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Functions of Freedom: Privacy, Autonomy, Dignity, and the Transnational Legal Process

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"Freedom is just another word for nothing left to lose,
Nothing don't mean nothing honey if it ain't free, now now."
Janice Joplin, Me & Bobby McGee (1971)[1]

ABSTRACT

What is the function of freedom for the transnational legal process? This Article answers this question through the lens of the ongoing Ukrainian crisis and the deeply inconsistent international legal arguments presented by each side of the conflict. These inconsistencies suggest that criticism of international law as purely political pretense has merits. The Article shows that transnational legal process theory can account for and incorporate these facial inconsistencies and thus address the criticism leveled at international law. The

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1. JANIS JOPLIN, *Me & Bobby McGee, on* BOX OF PEARLS (Sony Music Entertainment Inc. 1971). The lyrics to Bobby McGee were originally written by Kris Kristofferson and Fred Foster. When Janice Joplin first sings the lyric, the implication is that she is free because she loves her drifting companion, Bobby McGee. The implication arises because in the line immediately following the definition of freedom as having "nothing left to lose," "nothingness" itself is defined as that which is "free." To avoid being circular, this definition plays on the connotation of "free." "Nothing" in this sense has to be voluntarily bestowed and unconditional (i.e., freely given) but also transient (i.e., uncompelled and uncompellable). In this sense, "nothing" is a "something" one in fact *can* lose because "nothing" is transient. Such "nothing" resembles the qualities typically associated with love. The connection is then confirmed when the lyric returns after Bobby left our singer in the next verse. Janice Joplin now observes with literalist sarcasm that "Freedom is just another word for nothing left to lose,[¶] Nothing, that's all that Bobby left me, yeah." Bobby McGee thus left the singer with different kind of nothing compared to the one described earlier in the song— this new nothingness is not "free" but paid for with chagrin. At the same time, the singer now has that "nothing"—or chagrin, emptiness—left to lose; other than the first time the lyric is sung, this second nothing is something one would very much *want* to lose but no longer can: "But I'd trade all of my tomorrows for one single yesterday [¶] To be holding Bobby's body next to mine." Perhaps more than any other popular lyric, Bobby McGee thus highlights the fragility of "freedom"—and its tantalizing equipoise between being free from external constraint and freedom to pursue human fellowship—something that while "free" is also the most valuable thing one could possibly lose.

Article proceeds to develop a theory of freedom as a value that is internal to, and necessary for, transnational legal process. This theory of freedom relies not upon the classical liberal understanding of freedom as positive or negative freedom. Instead, it reconstructs freedom around the value of human dignity. The Article concludes that freedom as dignity is a central value of the transnational legal process and that the transnational legal process would cease to function in its absence.

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I. INTRODUCTION

Just like rival armies from the Middle Ages to Modernity proclaimed that they fought for "God," rival groups in violent uprisings today claim that they fight for "freedom."[2] For instance, in Ukraine, pro-Western forces employ freedom to justify their ouster of an unpopular president;[3] pro-Russian forces invoke freedom to justify their ejection of regional and local governments unfriendly to their cause in Crimea and throughout Eastern Ukraine.[4] Obviously, the same God could not have supported rival sides in war.[5] Perhaps just as obviously, rival groups could not all have freedom on their side, either.

But freedom is not just a slogan. It is a principle invoked by states taking sides in these conflicts to legitimize the behavior of their local champions.[6] Problematically, it is invoked by the same states to

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2. *See, e.g.*, CHRISTOPH TYERMAN, GOD'S WAR: A NEW HISTORY OF THE CRUSADES 27–58 (2006) (discussing the origins of Christian holy war); ROBERT BARTLETT, THE MAKING OF EUROPE: CONQUEST, COLONIZATION AND CULTURAL CHANGE 950–1350 (1993) (same); *cf.* Scott P. Sheeran, *Reconceptualizing States of Emergency Under International Human Rights Law: Theory, Legal Doctrine, and Politics*, 34 MICH. J. INT'L L. 491, 542 (2013) ("The distinction between 'terrorists' and 'freedom fighters' was contentious in the context of colonial oppression and states of emergency and still is today in situations such as the Occupied Palestinian Territories, the Kurds in Turkey, and the Tamils in Sri Lanka.").

3. *See, e.g.*, Alan Hubbard, *Inside Lines: Vitali Klitschko Set to Swap World Title for his Freedom Fight*, INDEP. (U.K.) (Dec. 14, 2013), http://www.independent.co.uk/sport/general/others/inside-lines-vitali-klitschko-set-to-swap-world-title-for-his-freedom-fight-9005530.html [http://perma.cc/JD5Y-G633] (archived Feb. 15, 2015) (explaining that Vitali Klitschko justified his move into politics by reference to freedom).

4. *See, e.g.*, Timothy Bankcroft-Hinchey, *Crimea, Democracy and Responsibility*, PRAVDA (Russ.) (Mar. 9, 2014), http://english.pravda.ru/opinion/columnists/09-03-2014/127070-crimea_democracy-0/ [http://perma.cc/8VH5-C6AE] (archived Feb. 12, 2015) (discussing a potential breakaway of Crimea from Ukraine in terms of freedom).

5. *Cf.* Wilfred Owen, *The Parable of the Old Man and the Young*, *in* POETRY OF THE FIRST WORLD WAR, AN ANTHOLOGY 171, 171–72 (Tim Kendall ed., 2013) ("Caught in a thicket by its horns, A Ram.; [¶] Offer the Ram of Pride instead. [¶] But the old man would not so, but slew his son, [¶] And half the seed of Europe, one by one."). Wilfred Owen fought in World War I and was one of the most enduring war poets due to his depiction of the savagery of war. His particular craft was to use classical tropes and confront them with the reality of modern war. Here, Owen uses the claim made by all armies fighting in the World War I that they fought "for God and Country" to show that the slaughter of the War was not so much the consequence of God's will (as the slogan "for God and Country" would have us believe) but the result of man's stubbornness and ignorance. For a discussion of the importance of Wilfred Owen in the Western experience of war, see Desmond Manderson, *Et Lex Perpetua: Dying Declarations & Mozart's Requiem*, 20 CARDOZO L. REV. 1621, 1631–36 (1999) (discussing changes in the perception of God over the last 200 years). On Wilfred Owen, see generally JON STALLWORTHY, WILFRED OWEN (2013).

6. *See, e.g.*, Abraham D. Sofaer, *International Law and Kosovo*, 36 STAN. J. INT'L L. 1, 19 (2000) (giving legal support for "[United States] policy over the last fifty years [that] has used force and the threat of force to offset activities that the nation's

support facially inconsistent actions. Thus, the United States and European Union use freedom to legitimize the formation of a government by pro-Western Ukrainian protestors following their ejection of a Pro-Russian President.[7] At the same time, the United States and European Union invoke freedom to condemn actions taken by pro-Russian groups to similar ends in Crimea and Eastern Ukraine as "undemocratic" and the result of "aggression."[8] Russia similarly relies on the concept of freedom and "independence" to support Crimean secession from Ukraine but deems the actions of protesters in Kyiv as inimical to freedom because they are "unconstitutional."[9]

Such apparently inconsistent use of a legal concept by rival sides in a geopolitical conflict highlights a core problem. When sophisticated superpowers like the United States and Russia each make arguments that on close inspection appear to defeat themselves, international legal argument appears little more than

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leaders have regarded as representing threats to the specific United States interest in preserving fundamental freedoms"). Judge Sofaer was Legal Adviser to the United States State Department. *See id.* at 11.

7. *See, e.g.*, Nedra Pickler, *Obama Casts Ukraine Crisis as March Toward Liberty*, PBS.ORG (June 4, 2014, 9:58 AM), http://www.pbs.org/newshour/rundown/obama-casts-ukraine-crisis-march-toward-liberty/ [http://perma.cc/39N5-GCGE] (archived Feb. 19, 2015) (reporting that President Obama referred to the ouster of pro-Russian forces as progress toward freedom); Press Release, U.S. State Dep't, Senior State Department Official, Special Briefing: Situation in Ukraine (Feb. 21, 2014), *available at* http://www.state.gov/r/pa/prs/ps/2014/02/221917.htm [http://perma.cc/HD29-8QKU] (archived Feb. 17, 2015) (discussing constitutional reform in Ukraine); Press Release, Secretary of State John Kerry, Kerry Remarks (Mar, 4, 2014), *available at* http://www.state.gov/secretary/remarks/2014/03/222882.htm [http://perma.cc/CQ85-4LB2] (archived Feb. 15, 2015) [hereinafter Kerry Statement] ("They raised their voices for dignity and for freedom. But what they stood for so bravely, I say with full conviction, will never be stolen by bullets or by invasions. It cannot be silenced by thugs from rooftops. It is universal, it's unmistakable, and it's called freedom.").

8. *See, e.g.*, Ambassador Samantha Power, Remarks at a Security Council Meeting on Ukraine (May 2, 2014), *available at* http://usun.state.gov/briefing/statements/225539.htm [http://perma.cc/4E3G-HHPY] (archived Feb. 17, 2015) (characterizing Russian actions as "aggression").

9. *See, e.g.*, Press Release, Russian Ministry of Foreign Affairs, Statement by the Russian Ministry of Foreign Affairs Regarding the Adoption of the Declaration of Independence of the Autonomous Republic of Crimea and Sevastopol (Mar. 11, 2014), *available at* http://www.mid.ru/bdomp/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/4751d80fe6f93d0344257c990062a08a!OpenDocument [http://perma.cc/5MJG-A8ZZ] (archived Feb. 19, 2015) [hereinafter Russian Ministry of Foreign Affairs, Crimea Statement] (reporting the official Russian reaction to the declaration of independence by Crimea); Press Release, Russian Foreign Minister Sergey Lavrov, Introductory Speech by the Russian Foreign Minister, Sergey Lavrov, and His Answers to Questions from the Mass Media During the Press Conference Summarising the Results of Negotiations with the US Secretary of State, John Kerry (Mar. 14, 2014), *available at* http://www.mid.ru/BDOMP/Brp_4.nsf/arh/B03F3C56CDAB4C1D44257C9F005873EE?OpenDocument [http://perma.cc/X33X-PGPV] (archived Feb. 16, 2015) [hereinafter *Minister Lavrov March 14, 2014 Statement*] (noting that protesters through armed provocation violated the terms of a February 21, 2014 agreement between the government and the protesters).

pretense.[10] Such exchanges make it look as if international law lacked a means to sort sense from nonsense—acceptable argument from preposterous proposition.[11] Critics of international law have long seized upon this perplexing quality of international legal argument.[12] They submit with some apparent force that international law simply cannot be used as a measure for assessing international behavior; international law is normatively bankrupt.[13]

As discussed in Part II, transnational legal process scholarship provides a means to refute this skepticism. [14] It shows that

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10. *See* David Kennedy, *The Sources of International Law*, 2 AM. U. J. INT'L L. & POL'Y 1, 20 (1987) [hereinafter Kennedy, *Sources*] (dividing international law into "hard" and "soft" arguments; "[a] 'hard' argument will seek to ground compliance in the 'consent' of the state to be bound. A 'soft' argument relies upon some extraconsensual notion of the good or the just" and submitting that all international legal positions relies upon both hard and soft arguments); *see also* MARTTI KOSKENNIEMI, BETWEEN APOLOGY AND UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 59 (2005) [hereinafter KOSKENNIEMI, UTOPIA] (defining international law as being made up of descending and ascending arguments, descending being "premised on the assumption that a normative code *overrides* individual State behavior, will or interest" and ascending being "premised on the assumption that State behavior, will and interest are determining of the law").

