who assert that laissez-faire liberals are “exclusively concerned with formal freedom” (Carter 488), Carter suggests that the formal-substantive freedom distinction is conceptually deficient and fails to clarify philosophical differences between laissez-faire liberals and egalitarians or socialists.

Carter posits three possible interpretations of ‘formal freedom’:

**a.** The formal freedom for some agent *A* to do *x* obtains when “*A* is legally permitted to do *x* and others are legally prohibited from preventing *A* from doing *x*; by contrast, *A* is substantively free to do *x*—is ‘really’ free to do *x*—only if, in addition to having this normative freedom, *A* is materially able to do *x*.” (488)

**b.** “[F]ormal freedom consists in the presence of legal claim-rights not to be prevented from exercising certain liberty-rights, plus the fact that those legal claim-rights are actually respected[...] One is substantively free, on the other hand, to the extent that one possesses the material means to exercise one’s legal liberty-rights.” (489)

**c.** “[F]ormal freedom consists in the legal recognition of all morally just claim-rights not to be prevented from exercising morally just liberty-rights, plus the fact that those morally just claim-rights are

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actually respected,” while substantive freedom is the same, plus the material conditions necessary to actually exercise those morally just claim-rights (490-492).

Carter argues that all three of these conceptions fail.

If we presuppose that laissez-faire liberals are “exclusively concerned” with formal freedom, Carter argues, then a. and b. lead us to absurd conclusions about the kinds of social arrangements laissez-faire liberals would support. a. forces us to conclude that laissez-faire liberals would describe a society as “free” where *A* is legally permitted to perform *x* even if agents “physically prevent” the performance of *x* (illegally) (488-489). On b., we would have to conclude that people are “formally free” even if they live in a society that legalizes shooting one’s neighbors for no reason, so long as this law is respected, even if the consequence is that “almost no one is able to leave their home” without being shot (489). In both cases, even the most committed laissez-faire liberal would not deny that the effected agents have become unfree. Hence, Carter concludes that both a. and b. are incorrect.

Conversely, if we accept c., then Carter holds that the formal-substantive freedom distinction risks incoherence. He notes that, on an egalitarian or socialist understanding of justice, a morally just freedom “requires substantive freedom” to be morally just in the first place. The upshot is that “[i]f formal freedom is justice-based freedom, and justice requires substantive freedom for all, then formal freedom qualifies as substantive freedom,” meaning “the contrast between formal and substantive freedom appears to have broken down” (491).

From these issues, Carter infers that those who refer to the formal-substantive freedom distinction are guilty of “conceptual slippage” with other, “more coherent distinctions” we find in the discourse on freedom (487, 494). Specifically, on a. – which Carter seems to find the most plausible – egalitarians and socialists are referring to the simple distinction between “interpersonal or social freedom” (as formal freedom) and “freedom-as-ability” (as substantive freedom). b. and c. further confuse matters by conflating formal freedom with either legally or morally normative conceptions of freedom, respectively, while maintaining that substantive freedom is equivalent to “freedom-as-ability” (492-494). Carter concludes that the formal-substantive freedom distinction is lacks clarity and fails to illuminate anything about the divide between laissez-faire liberalism and egalitarian or socialism: “[w]hichever of the three interpretations one endorses, it is incorrect to characterize the laissez-faire liberal’s refusal to identify freedom with ability as depending on an exclusive attachment to something called ‘formal freedom’” (495).

My non-univocal explanation of the formal-substantive freedom distinction and its significance substantially differs from Carter’s three (univocal) interpretations. Nevertheless, for the remainder of this section, I will extract from his core arguments two possible objections that could be leveled at my own account and offer my responses.

#### **4.2 The Relevance-to-Laissez-Faire Liberalism Objection**

I have already contended in 2.1 that the formal-substantive freedom distinction has philosophical relevance, not only for evaluating particular political

proposals, but also for evaluating political philosophies holistically. It helps to describe and clarify points of philosophical disagreement concerning what political freedom entails, as well as what rights to substantive freedom, if any, citizens ought to have.