11. International legal discourse would thus strongly resemble many a conversation in *Alice in Wonderland*. *See, e.g.*, LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 53 (Branden Books 1948) ("'Who are *you*? Said the Caterpillar. This was not an encouraging opening for a conversation. Alice replied, rather shyly, 'I – I hardly know, Sir, just at present – at least I know who I *was* when I got up this morning, but I think I must have been changed several times since then.' 'What do you mean by that' said the Caterpillar, sternly. 'Explain yourself!' 'I can't explain *myself*, I'm afraid, Sir,' said Alice, 'because I'm not myself, you see.' 'I don't see,' said the Caterpillar. 'I'm afraid I can't put it more clearly,' Alice replied, very politely, 'for I can't understand it myself, to begin with; and being so many different sizes is a very confusing thing.' 'It isn't,' said the Caterpillar. 'Well, perhaps you haven't found it so yet,' said Alice; 'but when you have to turn into chrysalis – you will some day, you know – and then after that into a butterfly, I should think you'll feel it a little queer, won't you?' 'Not a bit,' said the Caterpillar. 'Well, perhaps *your* feelings may be different,' said Alice: 'all I know is, it would feel very queer to *me*. 'You!' said the Caterpillar contemptuously. 'Who are *you*?' Which brought them back to the beginning of the conversation.") (emphasis in original). *See also* KOSKENNIEMI, UTOPIA, *supra* note 10, at 67.

12. *See, e.g.*, KOSKENNIEMI, UTOPIA, *supra* note 10, at 67, 269; *see also* David Kennedy, *Modern War and Modern Law*, 16 MINN. J. INT'L L. 471, 473 (2007); Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Post-Modern Anxieties*, 15 LEIDEN J. INT'L L. 553, 561–62 (2002) (arguing that tribunals constituted under different treaty instruments "are engaged in a hegemonic struggle in which each hopes to have its special interests identified with the general interest" (emphasis omitted)); Paul B. Stephan, *Privatizing International Law*, 97 Va. L. Rev. 1573, 1611 (2011) ("The variety of these tribunals and a lack of hierarchy among them in turn allow the cherry-picking on which progressive development of legal doctrine depends.").

13. *See supra* note 12.

14. *See* Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 184 (1996) [hereinafter Koh, *TLP*]; Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2645–46 (1997) [hereinafter Koh, *Obey*]; *see also* Melissa J. Durkee, *Persuasion Treaties*, 99 VA. L. REV. 63, 85–90 (2013) (presenting an alternative theory based explanations for cooperation amongst states

international law is not a formalist system, as the critique would tacitly suppose, but rather a synthetic meaning-generating process anchored in the norms and values of its participants.[15] As the wealth of transnational legal process scholarship explains, this synthetic process does not prefer any problem solutions because of their greater purity measured by reference to an outside axiom, or policy preference.[16] Instead, this web of problem solutions reflects the entire normative world inhabited by its participants. But this web remains a "legal" rather than a policy process because the web organizes this material in an inherently autonomous manner on the basis of the inductive strength of a proposed problem solution to the web of past legal problem solutions.[17] The apparent contradictions identified by a Koskenniemian critique thus do not speak to the futility of international law but are testament to its richness and vitality.[18]

Through the lens of transnational legal process, there is thus no facial contradiction in the positions taken by the United States and Russia with regard to the Ukrainian crisis.[19] Instead, the United States and Russia argue about which past problem solution the current situation most resembles.[20] In other words, both appeal to our store of cumulative historical experience rather than a purely scientific or metaphysical principle.

But Part II also concludes with a puzzling question: when current events force us to analyze the use of rivaling conceptions of freedom in international legal argument we have to ask does transnational legal process engage merely in strategies of evasion?[21] The fulcrum of the international legal critique is that international law is normatively meaningless because it lacks a value *of its own*.[22] In fact, transnational legal process theorists such as Harold Hongju Koh appear to concede as much when they reject theories that on their face import a single value or policy preference into the legal

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during the treaty formation process); Robert Howse & Ruti Teitel, *Does Humanity-Law Require (or Imply) a Progressive Theory of History? (And Other Questions for Martti Koskenniemi)*, 27 TEMP. INT'L & COMP. L.J. 377, 370–83 (2013) (refuting critics' mischaracterizations of Kant); Gregory Shaffer, *Transnational Legal Process and State Change*, 37 LAW & SOC. INQUIRY 229, 232–36, 248–58 (2012) [hereinafter Shaffer, *Process*]; Frédéric G. Sourgens, *Reconstructing International Law as Common Law*, 42 GEO. WASH. INT'L L. REV. (forthcoming 2015) (on file with the author).

15. *See* Koh, *Obey*, *supra* note 14, at 2646.

16. *See id.*

17. *See id.*

18. *See id.* at 2627 (noting the "richness" of transnational legal process); *see also* Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1409 (1999) [hereinafter Koh, *How*] (transnational legal process leads to "a much richer picture" of international law).

19. *See infra* Part II.D.

20. *See infra* Part II.D.

21. *See* KOSKENNIEMI, UTOPIA, *supra* note 10, at 342.

22. *See id.* at 67 ("[I]nternational law is singularly useless as a means for justifying or criticizing international behavior." (footnote omitted)).

process.[23] Critics therefore appear free to argue that this renders transnational process arguments entirely dependent upon politics.[24] The current Ukrainian crisis painfully appears to illustrate their point: one's conception of freedom even as international lawyers appears to depend not upon our legal convictions but upon the side from which we perceive the conflict. International law then does in fact appear to be "singularly useless as a means for justifying or criticizing international behavior" in Ukraine.[25]

The Ukrainian crisis, and others like it, thus illustrates both the difficulty and the importance of the task ahead. To defend transnational legal process theory, one has to identify the *value* of the transnational legal process—what are scholars engaged in transnational legal process theory actually for?[26] Failing to answer that question makes transnational legal process theory little more than dress up for the foreign policy positions espoused by their respective governments.[27] As this was one of the problems the transnational legal process project sought to resolve, answering this question is of particular importance for the growing number of adepts of this school of thought.[28]

Given the international nature of crises like Ukraine, the first question is whether freedom applies only to states, or whether it reaches peoples or individuals. Part III begins its analysis by addressing this question. It notes that the United States and Russia each argue on the basis of fundamentally inconsistent subjects of freedom. At times, each argues that Ukraine (as a state) is free to discredit the actions of political dissidents.[29] At times, each argues

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23. *See, e.g.*, Koh, *Obey*, *supra* note 14, at 2623 ("The New Haven School merged law into policy, and by so doing, too readily concluded that what constitutes right policy is *per se* lawful." (emphasis added)).

24. *See* Martti Koskenniemi, *The Politics of International Law*, *in* THE POLITICS OF INTERNATIONAL LAW 35 (Martti Koskenniemi ed., 2011) [hereinafter Koskenniemi, *Politics*]; Martti Koskenniemi, *The Politics of International Law. Twenty Years Later*, *in* THE POLITICS OF INTERNATIONAL LAW 63, 65 (Martti Koskenniemi ed., 2011).

25. *See* KOSKENNIEMI, UTOPIA, *supra* note 10, at 67.

26. *Cf. id.*

27. *See* Melissa A. Waters, *Normativity in the "New" Schools: Assessing the Legitimacy of International Legal Norms Created by Domestic Courts*, 32 YALE J. INT'L L. 455, 462–67 (2007) [hereinafter Waters, *Normativity*] (summarizing the legitimacy problems of transnational legal process scholarship).

28. *See* Richard A. Falk, *Casting the Spell: The New Haven School of International Law*, 104 YALE L.J. 1991, 2006 (1995) (noting that the New Haven school is plagued with problems because its value goal "in practical application has meant defending the contested international initiatives of the [United States] government" (footnote omitted)); Koh, *Obey*, *supra* note 14, at 2622–24 (demonstrating the need to get away from potentially apologist process theories).

29. *See, e.g.*, Ambassador Samantha Power, Remarks to the United Nations Security Council (Mar. 19, 2014), *available at* http://usun.state.gov/briefing/statements/223716.htm [http://perma.cc/E6XS-7JH3] (archived Feb. 19, 2015) [hereinafter Ambassador

that individuals are free in order to discredit the actions of the central government.[30] And at times, each argues that ethnic groups or peoples have a right to self-determination to trump the rights of both Ukraine and individuals living in Ukraine.[31]

As Part III explains, the transnational legal process accepts each of these facially inconsistent arguments as valid legal propositions.[32] This on its face means that the transnational legal process either completely lacks a concept of freedom—and accepts historically based arguments about freedom from any theory of historical importance for the development of international law—or that the transnational legal process can still overcome these deep inconsistencies.[33]

Part III provides a basis for reconciliation. Transnational legal process accepts that each of these arguments are relevant but does so through the lens of personal freedom.[34] Transnational legal process reconciles these competing positions because it views persons not as atomistic individuals but instead as citizens and members of a wide variety of communities. [35] Transnational legal process accepts arguments about the freedom of the state (i.e., Ukraine) and the freedom of peoples (e.g., ethnic Russians and ethnic Tatars) because they, too, reflect personal liberty.[36] A person living in a state that is occupied or otherwise coerced by its neighbor or is part of an oppressed ethnic minority sensibly should claim that he or she lacks freedom. In other words, the transnational legal process submits that

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Power March 19, 2014 Statement] (arguing that Russia's actions against Crimea undermine the territorial integrity of Ukraine); *Provocations, EU's Financial Interests Behind Ukraine Protests - Lavrov*, RT (Dec. 14, 2013, 2:59 PM), http://rt.com/news/lavrov-ukraine-criticism-provocations-243/ [http://perma.cc/6F9B-DZBF] (archived Feb. 19, 2015) [hereinafter *RT December 14, 2013 Article*] ("[Russian Foreign Minister] Lavrov defended the Ukrainian government's right to take decisions on its national policy and criticized Western officials who have sided with the protesters demanding the government's resignation.").

30. *See* Kerry Statement, *supra* note 7 (quoted above); *Kiev Authorities No Longer Concerned with Lives of Civilians, Military and Militias*, ITAR-TASS (Aug. 4, 2014, 10:25 PM), http://en.itar-tass.com/russia/743510 [http://perma.cc/B4UG-5F29] (archived Feb. 15, 2015) [hereinafter ITAR-TASS *August 4, 2014 Wire Story*] (quoting the Russian Foreign Ministry as follows: "The Kiev authorities instigated by their western sponsors are carrying out a punitive operation killing and wounding civilians and destroying civilian infrastructure. A humanitarian situation in the region is getting worse.").

31. *See* Russian Ministry of Foreign Affairs, Crimea Statement, *supra* note 9 (defending Crimean independence on grounds of the right to self-determination); Ambassador Power March 19, 2014 Statement, *supra* note 29 (raising discrimination and political violence against Tatars as an argument against effectiveness of the Crimean independence vote).

32. *See infra* Part III.D.

33. *See infra* Part III.D.

34. *See infra* Part III.D.

35. *See infra* Part III.D.

36. *See infra* Part III.D.

there is tension because each person feels a similar tension or conflict when "Freedom," capital "F," is threatened.[37]

Part IV turns to the question of what this new-found personal freedom means. Traditionally, conceptions of freedom in political theory are defined as "positive" freedom (freedom to)[38] and "negative" conceptions of freedom (freedom from).[39] Part IV showcases how the United States and Russia in their arguments about the Ukrainian crisis indiscriminately use arguments from the two principal rival conceptions of freedom recognized by modern political theory—negative freedom (freedom from), and positive freedom (freedom to). Again, it appears that the transnational legal process is at an impasse—it seeks to incorporate two normative values that are ultimately logically incommensurable.

Part IV submits that a process theory can embrace such incommensurability without giving up a substantive conception of freedom. It explains that the transnational legal process incorporates both views of freedom—negative and positive—through the lens of human dignity. Human dignity reflects both the right of the person to be respected by others and the need to cooperate with others as a process participant.[40] The Article reconstitutes this lens of human dignity by incorporating humanist thought reintroduced to contemporary political theory by historians such as J.G.A. Pocock and classical philosophers such as Martha Nussbaum.[41]

The Article contributes to the growing transnational legal process literature by providing the first inquiry into what its core value, its conception of freedom, is. The Article concludes that transnational legal process has such a value—and that this value, human dignity, has further significance. The Article's focus upon human dignity ultimately rejoins transnational legal process scholarship with Myres McDougal's, Harold Lasswell's, and W. Michael Reisman's "old" process school.[42] Both transnational legal

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37. *See infra* Part III.D.

38. *See infra* Part IV.B.

39. *See infra* Part IV.A.

40. *See infra* Part IV.C.

41. *See* J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION *passim* (2003); MARTHA C. NUSSBAUM, THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY *passim* (2d ed., 2001) [hereinafter NUSSBAUM, FOG]; MARTHA C. NUSSBAUM, POLITICAL EMOTIONS, WHY LOVE MATTERS FOR JUSTICE *passim* (2013) [hereinafter NUSSBAUM, PE].

42. *See, e.g.*, Myres S. McDougal, *The Dorsey Comment: A Modest Retrogression*, 82 AM. J. INT'L L. 51, 54 (1988) (noting the centrality of human dignity); W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard, *The New Haven School: A Brief Introduction*, 32 YALE J. INT'L L. 575, 575–76 (2007) ("The New Haven School was developed by Professors Myres S. McDougal and Harold D. Lasswell. McDougal had been trained in classics and later at Oxford in legal history. Lasswell, at the time that he met McDougal, was already recognized as one of the most creative political and

process and the old school ultimately defend the value of human dignity. But whereas the old school seeks to do so through external justification, transnational legal process ultimately can provide an internal justification for human dignity.[43] This switch in perspective further cements the value of human dignity to transnational law as its quintessential precondition—and thus permits the rather startling proposition that without human dignity transnational law simply ceases to exist.[44] It is thus the absence of transnational law that leads to the dystopian vision of pure politics painted by the critiques of international law—not transnational law.

This Article concludes that this new appraisal of the functions of freedom in the transnational legal process provides a measure by which to judge which party may legitimately label itself a champion of freedom. In the Ukrainian context, this analysis reveals that while there are no angels in foreign policy, the U.S. claim to protect freedom is by and large stronger than that of its Russian counterpart. The U.S. claim takes (more) seriously the right of those most affected by geopolitical decisions to participate in their making.[45] It is, in this case at least, by and large less cynical and destructive of the transnational legal process than the exercise of empire by military and paramilitary force.

II. THE PROBLEM OF FREEDOM: MIGHT, RIGHT, OR PROCESS

The Ukrainian crisis shows the limitations of axiomatic theories of freedom in international law.[46] The arguments advanced by both the United States and Russia rely on arguments drawn from inconsistent *Realpolitik* and idealist axioms in order to make sense of the ongoing crisis.[47] In fact, it is not currently feasible to create an account that draws on a single axiom to resolve the problem—the theoretical premises of *Realpolitik* and idealism are incommensurable.[48]

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social scientists of the twentieth century. The jurisprudential school that they created at Yale adapts the analytical methods of the social sciences to the prescriptive purposes of the law. Deploying multiple methods, it seeks to develop tools to bring about changes in public and civic order that will make them more closely approximate the goals of human dignity which it postulates." (footnotes omitted)).

43. *See id.* (noting the empirical basis for the value commitment to human dignity in social scientific and comparative law research).

44. A similar switch of perspective permitted Plato in the *Protagoras* to anchor a unitary vision of ethical goodness. *See* NUSSBAUM, FOG, *supra* note 41, at 119–21.

45. *See infra* Part V.

46. *See infra* Parts II.B & II.C.

47. *See infra* Part II.A.

48. *See infra* Part II.C. On the concept of incommensurability, see Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 796 (1994) ("Incommensurability occurs when the relevant goods cannot be aligned along a single

The state of legal arguments about Crimea's annexation by the Russian Federation following the ouster of a pro-Russian Ukrainian president by popular protests in Western Ukraine thus presents fertile grounds for the critics of international law.[49] Relying on Marti Koskenniemi's critique of international law, they submit that international law is at best powerless in resolving, and at worst complicit in creating, the current crisis.[50] The basis for this critique is the inability of international law to form a single common normative denominator.[51] Instead, all actions can be legally defended, and all actions can be legally impeached.[52]

The obvious retort to these critics is that truth lies not in a unique common denominator but in a balance of competing principles.[53] Instead of making all arguments measurable on a single scale, this balance assumes that law as process reflects the incommensurable values of its participants.[54] Process, in other words, must permit the striking of a balance without providing a linear scale.[55]

As this Part will conclude, process theory makes such balancing of incommensurable values possible. It creates an inductive structure which *can* compare whether, to paraphrase Justice Scalia, a line is longer than a rock is heavy.[56]

While process theory can compute an outcome in such scenarios, and thus compute whether the legal arguments advanced by the United States are more plausible than the legal arguments advanced by Russia, it raises the question whether it can only do so because it is ultimately agnostic about value. This Part will thus leave us to answer a deeper question: does the transnational legal process of decision making simply determine a "winner" in the legal contest

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metric without doing violence to our considered judgments about how these goods are best characterized.").

49. *See, e.g.*, Solomon Appiah, *Competing Interests: the Ukranian Crisis*, OPEDNEWS.COM (Mar. 14, 2014, 11:27 AM), http://www.opednews.com/articles/Competing-Interests-The-U-by-Solomon-Appiah-Crisis_Diplomats_Government_Kremlin-140314-961.html [http://perma.cc/HY23-GP9A] (archived Feb. 18, 2015) (analyzing the Ukrainian crisis through a Koskenniemian lens).

50. *See id.* (citing MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960 (2002)).

51. *See* Koskenniemi, *Politics*, *supra* note 24 *passim*.

52. *See* KOSKENNIEMI, UTOPIA, *supra* note 10, at 67 (noting that international law can be used to legitimize or attack any action).

53. *See infra* Part II.D.

54. *See infra* Part II.D.

55. *See infra* Part II.D.

56. *See* Bendix Autolite Corp. v. Midwesco Enter., Inc., 486 U.S. 888, 897 (1988) (Scalia, J. concurring). Justice Scalia's comment is directed at the lack of common unit for balancing. Instead, balancing tests such as the one at issue in *Bendix Autolite Corp.* compare interests that are ultimately incommensurate. On incommensurability in the U.S. law context, see Frédéric Gilles Sourgens, *Reason and Reasonableness, The Necessary Diversity of the Common Law*, 64 ME. L. REV. (forthcoming January 2015) (on file with the author).

between Great Powers or does it tell us something about freedom in a truly pluralist world order?

A. *When* Realpolitik *Meets Idealism – The Ukrainian Crisis*

At first blush, it appears that the arguments regarding the Ukrainian crisis advanced by the United States rely upon an idealistic conception of freedom and that the arguments advanced by Russia rely upon a notion of freedom drawn from *Realpolitik*. According to this intuitive narrative, the United States supported Ukrainian protesters from late 2013 to enforce human rights norms and defend the freedom of the Ukrainian people against allegedly unconstitutional acts of their government.[57] Similarly, when Russian forces invaded Crimea and Crimea held a referendum to secede from Ukraine, the United States stood vocally in the way of *Realpolitik*, that is, Russia's attempt to create new conditions on the ground by forcibly taking control of Crimea and, as it then appeared, Eastern Ukraine more generally.[58]

Russia, on the other hand, at first blush looks like the cynical champion of *Realpolitik*. During the protests of pro-Western demonstrators, Russia emphasized the right of Ukraine's then pro-Russian government to deal with its internal affairs free from Western interference.[59] Similarly, the arguments supporting the Russian annexation of Crimea were premised in effectiveness—a vote in favor of the annexation having occurred, albeit in the presence of Russian special forces walking the streets.[60]

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57. *See, e.g.*, Testimony of Thomas O. Melia, Deputy Assistant Sec'y, Bureau of Democracy, Human Rights & Labor, Statement Submitted for the Record to the Senate Foreign Relations Committee (Jan. 15, 2014), *available at* http://www.state.gov/j/drl/rls/rm/2014/219827.htm [http://perma.cc/T6F2-LSGH] (archived Feb. 17, 2015) [hereinafter State Department January 15, 2014 Testimony] ("[T]he [United States] stands with the Ukrainian people in solidarity in their struggle for fundamental human rights and a more accountable government."); Nico Kirsch, *Crimea and the Limits of International Law*, EJIL: TALK! (Mar. 10, 2014), http://www.ejiltalk.org/crimea-and-the-limits-of-international-law/ [http://perma.cc/67YC-FHJU] (archived Feb. 14, 2015) ("At the same time, there are aspects of the Crimea crisis that do seem to reflect a certain impact of international law. Cynically enough, the strongest effect might be that we see Russia intervening 'only' in Crimea – not in Eastern Ukraine or Ukraine as a whole (for now).").

58. *See, e.g.*, Ambassador Powers March 19, 2014 Statement, *supra* note 29 ("The United States rejects Russia's military intervention and land grab in Crimea. These actions, again, violate the sovereignty and territorial integrity of Ukraine . . . .").

59 *RT December 14, 2013 Article*, *supra* note 29 ("[Russian Foreign Minister] Lavrov defended the Ukrainian government's right to take decisions on its national policy and criticized Western officials who have sided with the protesters demanding the government's resignation.").

60. *See, e.g.*, Russian Ministry of Foreign Affairs, Crimea Statement, *supra* note 9 (quoted above); *Minister Lavrov March 14, 2014 Statement*, *supra* note 8 (quoted above).

This narrative, while convenient, is imprecise. Careful analysis of the statements of the United States and Russia shows that the United States and Russia each rely on arguments grounded in *Realpolitik* and arguments grounded in an idealistic view of international law.[61] The arguments advanced by each the United States and Russia thus appear to be mired in self-contradiction: they defend effectiveness when their respective side holds the upper hand and human rights when it does not, without acknowledging the fundamental problem such inconsistency creates.