In contrast, Carter's primary claim is that while the distinction often gets invoked in criticisms of laissez-faire liberalism, it is not relevant to the "ideological divide between" that political philosophy and egalitarianism or socialism (487, 489, 495). Much of Carter's argument against the distinction's relevance in this respect rests on the presupposition that those who invoke the distinction also accept the *exclusivity thesis*: the proposition that formal freedom is the "exclusive" kind of freedom endorsed by laissez-faire liberals. Indeed, if we hold that the exclusivity thesis is true,<sup>25</sup> Carter is correct that the formal-substantive freedom distinction implies some absurd conclusions, even on my own conception. However, if we reject the exclusivity thesis – as I think we should – and instead affirm that laissez-faire liberals primarily endorse the governmental provision of *rights* to formal freedom rather than substantive freedom, then my conception not only dodges his objection, but helps demonstrate why the language of formal freedom and substantive freedom can help clarify philosophical disagreements.

Hence, I suggest that the distinction does help us to understand a key difference between laissez-faire liberalism and egalitarians or socialists: due to its

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<sup>25</sup> Notably, though Carter states "it has been common" for egalitarians and socialists to accuse laissez-faire liberals of having an "exclusive concern with 'formal' freedom," he does not cite a source wherein such an "exclusive concern" is alleged (486).

other philosophical commitments, laissez-faire liberalism tends to oppose rights to substantive freedom. More specifically, most forms of laissez-faire liberalism endorse a *state-centered non-interference theory of freedom*. I am defining state-centered non-interference theories as those which hold that the primary gauge of political freedom is the absence of interference by the government rather than the absence of interference of all sorts. This idea is firmly located within the laissez-faire liberal tradition.<sup>26</sup> As Phillip Pettit notes, the contention that the state as such merits central focus as a threat to liberty has a long tradition in classical liberal philosophy. Pettit specifically quotes Maurice Cranston and Anthony Arblaster as claiming state non-interference *per se* is the very definition of freedom on liberalism, while showing Hobbes and Bentham hold only slightly-less radically state-centered views (167-168).<sup>27</sup> This *prima facie* opposition to government interference with political, social, and economic inequalities *effectively* translates into proposals that generate merely formal freedom for many.<sup>28</sup> For instance, in-principle opposition to government interference may mean opposing the criminalization of abortion, but also opposing redistributive economic proposals that ensure women seeking an abortion can afford abortion services. When actualized, the effect of such an approach is that poor women have the formal freedom to have an abortion – for they have legal permission to do so – but not the substantive freedom to do so – because

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<sup>26</sup> Of course, not *all* liberals would claim this view. For example, see: Kramer 71n69.

<sup>27</sup> Pettit draws his points about Hobbes and Bentham from Isaiah Berlin; see: Berlin 170n3. For more examples of the connection between ‘laissez-faire liberalism’ and state-centered non-interference theories in the literature, see: Ripstein, “Beyond” 36-37; Law 163.

<sup>28</sup>As Jonathan Weinberg puts it, “That a regime of formal freedom and equal rights may in fact be unfree and unequal because of gross preexisting inequality in economic or other power is not a new argument[...] It was at the heart of our rejection of *Lochner*” (1164). Quoted also in: Persad.

they cannot exercise that permission. We can imagine many similar examples.

In other words, for those who hold to a state-centered non-interference theory of freedom, universal guarantees of substantive freedom are typically out of the question since they tend to entail state interference. This raises particularly difficult challenges for laissez-faire liberals who claim that their chief aim is the maximization of freedom: if their proposals maximize formal freedom but also generate deficits in substantive freedom, the notion that they are maximizing ‘freedom’ *simpliciter* may be vulnerable to critique.

There are a few possible replies to this. As I mentioned in 2.1, one may altogether deny that substantive freedom is necessary for political freedom to obtain, but this presupposes that exercisability is not politically-relevant, which still requires justification (just as the opposite position requires justification).