For instance, the United States relied heavily upon *Realpolitk* following the ouster of Ukrainian President Yanukovych in late February 2014.[62] Almost immediately, the United States supported the newly formed government on grounds of effectiveness—President Yanukovych fled the country.[63] Success in overthrowing the prior government at its simplest level was the mark of its legitimacy.[64] The United States position in this instance *had* to rely upon effectiveness. Just prior to the ouster of President Yanukovych, the United States and the European Union on the side of the protesters and Russia on the side of President Yanukovych had negotiated a constitutional solution to end the internal standoff.[65] This negotiated solution foresaw that President Yanukovych would remain in power.[66] The ouster of President Yanukovych within days of reaching this agreement thus deviates from the theme of constitutional, rule-of-law based reform previously endorsed by the United States.[67]

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61. *Compare supra* notes 59–60 and accompanying text, *with supra* note 58 and *infra* notes 63–64 & 67 and accompanying text.

62. *See* Conal Urquhart & Barry Neild, *Ukraine: Tymoshenko Freed as President Denounces "Coup" - 22 February As It Happened*, GUARDIAN (U.K.) (Feb. 22, 2014, 7:01 PM), http://www.theguardian.com/world/2014/feb/22/ukraine-crisis-uncertainty-after-yanukovych-signs-deal-live-updates [http://perma.cc/8NCW-MEB8] (archived Feb. 17, 2015).

63. *See* Ambassador Samantha Power, Remarks at a UN Security Council Meeting on Ukraine (Mar. 3, 2014), *available at* http://usun.state.gov/briefing/statements/222805.htm [http://perma.cc/8NCW-MEB8] (archived Feb. 17, 2015) ("Indeed, he fled the city; he packed up himself and his family, and he left the seat of the presidency vacant for two days while his country was in crisis.").

64. *See id.*

65. *See Agreement on the Settlement of Crisis in Ukraine*, GUARDIAN (U.K.) (Feb. 21, 2014, 10:17 AM), http://www.theguardian.com/world/2014/feb/21/agreement-on-the-settlement-of-crisis-in-ukraine-full-text_[http://perma.cc/3HHA-T2N5] (archived Feb. 17, 2015).

66. *See id.*

67. The U.S. State Department in fact relies only on the act of fleeing itself as justification for disregarding the terms of the February 21 agreement thus giving into effectiveness completely. *See* Press Release, United States State Dep't, President Putin's Fiction: 10 False Claims About Ukraine (Mar. 5, 2014), *available at* http://www.state.gov/r/pa/prs/ps/2014/03/222988.htm [http://perma.cc/P22T-AWC7] (archived Feb. 17, 2015).

Similarly, and understandably given the facts, the Russian position relied upon idealist arguments. The very justification for Russian involvement is principally a defense of constitutional government in Ukraine.[68] Russia submitted both that it intervened at the behest of the constitutionally elected government of Ukraine and that it acted to protect ethnic Russian populations against possible excesses against that population by a rogue government.[69] Both of these arguments echo internationalist legal arguments developed precisely to combat *Realpolitik*.[70] The Russian position in this instance had to rely upon internationalist arguments. A theme constantly struck by Russia is that the West inappropriately involved itself in Ukrainian internal affairs.[71] Russia therefore could not rely upon effectiveness in order to support its own intervention without conceding the right of the United States and the European Union to do the same. The intervention permitting the arguments on the basis of effectiveness thus needed an internationalist justification in its own right.[72]

A nuanced appraisal of the United States and Russian positions shows that each relies upon facially inconsistent arguments. Both assert that the effectiveness of measures favoring their interests legitimize these measures.[73] But both also assert that legitimacy does not depend upon effectiveness but upon rights-based norms.[74] Problematically, these rights-based arguments significantly undercut critical portions of their respective initial positions. Taking the rights-based argument seriously, the United States position regarding the removal of President Yanukovych and the prosecution of Ukraine's fight to regain control of Eastern Ukraine and Crimea are deeply

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68. Michael B. Kelley, *Putin: What Happened in Kiev Was an Unconstitutional Overthrow and Yanukovych Is Still President*, BUS. INSIDER (Mar. 4, 2014, 5:54 AM) [hereinafter *Putin March 4, 2014 Interview*], http://www.businessinsider.com/putin-what-happened-in-kiev-was-an-unconstitutional-overthrow-and-yanukovych-is-still-president-2014-3 [http://perma.cc/U2L7-HYCB] (archived Feb. 19, 2015) (quoting President Putin as claiming that the protesters' ouster of Yanukovych violated a truce signed on February 21, 2014).

69. *Ukraine's Yanukovych Asked for Troops, Russia Tells UN*, BBC.COM (U.K.) (Mar. 4, 2014, 2:09 PM), http://www.bbc.com/news/world-europe-26427848 [http://perma.cc/F9LZ-V4SG] (archived Feb. 19, 2015) ("Ousted Ukrainian President Viktor Yanukovych asked Russia to send troops across the border to protect civilians . . . ."); *see also* Kathy Lally & Will Englund, *Putin Says He Reserves Right to Protect Russians in Ukraine*, WASH. POST (Mar. 4, 2014), http://www.washingtonpost.com/world/putin-reserves-the-right-to-use-force-in-ukraine/2014/03/04/92d4ca70-a389-11e3-a5fa-55f0c77bf39c_story.html [http://perma.cc/EYL7-SBJ6] (archived Jan. 20, 2015).

70. *See infra* Part III.C.

71. *See RT December 14, 2013 Article*, *supra* note 29 (quoted above).

72. The same pattern of international legal argument is in fact typical of all international legal disputes. *See* KOSKENNIEMI, UTOPIA, *supra* note 10, at 67.

73. See *supra* notes 57–60, 63–64, 67 and accompanying text.

74. See *supra* notes 57–60, 63–64, 67 and accompanying text.

suspect; Russia appears correct that the overthrow was unconstitutional, potentially in violation of a negotiated truce, and that the Ukrainian strategy in both Eastern Ukraine and Crimea disproportionately, and thus illegally, targets the civilian population.[75] But taking rights-based arguments seriously, Russia does not have a leg to stand on, either. The declaration of independence of Crimea and its annexation by Russia, along with the support of uncontrollable militia wreaking havoc in Eastern Ukraine to the point of apparently shooting down a civilian airliner "by mistake," do not live up to the rights-based arguments espoused by Russia.[76]

The Ukrainian crisis thus appears to fit the mold of the Koskenniemian critique of international law. The critique submits that all international legal argument relies upon combining fundamentally inconsistent propositions, some based purely upon effectiveness, state will, and state power, others based upon a conception that effectiveness, state will, and state power must obey external norms to be legal and legitimate.[77] The Ukrainian crisis thus appears to be one more recent example of the critique's claim that international law is fundamentally meaningless in assessing and resolving international disputes.[78] How all parties involved to date have behaved themselves in the crisis would tend to lend intuitive credibility to that claim.

B. *Might – International Law as* Realpolitik

"I will make it legal."[79] This claim by a fictional upstart Senator dealing with an international crisis describes a common conception of international law.[80] What is "law" is what people get away with.[81] To

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75. *See, e.g., Putin March 4, 2014 Interview*, *supra* note 68 (quoting President Putin as accusing the West of supporting an unconstitutional coup in violation of a written truce agreement); ITAR-TASS *August 4, 2014 Wire Story*, *supra* note 30 (quoting the Russian Foreign Ministry as accusing the "Kiev authorities instigated by their western sponsors" to carry out operations disproportionately affecting the civilian population).

76. *See* Helen Davidson, *MH17: Rebels Likely Shot Down Plane "By Mistake,"* GUARDIAN (U.K.) (July 23, 2014, 4:52 PM), http://www.theguardian.com/world/2014/jul/23/mh17-rebels-likely-shot-down-plane-by-mistake-live-updates [http://perma.cc/L9C9-8NAX] (archived Feb. 14, 2015).

77. *See* KOSKENNIEMI, UTOPIA, *supra* note 10, at 67; Kennedy, *Sources*, *supra* note 10, at 20.

78. *See* KOSKENNIEMI, UTOPIA, *supra* note 10, at 67.

79. aletterofmarque, *Star Wars Episode 1 – "I will Make it Legal"*, YOUTUBE (Apr. 24, 2012), http://www.youtube.com/watch?v=nz20lu2AM2k [https://perma.cc/9TZT-NUYM?type=source] (archived Mar. 5, 2015).

80. *Id.*; *see also* Pedro Talavera, *Peace as Priority*, 13 IUS GENTIUM 205, 224 (2012) (noting the relationship between neo-conservative U.S. legal scholarship, Carl Schmitt, and *Realpolitik*).

determine what is law is simply to follow *Realpolitik*, power, or might.

Contrary to what one might believe, this view of *Realpolitik* has a cogent legal and theoretical view of, and place for, freedom. Following the temptation to treat *Realpolitik* as simply the opposite of lawfulness would thus be incorrect. It, in turn, would be simplistic to deem all parties in the Ukrainian crisis to be in violation of their international obligations whenever they fail to observe a relevant rights-based norm. This conclusion would fail to reflect the current state of international law.

Doctrinally, legal conceptions of *Realpolitik* can rely upon the doctrine of "effective control."[82] According to this doctrine, "a government in effective control of the territory is generally accepted as the representative of the population within that territory even if it has assumed power through violent or otherwise undemocratic methods."[83] The implications of power politics are unmistakable:

> The international order's attribution of sovereign independence to established territorial political communities thereby has traditionally entailed (to put it most bluntly) the right of each to fight its civil war in peace and to be ruled by its own thugs. Insofar as it is perceived as little more than an imprimatur for 'might makes right' at the local level, this 'effective control doctrine' is manifestly offensive to a rule of law sensibility.[84]

Such doctrinal precepts rely upon a theoretically cogent view of freedom.[85] The *Realpolitik* view of freedom was developed by the early leading "realist," Thomas Hobbes.[86] To Hobbes, freedom was a matter of the assertion of will.[87] Such assertion of will was not "free" in the sense of being a matter of free choice; the will was mechanically determined.[88] The assertion of will therefore was little

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81. *Cf.* Brigitte Stern, *Custom at the Heart of International Law*, 11 DUKE J. COMP. & INT'L L. 89, 108 (2001) ("[T]here are always wills of states to be found at the origin of customary rules . . . .").

82. *Cf.* JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 55–61 (2d ed. 2006) (discussing the importance of effective governmental control in the context of the status of statehood in international law).

83. ANNA-KARIN LINDBLOM, NON-GOVERNMENTAL ORGANISATIONS IN INTERNATIONAL LAW 6 (2005).

84. Brad R. Roth, *Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine*, 11 MELB. J. INT'L L. 393, 394 (2010).

85. *But see* Robert Knowles, *American Hegemony and the Foreign Affairs Constitution*, 41 ARIZ. ST. L.J. 87, 138 (2009) ("[T]he realist model seems to leave little room for the consideration of individual liberties . . . .").

86. *See* Mary Robinson, *Fifth Annual Grotius Lecture*, 97 AM. SOC'Y INT'L L. PROC. 1, 1 (2003) (noting the existence of "a more realistic—perhaps the better term is 'realpolitik'—tradition that draws on the writings of the English philosopher Thomas Hobbes").

87. *See* THOMAS HOBBES, LEVIATHAN 148 (A. R. Waller ed., 1904) (1651) [hereinafter LEVIATHAN].

88. *See id.*

more than the effectuation of externally conditioned impulses.[89] These impulses are broadly reducible to the avoidance of aversion and the satisfaction of appetites.[90] Freedom was simply the absence of external physical constraint.[91] Freedom did not describe the absence of interference with internal impulses.[92] To Hobbes, such a conception would have been absurd as *all* internal impulses were by definition equally mechanistically predetermined by the outside world.[93] To the extent a person makes a choice, asserts his or her will, it is thus a given that outside circumstances predetermined the decision.[94] Freedom describes the absence of physical incarceration—and little else.[95]

Applying Hobbes to international *Realpolitik*, we thus arrive at the principle of effectiveness. In true Hobbesian fashion, it does not matter whether there is any outside pressure brought to bear on civil society in order to inform which "thug" would rule.[96] The only question, through the prism of Hobbesian freedom, is one of least aversion: which thug is most likely to provide relative security, which thug is more like the storm likely to destroy the ship of state.[97] A decision to submit to a thug who promises such relative security—no matter on what material basis—thus would be perfectly free.[98]

C. *Right – International Law as Command*

The philosophical origin of rights-based arguments raised by all sides in the Ukrainian crisis confirms our intuitive conclusion: rights-based arguments are diametrically opposed to *Realpolitik*.[99] Tracing the genealogy of rights-based international legal arguments leads us

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89. For a list of relevant impulses, see *id.* at 28–38.

90. *See id.*

91. D. D. RAPHAEL, HOBBES: MORALS AND POLITICS 27 (1977) (explaining that for Hobbes, "freedom is to be contrasted with external compulsion" and that response to fear of an "unpleasant experience" is "internal . . . a form of aversion . . . and voluntary or free").

92. *See id.*

93. *See* Thomas Pink, *Freedom and Action Without Causation: Noncausal Theories of Freedom and Purposive Agency, in* THE OXFORD HANDBOOK OF FREE WILL 349, 353 (Robert Kane ed., 2d ed. 2011) (noting that to Hobbes, the will was always externally predetermined).

94. *See id.*

95. *See* LEVIATHAN, *supra* note 87, at 148; QUENTIN SKINNER, HOBBES AND REPUBLICAN LIBERTY 135–37 (2008) [hereinafter SKINNER, HOBBES] (discussing the development of Hobbes' thought to its final destination to equate what is voluntary with what is free by reference to the example of sea wreck).

96. *See* RAPHAEL, *supra* note 91, at 27.

97. *See* LEVIATHAN, *supra* note 87, at 118–19.

98. *See* SKINNER, HOBBES, *supra* note 95, at 138 ("Although [a person] brings his freedom to an end, he does so by way of acting freely.").

99. *See supra* Part II.A.

to a radically different view of freedom. This view of freedom takes choice seriously in the sense that it is premised in safeguarding choice, the right to choose, against political and social compulsion.[100] Such a view is irreconcilably different from the Hobbesian account of freedom.[101] All attempts to find a common denominator between rights-based and effectiveness-based norms in international law made relevant by the facially inconsistent arguments used in the Ukrainian conflict are thus destined to fail. Consequently, the critics of international law appear to be making a dangerously valid observation when they submit that international legal argument in the context of the Ukrainian crisis and beyond is ultimately self-defeating and absurd.[102]

Doctrinally, rights-based academics submit that as a matter of international law the unconstitutional overthrow of government is ultimately illegitimate.[103] The government that emerges from it cannot rightfully be recognized.[104] Nor can many of its actions.[105]In order to be legitimate, according to these arguments, control must be more than effective.[106] It must satisfy certain external criteria.[107] These criteria are ultimately normative—they set out what states

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100. *See* SAMUEL FREEMAN JUSTICE AND THE SOCIAL CONTRACT: ESSAYS ON RAWLSIAN POLITICAL PHILOSOPHY 35–36 (2007) (discussing the importance and problem of choice in social contract theory).

101. *See* Pink, *supra* note 93, at 353 (noting the impossibility of "choice" in the traditional sense in Hobbesian theory).

102. *See* KOKSENNIEMI, UTOPIA, *supra* note 10, at 67 (quoted above).

103. *See, e.g.*, Jean d'Aspremont, *The International Law of Statehood: Craftsmanship for the Elucidation and Regulation of Births and Deaths in International Society*, 29 CONN. J. INT'L L. 201, 218 (2014) (summarizing the submissions of legalist theorists); Oona A. Hathaway et al., *Consent-Based Humanitarian Intervention: Giving Sovereign Responsibility Back to the Sovereign*, 46 CORNELL INT'L L.J. 499, 545 (2013) (explaining that "states have . . . continued to treat a government overthrown by an unconstitutional process . . . as the recognized government of a state" despite its lack of effective control (citing Jean d'Aspremont, *Legitimacy of Governments in the Age of Democracy*, 38 N.Y.U. J. INT'L L. & POL. 877, 901–02 (2006)); Eki Yemisi Omorogbe, *A Club of Incumbents? The African Union and Coups d'Etat*, 44 VAND. J. TRANSNAT'L L. 123, 138 (2011); Roth, *supra* note 84, at 427–30, 435-39; *see also, e.g.*, Roth, *supra* note 84, at 395 (summarizing this position but noting that *Realpolitik* is not so easily jettisoned).

104. *See, e.g.*, Jeremy I. Levitt, *Pro-Democratic Intervention in Africa*, 24 WIS. INT'L L.J. 785, 793 (2006) ("[D]emocratic governance appears to have attained a more prominent status than the effective control doctrine." (footnote omitted)).

105. *See, e.g.*, Ethan S. Burger, *The Recognition of Governments Under International Law: The Challenge of the Belarusian Presidential Election of September 9, 2001 for the United States*, 35 GEO. WASH. INT'L L. REV. 107, 129 (2003) (noting that in the context of the non-recognition of a government (rather than a state) "[t]he impact of non-recognition is generally limited to denying an unrecognized government access to [United States] courts and ignoring its ownership of property belonging to the state that the government purports to represent" (footnote omitted)).

106. *See supra* note 103 and accompanying text.

107. *See supra* note 103 and accompanying text.

ought to do, how they ought to act rather than how they habitually do act.[108] These normative commands counterbalance and contain *Realpolitik*.[109]

Just as the *Realpolitik* position is indebted to Hobbes, the normative internationalist position is indebted to John Locke.[110] Locke's theoretical project was to counter *Realpolitik*.[111] To Locke, freedom requires not only an application of will as it did for Hobbes.[112] Rather, it requires that any choice to be free must be made without outside compulsion.[113] The choice is free only to the extent that it is not driven by physical coercion or fear of physical coercion.[114]

This conception of freedom led directly to the Lockean social contract. The social contract had to be entered into freely.[115] This freedom required that the subjects of the state delegated authority (and the limits of authority) to the State rather than the subjects simply submit to the arbitrary power of the state outright.[116]

This move by Locke directly contradicted Hobbesian *Realpolitik*. One Locke scholar summarizes the root of this disagreement as follows:

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108. *See supra* note 103 and accompanying text.

109. *See, e.g.*, Hathaway et al., *supra* note 103, at 546 (noting a practice by many states "to continue to recognize the ousted government have also been willing to take significant action to help restore it to power").

110. *See, e.g.*, Michael D. Ramsey, *Reinventing the Security Council: The U.N. as a Lockean System*, 79 NOTRE DAME L. REV. 1529, 1559 (2004) (arguing for a robust internationalist collective security mechanism premised in Locke's political theory); *cf.* Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53 *passim* (1992) ("[I]nternational law and domestic justice are fundamentally connected." (footnote omitted)); *see also* JOHN RAWLS, A THEORY OF JUSTICE (1973) (discussing the overlap between Kantian and Lockean theories of justice and social contracts); John Rawls, *The Law of Peoples* (1993), *reprinted in* JOHN RAWLS: COLLECTED PAPERS 529, 559 (Samuel Freeman ed., 1999) (discussing the same in the context of international law).

111. *See, e.g.*, JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 7 (C. B. Macpherson ed., 1980) (1690) [hereinafter LOCKE'S SECOND TREATISE] (rejecting that "men live together by no other rules but that of beasts, where the strongest carries it, and so lay a foundation for perpetual disorder and mischief, tumult, sedition and rebellion . . . .").

112. *See* LEVIATHAN, *supra* note 87, at 148.

113. *See* LOCKE'S SECOND TREATISE, *supra* note 111, at 91 (arguing that compulsion by a robber or a state is similarly unjust and does not entitle either to the spoils of their wrongdoing).

114. *See id.*

115. *See id.* at 63.

116. *See, e.g.*, GEORGE H. SMITH, THE SYSTEM OF LIBERTY: THEMES IN THE HISTORY OF CLASSICAL LIBERALISM 106 (2013) (noting that for Locke, "it is absurd to suppose that people would join a civil society to become worse off than they would have been in a state of nature – and worse off they would certainly be, if in a civil society their property, liberty, and lives would be at the mercy of an absolute sovereign and his or her arbitrary decrees" (footnote omitted)).

> Hobbes' rejection of the philosophical premise of Locke's natural executive power is obviously connected to his concern to establish the rational and moral grounds for absolute sovereignty. To Hobbes . . . . [t]he contract forming political society is a product of consent, but this act of consent is not the efficient cause of sovereign power. Rather the sovereign derives his or her authority by virtue of being the single uncontracted agent watching over society while retaining his or her natural freedom entire.[117]

To Hobbes, freedom permitted individuals to subject themselves completely to thugs out of a hope of protection.[118] To Locke, any such choice would be by definition unfree because it was the subject of force or fear and thus void the social contract based upon consent so obtained.[119]

Applying the Lockean conception of freedom in a revolutionary context such as Ukraine, choices made under gunfire, or threat of military action, are always inherently suspect.[120] They are prone to involve precisely the kinds of situations where a reasonable person may well not feel safe—and thus constrained by outside events to assent to political actions that he or she would not have otherwise agreed to.[121]

This doubt is the stronger in the context of a constitutional democracy.[122] Democracies would provide the people with a relatively efficacious mechanism to change governments and government policy in an ordinary manner. [123] To the extent elections are not

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117. LEE WARD, JOHN LOCKE AND MODERN LIFE 75 (2010) (footnote omitted).

118. *See* LEVIATHAN, *supra* note 87, at 118.

119. *See* LOCKE'S SECOND TREATISE, *supra* note 111, at 91 (arguing that compulsion by a robber or a state is similarly unjust and does not entitle either to the spoils of their wrongdoing); Jeffrey M. Gaba, *John Locke and the Meaning of the Takings Clause*, 72 MO. L. REV. 525, 560 (2007) ("Locke's justification for rejection of arbitrary royalist power, his rationale for revolution, lies in his view that illegitimate and arbitrary exercise of authority are not within the range of consent provided by its citizens."); Hallie Ludsin, *Returning Sovereignty to the People*, 46 VAND. J. TRANSNAT'L L. 97, 116 (2013) (discussing the link between tacit consent and the right to revolution).

120. *See* LOCKE'S SECOND TREATISE, *supra* note 111, at 91. On Locke's theory of a right to revolution in the Second Treatise, see *id.* at 78; *see also* DAVID LLOYD THOMAS, ROUTLEDGE PHILOSOPHY GUIDEBOOK TO LOCKE ON GOVERNMENT 60 (2013) ("Without that trust the constitutional form will lack legitimacy for that political community. The scene for a rebellion is set, therefore, when a majority of the community have withdrawn their trust, thereby leaving the constitution, and the people empowered under it, without legitimacy.").