Conversely, one might accept that substantive freedom is necessary for political freedom, but argue laissez-faire liberalism does a better job of expanding substantive freedom for most people than egalitarian or socialist policies – perhaps due to the gains in wealth attributed to unencumbered market economies – despite its rejection of upholding substantive freedom as a right. However, this position opens the door to complex empirical and theoretical questions that are not easily answered.<sup>29</sup>

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<sup>29</sup> Regarding ‘theoretical questions,’ it is not clear that *any* property regime that includes holdings of any kind – including laissez-faire market economies – can be said to provide more freedoms than unfreedoms. Numerically speaking, on a strict non-interference view, creating a single bit of personal property – say, a doodle on a single sheet of paper – generates *billions* of unfreedoms: unfreedoms for everyone other than the creator to have the drawing as their property. This is not to say that absolute opposition to personal property rights is a defensible position, but the example demonstrates the extreme conceptual difficulties of calculating the balance of freedoms and

It is not my intention to defend either side of these disagreements here. Instead, the very *existence* of the disagreements strengthens my principal point: the formal-substantive freedom distinction highlights key differences between ideologies, particularly between laissez-faire liberalism and egalitarianism or socialism, as well as between the different conceptions of freedom on which these views tend to rely (as discussed in 2.1). The distinction aids our discourse by pointing toward a real philosophical difference about the necessary conditions for political freedom. While laissez-faire liberals should not be generically labeled as “exclusive concerned” with formal freedom, it is also true that our different approaches to formal and substantive freedom are an essential ideological divergence point, and to hold that the distinction ultimately amounts to incoherence or mislabeling appears to be an attempt to simply dodge the more demanding task of justifying one’s position vis-à-vis whether mere legal permission is sufficient for political freedom to obtain.

### 4.3 The Semantic Objection

Speaking generally, Carter’s arguments imply that, while the properties to which the terms ‘substantive freedom’ and ‘formal freedom’ refer may be distinct, they should not be called ‘formal freedom’ and ‘substantive freedom.’ Rather, Carter holds that the most plausible conception of formal freedom and substantive freedom are basically different terms for two different conceptions of political freedom, with ‘formal freedom’ referring to social or interpersonal conceptions of freedom and

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unfreedoms generated by an institution like the market. (My argument here is inspired by Cohen. See: Cohen, *On the Currency* 147-165.)

‘substantive freedom’ referring to “freedom-as-ability” (or freedom as “the power to act”). On Carter’s view, rather than use the terms ‘formal freedom’ and ‘substantive freedom,’ it would be more accurate to simply speak of the distinction between ‘interpersonal freedom’ and ‘freedom-as-ability’ (492, 494-495).

However, if we conceive of formal freedom and substantive freedom as I have outlined, Carter’s objection does not hold: an argument for substantive freedom need not be based in an argument for ‘freedom-as-ability.’ As discussed in 1.2.2, self-direction, an interpersonal property, is a part of exercisability alongside ability and opportunity. One may advocate for ‘substantive freedom’ by endorsing proposals that will expand self-direction for citizens while adhering to a strict interpersonal conception of freedom without contradiction.

While it is true that substantive freedom can also be deployed in a sense that will most appeal to those holding to a ‘freedom-as-ability’ conception, substantive freedom, as a non-univocal term, does not necessarily presuppose that conception. Hence, the term ‘substantive freedom’ cannot be universally replaced with ‘freedom-as-ability.’

## 5 CONCLUSION

I have argued that the formal-substantive freedom distinction is a coherent, meaningful distinction. In addition, the distinction is useful in clarifying disagreements concerning proposals that ostensibly provide broad rights to freedom that are, in fact, limited in their exercisability. I have shown that these issues have practical and ideological significance. I have also shown that the terminological

implications of ‘formal’ and ‘substantive’ freedom are fair and accurate descriptions of the concepts to which the terms refer. Finally, I have shown that the formal-substantive freedom distinction is neutral on the question of freedom’s normative status.

The stakes of this dispute extend beyond the walls of academia.

Distinguishing merely formal freedom from real, substantive freedom has import not only for philosophy but also for popular movements that seek to draw attention to subtler forms of oppression and unfreedom than the overt criminalization of actions. Dismissing the distinction as a ‘myth’ is potentially damaging to those movements that refer to it in their demands for social justice. This should further motivate us to reject attempts to shelve the formal-substantive freedom distinction, especially since – as this paper has argued – allegations that it faces coherence and usefulness problems do not pass scrutiny.

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