121. See LOCKE'S SECOND TREATISE, *supra* note 111, at 91.

122. *See* Guyora Binder, *What's Left?*, 69 TEX. L. REV. 1985, 1995–96 (1991) ("Locke's right of revolution proceeded from the theory that any illegal alteration of the constitution dissolved it and authorized society to establish a new one." (footnote omitted)).

123. *See generally* Tom Ginsburg, Daniel Lansberg-Rodriguez & Mila Versteeg, *When to Overthrow Your Government: The Right to Resist in the World's Constitutions*, 60 UCLA L. REV. 1184 (2013) (discussing constitutionally recognized rights to rebel on the basis of comparative constitutional law scholarship).

accompanied by tactics of thuggish intimidation, their results are a far better gauge of the free will of the governed. Thus, the notion that unconstitutional change is nevertheless legitimate would undergo strict scrutiny under this theory of freedom—and would lose to the extent the malcontents have not lost confidence in the constitutional form legitimating the actions of their government but simply in the actions of their government.[124] Right and might thus appear poised at an impasse—they appear on their face incommensurate.[125]

D. *Process – International Law as Balance*

The conceptions of freedom underlying the arguments made by all parties in the Ukrainian conflict rely upon incommensurable comprehensive theories of value.[126] They cannot be reconciled logically or by means of formal dialectics.[127] When such reconciliation or development is impossible what remains is balance.[128]

But incommensurability creates significant problems for balancing, too. It deprives balancing of a *unit*. As Justice Scalia remarked:

> Having evaluated the interests on both sides as roughly as this, the Court then proceeds to judge which is more important. This process is ordinarily called "balancing," but the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy. All I am really persuaded of by the Court's opinion is that the burdens the Court labels "significant" are more determinative of its decision than the benefits it labels "important." Were it not for the brief implication that there is here a discrimination unjustified by *any* state interest, . . . I suggest an opinion could as persuasively have been written coming out the opposite way.[129]

Is it possible then to achieve a balance without a common unit of measurement? Can balance incorporate or compare incommensurable values?

Process theory on its face provides a means to achieve such a balance.[130] It relies upon a synthetic meaning-creating process to

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124. *See* THOMAS, *supra* note 120, at 60.

125. *See* Sunstein, *supra* note 48, at 796 (quoted above).

126. On the problem of incommensurability of value in Greek ethics, see generally NUSSBAUM, FOG, *supra* note 41.

127. *Cf. id.* at 63–82.

128. *See, e.g.*, Brett G. Scharffs, *Adjudication and the Problems of Incommensurability*, 42 WM. & MARY L. REV. 1367, 1384 (2001) ("The law often seeks to weigh and balance values that are heterogeneous and sometimes incommensurable.").

129. *Bendix*, 486 U.S. at 897 (Scalia, J., concurring) (citation omitted).

130. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term – Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 28–29 (1994) ("[L]aw is an equilibrium, a state of balance among competing forces or institutions.").

understand how these conceptions of freedom relate to one another.[131] It then determines which argument, viewed in its totality, is most successful in comparing its claim factually to past instances in which freedom was a cognizable legal argument.[132]

Such a synthetic meaning-creating process functions like a language.[133] Instead of consulting an axiomatic definition, a synthetic process makes connections between the new event or situation and past experiences.[134] For example, when determining whether a cinematically-produced massive multiplayer online game (MMO) really is a movie or a game, it makes little sense to look to a definition of a movie or the definition of a game.[135] The cinematically produced MMO will meet elements of both definitions.[136] It is "a recording of moving images that tells a story and that people watch on a screen or television."[137] But it is also "a physical or mental activity or contest that has rules and that people do for pleasure."[138] In the case of an MMO, a participant in the relevant process would look for examples of similar movie experiences to an MMO—perhaps attempts at movies in which the audience can determine which ending will be shown.[139] Our process participant would also look for examples of similar game experiences to an MMO.[140]

For instance, assume for a moment that such a dispute concerned George Lucas and his agreement with 20th Century Fox relating to the Star Wars franchise entered into in 1973.[141]

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131. *See, e.g.*, Thomas P. Crocker, *Envisioning the Constitution*, 57 AM. U. L. REV. 1, 6 (2007) (discussing the meaning-creating process in relation to the Constitution).

132. *Cf.* Frédéric G. Sourgens, *Law's Laboratory, Developing International Law on Investment Protection as Common Law*, 34 NW. J. INT'L L. & BUS. 181, 233 (2014) (explaining how the international law of investment protection functions like a language).

133. *See id.*

134. *See* Ludwig Wittgenstein, *Philosophische Untersuchungen*, *in* 1 WITTGENSTEIN WERKAUSGABE 276–78 (Suhrkamp Verlag ed., 1984) (discussing the family resemblance theory of semantics).

135. *See MMO Definition*, SCOTT ON MULTIMEDIA LAW, *available at* 2013 WL 3212792 (C.C.H.) ("A massively multiplayer online *videogame* (also called MMOG) . . . is capable of supporting hundreds or thousands of players simultaneously.").

136. *See Game Overview*, STAR WARS: THE OLD REPUBLIC, http://www.swtor.com/info/overview (last visited Feb. 19, 2015) [http://perma.cc/U9BW-N2Y7] (archived Feb. 19, 2015) (describing the cinematic content of the MMO).

137. *Movie Definition*, MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/movie (last visited Feb. 17, 2015) [http://perma.cc/XLC7-W7GN] (archived Feb. 17, 2015).

138. *Game Definition*, MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/game (last visited Feb. 17, 2015) [http://perma.cc/5FSN-BHG5] (archived Feb. 17, 2015).

139. *See supra* note 137.

140. *See supra* note 138.

141. *See* Brian Warner, *How One Brilliant Decision in 1973 Made George Lucas a Multi-Billionaire Today*, CELEBRITYNETWORTH.COM (May 1, 2014), http://www

Hypothetically, assume that George Lucas had not retained the right to both merchandising and sequels at that time, but simply to "games and toys" based on the movie.[142] In 2012, Lucas releases Star Wars: Old Republic, a story-based MMO involving voice acting, cutting edge animation, and a cinematic story arch for those who persevere long enough to play to higher character levels.[143] Looking at an MMO in today's environment, there are multiple generations of both story-based videogames and role playing games available for comparison.[144] The relationship between Star Wars: Old Republic and games therefore is comparatively strong.

But what if we had to determine what George Lucas and Fox intended in 1973 with regard to a fictional agreement to permit Lucas to market games?[145] How would the change in time change the interpretation of "game" or "movie?" In that context, today's computer games would appear as even more outrageous science fiction than Lucas' famous Death Star.[146] Dungeons and Dragons, the world's most famous role playing franchise, had not yet premiered its first tabletop game (it would appear in 1974).[147] But during the same time frame, an interactive movie—*Kinoautomat*—was first screened in 1967 at the Montreal Expo and rescreened in San Antonio in 1968, Prague in 1971 and 1972, and at the Spokane Expo in 1974.[148] Different experience meaningfully changes the balance whether Star Wars: Old Republic meaningfully is a game or a movie.

Once the process participant has determined the population of analogues and the relationship between a new item and these analogues, the process participant can make a judgment whether the

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.celebritynetworth.com/articles/entertainment-articles/how-one-genius-decision-made-george-lucas-a-billionaire/ [http://perma.cc/8D35-9ZCT] (archived Feb. 17, 2015) (describing the then-unique terms of the original deal between Lucas and Fox).

142. *See id.* (reporting that in reality, Lucas "offered to keep his salary at $150,000 in exchange for two seemingly insignificant requests: 1) That he retain all merchandising rights, and 2) that he would retain the rights to any sequels.").

143. *See Game Overview*, STAR WARS: THE OLD REPUBLIC, *supra* note 136.

144. For a discussion of these types of games, see Marc Jonathan Blitz, *A First Amendment for Second Life: What Virtual Worlds Mean for the Law of Video Games*, 11 VAND. J. ENT. & TECH. L. 779 *passim* (2009).

145. *See, e.g.*, Rahim Moloo, *When Actions Speak Louder than Words: The Relevance of Subsequent Party Conduct to Treaty Interpretation*, 31 BERKELEY J. INT'L L. 39, 53 (2013) (discussing the principle of contemporaneity and good faith in international law treaty interpretation); Harry G. Prince, *Contract Interpretation in California: Plain Meaning, Parol Evidence and Use of the "Just Result" Principle*, 31 LOY. L.A. L. REV. 557, 583–84 (1998) (discussing the principle of contemporaneity and good faith as a matter of California law).

146. *See, e.g.*, Mark J.P. Wolf, *Introduction* to BEFORE THE CRASH: EARLY VIDEO GAME HISTORY 3 (Mark J.P. Wolf ed., 2012) (describing the types of videogames available in the early 1970s).

147. *See, e.g.*, JAMES D. IVORY, VIRTUAL LIVES: A REFERENCE HANDBOOK 16 (2012).

148. *See* NICO CARPANTIER, MEDIA AND PARTICIPATION: A SITE OF IDEOLOGICAL-DEMOCRATIC STRUGGLE 277 (2011).

MMO is more of a movie or more of a game.[149] The MMO then becomes internalized in the broader "world," *Lebensform*, of our process participant.[150]

These examples show that while the abstract definitions of what constitutes a game or movie would not have changed, at all, their interpretation—their meaning—could in fact radically shift.[151] This observation confirms what we intuitively know already: our worlds are not governed by abstract constants, or units of measurement, but much more by our own interpretation of a pool of relevant experience.[152] We understand by placing items in context, not by engaging in metaphysical lexicography.[153]

This process operates analogously to transnational process scholarship. The process begins with interaction.[154] In the George Lucas example, this "interaction" is the (fictional) dispute between Lucas and his movie studio whether Star Wars: The Old Republic is a movie or a game.[155] This interaction "forces an interpretation or enunciation of the global norm applicable to the situation."[156] The goal of interpretation is "not simply to coerce the other party, but to internalize the new interpretation of the international norm into the other party's internal normative system."[157] In the context of the George Lucas example, the interpretation that the MMO is a game (or movie) is internalized because the participants internalize MMOs in an existing norm structure made up of their past experience. The norm to call MMOs "games" or "movies" thus is not the result of external norm-based compulsion but of internalized understanding.

Process theory submits that each internalization of a new situation, each instance of understanding, *changes* the normative world of the participant.[158] The substance of the participant's universe is different after each interaction.[159] For instance, the

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149. Wittgenstein, *supra* note 134, at 277 ("Instead of providing a common core that all things we call language have in common, I say that these phenomena do not have one thing in common causing us to use the same word. Instead they are all related to each other in many different ways." (author's translation)).

150. Wittgenstein, *supra* note 134, at 250 ("[T]he speaking of a language is part of an activity, or form of life (*Lebensform*)." (author's translation)).

151. *See supra* notes 145, 149 and accompanying text.

152. Wittgenstein, *supra* note 134, at 278 ("And the result of our enquiry states: we see a complicated network of resemblances that interweave and crisscross. Resemblances big and small." (author's translation)).

153. *Id.*

154. *See* Koh, *Obey*, *supra* note 14, at 2646.

155. *See id.*

156. *Id.*

157. *Id.*

158. *See id.* ("[E]ventually, repeated participation in the process will help to reconstitute the interests and even the identities of the participants in the process." (footnote omitted)).

159. *See* Wittgenstein, *supra* note 134, at 253.

universe in our example is enriched both by the MMO and the new connection between MMO and past instances of movies and games.

By approaching balance in this manner, process theory can answer Justice Scalia's criticism.[160] In the context of the MMO example, it is a comparison whether something is more of a movie or more of a game rather than whether a particular line is longer than a particular rock is heavy. But both comparisons look not to a common unit of measurement, but balance the belonging of a particular object in light of the strength of its relationship to incommensurable values.

In the context of the MMO example, we saw how that balancing works without a unit measurement.[161] It contextualizes MMOs by reference to existing factual examples of games. It is possible to judge which characteristic of MMOs (or interest of litigants) is more important by the overall factual analogy.[162] While each factual analogy is driven by completely different standards, it is possible to compare these analogies by reference to the closeness in family resemblances between each analogy and the relevant closest test sample.[163] Process permits judgment, balance, by placing each specific case to be analyzed within the map of earlier experiences that have already been processed.

This act of situating an event within a broader set of experiences explains how apparently incommensurable interests relate to each other. The interests are only *analytically* incommensurable.[164] The interests as a matter of definition concern very different ultimate

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160. *Cf. Bendix*, 486 U.S. at 897 (Scalia, J., concurring).

161. In fact, linguistic understanding by definition lacks such a common denominator. *See* WITTGENSTEIN, *supra* note 134, at 276.

162. *See id.* at 278.

163. *See id.* at 276.

164. *See, e.g.*, JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG, BEITRÄGE ZUR DISKURSTHEORIE DES RECHTS UND DES DEMOKRATISCHEN RECHSSTAATS 309–24 (1992) (discussing the analytical problem of balancing tests by critiquing the work of Robert Alexy); *see also* Frederick Schauer, *Balancing, Subsumption, and the Constraining Role of Legal Text*, 4 LAW & ETHICS HUM. RTS. 34, 35–37 (2010) (discussing Alexy's balancing theory and Habermas' critique); *cf.* ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 102 (Julian Rivers trans., 2002) ("These expressions point to a constitutive rule for balancing exercises undertaken by the Federal Constitutional Court which goes like this: (A) The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other. This rule expresses a law for balancing all types of principles, and it can be called the *Law of Balancing*. According to the Law of Balancing, the permissible level of non-satisfaction of, or detriment to, one principle depends on the importance of satisfying the other. In defining principles, the clause 'relative to the legally possible' puts what the principle in question requires into relation with what competing principles require. The Law of Balancing states what this relation amounts to. It makes it clear that the weight of principles can never be determined independently or absolutely, but that one can only ever speak of relative weight." (footnotes omitted)).

values. These values lack a meaningful common denominator.[165] But they are still *historically* and *socially* related.

For instance, we can compare Ovid's *Metamorphoses* to Shakespeare *Romeo and Juliet* from a historical perspective despite the fact that one is an epic poem and the other a tragic play, one written in Latin and other written in English, one written for literati and the other for a general audience.[166] As matter of common analytical measure, they have nothing in common. As a matter of historical accident, they have everything in common.[167] Shakespeare weaves Ovidian themes into the heart of the Elizabethan Renaissance and in so doing changed the sensibilities of Englishmen and women forever.[168] This observation makes sense from the point of view of a literary social process.[169] It makes no sense from Justice Scalia's antiseptic jurisprudential perch.[170]

From a social perspective, our very understanding of the *tragedy* of a play like *Romeo and Juliet* depends upon our ability to inhabit

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165. Wittgenstein, *supra* note 134, at 256: "Imagine someone points to a vase and says: "'look at that marvelous blue! – the shape does not matter.' Or: 'look at that marvelous shape! – the color is unimportant.' There is no doubt that you would do different things when you follow these instructions." Color and shape have no cognizable common denominator. But the manner in which we encountered the vase gave us an example in which color and shape factually intersected by historical accident. That example provides a tangible means to determine why shape sometimes may be more important than color. In so doing, it provides a means to compare shape and color even though they have absolutely nothing in common other than a historical link between our experiences of the color blue and the shape of a vase.

166. On the Ovidian theming in Romeo and Juliet, see, for example, Subha Mukherji, *Outgrowing Adonis, Outgrowing Ovid, The Disorienting Narrative of Venus and Adonis*, *in* THE OXFORD HANDBOOK OF SHAKESPEARE'S POETRY 396, 412 (Jonathan F.S. Post ed., 2013) ("In that other early work, *Romeo and Juliet*, it is an Ovidian allusion that flickers like a stab of pain through Shakespearean poetry at its most absolute, which is also Juliet's unwitting *liebestod*." (emphasis added)); *see also* WILLIAM SHAKESPEARE'S ROMEO AND JULIET 69 (Harold Bloom ed., 2009) (noting Shakespeare's reputation as an English Ovid).

167. *See, e.g.*, LYNETTE HUNTER & PETER LICHTENFELS, NEGOTIATING SHAKESPEARE'S LANGUAGE IN *ROMEO AND JULIET*: READING STRATEGIES FROM CRITICISM, EDITING AND THE THEATRE 13 (2009) (noting the direct influence of Arthur Golding's translation of the Metamorphoses on Shakespeare, as well as the indirect influence of Ovid through the works of Marlowe and Lyly).

168. *See* DAVID L. FROST, THE SCHOOL OF SHAKESPEARE: THE INFLUENCE OF SHAKESPEARE ON ENGLISH DRAMA 1600–42, at 1 (1968) ("There could be no greater indictment of the aesthetic and intellectual pretensions of an age than to say that it failed to appreciate Shakespeare."); Jessica Wolfe, *Classics*, *in* THE OXFORD HANDBOOK OF SHAKESPEARE 517, 524 (Arthur F. Kinney ed., 2012) ("Ovid's influence on Shakespeare is as varied as it is complex: his poems shape Shakespeare's comprehension of dramatic genre, his treatment of gender and erotic desire, and his understanding of cosmic change and recurrence.").

169. *See* Pierre Legrand, *Siting Foreign Law: How Derrida Can Help*, 21 DUKE J. COMP. & INT'L L. 595, 609 (2011).

170. *Cf. Bendix*, 486 U.S. at 897 (Scalia, J., concurring).

multiple incommensurable social worlds all at once.[171] Choice is tragic (rather than stupid) because we understand the powerful gravitational force of conflicting values, or social roles, in a given situation.[172] In *Romeo and Juliet*, Romeo's obligations (1) of friendship to Mercurio, (2) to abide the laws of Verona, and (3) to protect his new wife's family conflict when Tybalt and Mercurio duel.[173] Should Romeo protect his newly minted cousin by marriage from Mercurio?[174] When Tybalt kills Mercurio, should Romeo avenge his friend?[175] Or should Romeo abide by the law and let the Prince punish Tybalt?[176] Or should Romeo protect Juliet's beloved cousin from the law?[177] Once Tybalt kills Mercurio, it apparently is no longer possible for Romeo to meet the demands of all of his social roles—he either avenges his friend, or he abides the law, or he protects his cousin.[178] We understand this pull because we can imagine being in a similar situation.[179] Process theory precisely does not blindly ignore that people frequently act in the context of such conflicting values.[180] And that interaction with others requires mediation between these values rather than an all out choice of one

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171. *See, e.g.*, NUSSBAUM, PE, *supra* note 41, at 269 (discussing the tragic choice in Antigone by reference to the incommensurable social roles she inhabits).

172. *See id.*

173. *See* WILLIAM SHAKESPEARE, ROMEO AND JULIET act 3, sc. 1.

174. *See id.* ("Draw, Benvolio; beat down their weapons. / Gentlemen, for shame, forbear this outrage! / Tybalt, Mercutio, the prince expressly hath / Forbidden bandying in Verona streets: / Hold, Tybalt! good Mercutio!").

175. *See id.* ("Alive, in triumph! and Mercutio slain! / Away to heaven, respective lenity, / And fire-eyed fury be my conduct now!").

176. *See id.* at act 1, sc. 1 (Prince: "If ever you disturb our streets again, / Your lives shall pay the forfeit of the peace.").

177. *See id.* at act 3, sc. 2 (Juliet having found out that Romeo killed Tybalt—her dearly loved cousin—exclaims "O serpent heart, hid with a flowering face! / Did ever dragon keep so fair a cave? / Beautiful tyrant! fiend angelical! / Dove-feather'd raven! wolvish-ravening lamb! / Despised substance of divinest show! / Just opposite to what thou justly seem'st, / A damned saint, an honourable villain!").

178. *See id.* at act 3, sc. 1 ("This gentleman, the prince's near ally, / My very friend, hath got his mortal hurt / In my behalf; my reputation stain'd / With Tybalt's slander,--Tybalt, that an hour / Hath been my kinsman!").

179. *See, e.g.*, NUSSBAUM, FOG, *supra* note 41, at 53 (describing a scene "of ordinary practical deliberation" in *Antigone* that "[m]ost members of the audience would recognize . . . [as] part of their own daily lives").

180. *See, e.g.*, Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 559–64 (2005) (discussing how the transnational legal process addresses norm conflicts in the municipal legal context).

over the other;[181] process does not deny the tragedy of choice but provides a means to choose, eyes wide open.[182]

Process theory therefore can make perfect sense of balancing international legal norms. In the context of Ukraine, it does not matter that the arguments of the United States and Russia each continue to rely upon inconsistent and incongruent premises, that is, *Realpolitik* and constitutional justifications.[183] As participants in the practice of international law, process theory posits that we intuitively understand that these arguments seek to establish family relationships between each side's respective legal arguments about the Ukrainian crisis and past instances in which similar civil strife became a matter of international legal concern.[184] In this vein, the arguments of Russia draw on the Kosovo example to lend global credence to its claims that Crimea appropriately seceded from Ukraine.[185] They further rely upon older claims of pan-Slavic protectionism against Western incursion for a more regional audience.[186] Finally, it contextualizes the Ukrainian revolution in Kyiv as illegitimate by reference to behind the scenes Western intervention in the domestic political process of a country suiting its geopolitical interests.[187]

The United States on the other hand evokes other examples, most centrally the break-up of the Soviet Union and President Yeltsin's rise to power in Russia.[188] For more local consumption, it

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181. *See* NUSSBAUM, PE, *supra* note 41, at 270 ("If the political sphere decides, wisely, to recognize plural spheres of value, it thereby builds in the permanent possibility of tragic clashes among them.").

182. *See* NUSSBAUM, FOG, *supra* note 41, at 81 ("[A]s Heraclitus put it, justice really *is* strife: that is, that the tensions that permit this sort of strife are also, at the same time, partly constitutive of the values themselves.").

183. *See supra* Part II.A.

184. *See* Wittgenstein, *supra* note 134, at 276.

185. *See supra* Part II.A. For a discussion on the overlapping Realpolitik and internationalist arguments in the context of Kosovar independence, and their problematic nature at the time of their making, see Jure Vidmar, *International Legal Responses to Kosovo's Declaration of Independence*, 42 VAND. J. TRANSNAT'L L. 779 *passim* (2009).

186. *See supra* Part II.A; *see also* Jeffrey W. Stempel, Sarig Armenian & David McClure, *Stoney Road out of Eden: The Struggle to Recover Insurance for Armenian Genocide Deaths and its Implications for the Future of State Authority, Contract Rights, and Human Rights*, 18 BUFF. HUM. RTS. L. REV. 1, 12–13 (2012) (describing the pan-Slavic motivations of the Czar in entering into the Crimean War in the 1850s).

187. *See supra* Part II.A; A. John Radsan, *An Overt Turn on Covert Action*, 53 ST. LOUIS U. L.J. 485, 508–11 (2009) (discussing the more or less covert role of the United States in Chilean internal politics in the Johnson and Nixon administrations).

188. *See supra* Part II.A; *see also* David Golove, *Liberal Revolution, Constitutionalism and the Consolidation of Democracy: A Review of Bruce Ackerman's The Future of Liberal Revolution*, 1993 WIS. L. REV. 1591, 1597 n.9 (1993) ("Ackerman, indeed, has applauded Yeltsin's approach, noting the parallels with the conduct of George Washington after the American Revolution.").

further links the events to human rights narratives of civil rights movements and popular political protests.[189] Finally, it contextualizes Russian presence in Ukraine as aggression—with obvious parallels to Soviet incursions into Budapest and Prague.[190] These arguments thus do not treat Ukraine as analytical legal problem to be resolved by the application of a "freedom rule."[191] They seek to situate Ukraine in a broader context of the international legal discourse itself.[192] By doing so, both the United States and Russia attempt to persuade participants to internalize the current conflict in a different manner—and draw diametrically opposed normative conclusions concerning it.[193]

Process theory resolves the dispute by comparing the strength of family resemblance between the respective arguments, on the one hand, and our internal web of past freedom norm applications, on the other hand.[194] These arguments thus seek to make relevant the whole of range of freedom norms to strengthen family resemblance rather than to focus on a single axiomatic argument—an axiomatic argument that never is reflected in all its purity in past instances of norm application.[195]

In this sense, the transnational legal process can make sense of freedom in the context of the past practice of transnational law.[196] This practice, of course, is heavily defined by historical accident—that is, the store of experience or cases studied by transnational law practitioners.[197] Freedom in this sense ceases to be a value with any claim to exclusivity and simply becomes one of many—a data point in the larger historical fabric. [198] The worst of the critique of international law thus is, at first, averted.

But this conclusion does not at all help to clarify if the transnational process has any *independent* value.[199] Quite to the contrary, it suggests that the transnational legal process must lack

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189. *See supra* Part II.A.

190. *See supra* Part II.A; *see also* Ferenc A. Váli, *Soviet Satellite and International Law*, 15 JAG J. 169 *passim* (1961) (discussing Soviet suppression of civic uprisings in Budapest and Prague).

191. *Cf.* Robert Bejesky, *Politico-International Law*, 57 LOY. L. REV. 29, 53 (2011) ("Neoconservatives, however, were even more emphatic and enskied the [United States] as the leading power that provided a 'geopolitical framework for widespread economic growth and the spread of American principles of liberty and democracy' throughout the world." (footnote omitted)).

192. *Compare supra* Part II.A, *with* Koh, *Obey*, *supra* note 14, at 2645–46 .

193. *Compare supra* Part II.A, *with* Koh, *Obey*, *supra* note 14, at 2645–46.

194. *See* Wittgenstein, *supra* note 134, at 276.

195. *Cf. supra* Part II.A.

196. *Compare supra* Part II.A, *with* Koh, *Obey*, *supra* note 14, at 2645–46.

197. *Compare supra* Part II.A, *with* Koh, *Obey*, *supra* note 14, at 2645–46.

198. *Cf.* NUSSBAUM, FOG, *supra* note 41, at 59–63 (noting the problem with purely civic virtue).

199. *See id.*

such value.[200] Any use of value would undermine what process is about.[201] It would appear to force what is currently an experience-based, synthetic process of meaning creation to become a deductive value-applying calculus. Thus, the question: has process theory pushed freedom—the value people from Cato to William Wallace to Patrick Henry were willing to die for—to the vanishing point? Has it engaged merely in another strategy of evasion to delay the Koskenniemian critique's inevitable conclusion that all law is politics by different means?[202]

III. WHOSE FREEDOM: STATES, PEOPLES, OR PEOPLE?

Given the international legal nature of the Ukrainian crisis and others like it, the first question is *who* should be free.[203] There are three plausible candidates. Freedom can apply to states,[204] it can apply to peoples,[205] and it can apply to people.[206]

As the Ukrainian crisis shows, transnational legal arguments about freedom invoke all three of these dimensions at the same time. Both the United States and Russia rely upon state-based freedom, accusing the other of inappropriately interfering in Ukrainian internal affairs.[207] Russia also relies upon the right of areas with majority ethnic Russian populations, such as Crimea, to declare their

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200. *Compare* NUSSBAUM, FOG, *supra* note 41, at 59–63, *with* Koh, *Obey*, *supra* note 14, at 2645–46 (explaining that civic discourse mediates existing value commitments of civic discourse participants).

201. *Compare* NUSSBAUM, FOG, *supra* note 41, at 65, *with* Koh, *Obey*, *supra* note 14, at 2645–46.

202. *See* Koskenniemi, *Politics*, *supra* note 24, *passim* (noting that "some measure of politics is inevitable" in the "fight for an international Rule of Law").

203. For a discussion on the definitional importance of defining who is covered by the right to freedom, see, for example, SCOTT DOUGLAS GERBER, TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION 164–66 (1995) (examining the 1857 United States Supreme Court *Dred Scott* case and the tension between slavery and the United States Declaration of Independence).

204. *See infra* Part III.A.

205. *See infra* Part III.B.

206. *See infra* Part III.C.

207. *See* Deputy Assistant Secretary, Eric Rubin, Bureau of European and Eurasian Affairs, U.S. Foreign Policy Toward Ukraine: Statement Before the House Foreign Affairs Committee (March 6, 2014), *available at* http://www.state.gov/p/eur/rls/rm/2014/mar/223023.htm [http://perma.cc/3P97-W922] (archived Jan. 20, 2014) [hereinafter Rubin March 6, 2014 Statement] ("Russia's actions in Crimea are in clear violation of Ukrainian sovereignty and territorial integrity and a breach of international law . . . ."); Brian D. Taylor, *Putin's Own Goal: The Invasion of Crimea and Putin's Political Future*, FOREIGN AFFAIRS (Mar. 6, 2014), http://www.foreignaffairs.com/articles/141010/brian-d-taylor/putins-own-goal [http://perma.cc/TEW3-2NZE] (archived Feb. 19, 2015) (noting that Putin "blamed the West for interference in Ukraine").

independence.[208] This argument moves from states as the appropriate subjects of freedom and looks instead to peoples as having the legally cognizable right to be free.[209] Finally, both the United States and Russia rely upon individual freedom by arguing that the United States interfered in the Ukrainian constitutional process or that Russia is seeking to thwart the will of the people in the streets with brute force.[210]

The Ukrainian crisis also shows that these arguments meaningfully conflict. A pure statist view ignores that ethnic groups and individuals are frequently oppressed.[211] A view premised exclusively in the freedom of peoples would seem to permit a tyranny of the majority over dispersed ethnic minorities.[212] A conception of the primacy of individual rights renders national borders and community attachments largely irrelevant.[213] The challenge thus is this: for transnational legal process to *value* freedom in its own right rather than simply make sense of assertions *about* freedom for a given case in light of conflicting norm attachments of its participants, the transnational legal process must conceptualize freedom in a way that incorporates all of these apparently conflicting subjects.[214]

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208. *See, e.g.*, Russian Ministry of Foreign Affairs, Crimea Statement, *supra* note 9 (discussed in Part II.A).

209. *See id.*

210. *See id.* (relying upon constitutionality as mark of legitimacy); U.S. DEP'T OF STATE, 2013 HUMAN RIGHTS REPORTS: UKRAINE (2013) [hereinafter HUMAN RIGHTS REPORT UKRAINE], *available at* http://www.state.gov/documents/organization/220554.pdf (last visited July 10, 2014) [http://perma.cc/A6TK-M38A] (archived Feb. 15, 2015).

211. *See, e.g.*, Raghida Dargham, *Oman Says it Will Not Interfere in Syria's Internal Affairs*, AL-MONITOR.COM (Oct. 4, 2012), http://www.al-monitor.com/pulse/tr/politics/2012/10/oman-no-to-interference-in-syria.html# [http://perma.cc/S9L8-NXDR] (archived Jan. 20, 2014) (reporting a statement by Oman's Foreign Minister to that effect).

212. *See, e.g.*, DAVID RAIČ, STATEHOOD AND THE LAW OF SELF-DETERMINATION 280 (2002) ("One has often sought to justify majority decision-making procedures on the basis of moral considerations or as a method inherent in the collective right of self-determination. . . . However, the so-called 'tyranny of the majority' is an inherent threat and possibility of such a decision-making procedure . . . .").

213. *See, e.g.*, David Beetham, *Human Rights as a Model for Cosmopolitan Democracy*, *in* RE-IMAGINING POLITICAL COMMUNITY: STUDIES IN COSMOPOLITAN DEMOCRACY 58, 59 (Daniele Archibugi et al. eds., 1998) (arguing that human rights law sets up a cosmopolitan regulatory space).

214. The same problem plagues ethical theories. There is a significant anti-theoretical push in the philosophical community that argues precisely that it is possible to make meaningful statements about ethics and ethical choices without being able to systemize these statements into an ethical theory. *See, e.g.*, ANTI-THEORY IN ETHICS AND MORAL CONSERVATISM *passim* (Stanley G. Clarke & Evan Simpson eds., 1989) (setting out such a position).

Freedom must be an individual right and a social norm all at once.[215] If the transnational legal process fails to do so, freedom in the transnational legal process becomes an empty shell even before we ask any questions about its substance: we would not even be able to identify to whom this mysterious freedom applies let alone what it means.[216]

A. *States – Sovereign Equality*

Freedom in international law traditionally applies to states.[217] International law classically is the law of state-to-state relations.[218] Transnational legal process scholarship does not deny that it applies to this realm.[219] Quite to the contrary, state-to-state conduct is a fixed axis for its application.[220]

State-based freedom in orthodox international law operates in three interrelated ways. First, freedom refers to the absence of an international hegemon.[221] No state could dictate to another state what it ought to do simply by virtue of status.[222] States are thus free in the sense that they are equal—they are not subject to any other.[223]

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215. *Cf.* AMARTYA SEN, THE IDEA OF JUSTICE 306 (2009) (arguing that there is room for multiple perspectives of freedom at a time without necessarily creating irreconcilable tension).

216. *Cf.* Koskenniemi, *Politics*, *supra* note 24, at 61 ("It is impossible to make substantive decisions within the law which would imply no political choice.").

217. *See, e.g.*, JAN ANNE VOS, THE FUNCTION OF PUBLIC INTERNATIONAL LAW 281 (2013) ("[R]ules of public international law containing obligations are linked to the assumption of a freedom of States. . . .").

218. *See, e.g.*, I. Seidl-Hohenveldern, *International Economic Law, General Course on Public International Law*, *in* 198 RECUEIL DES COURS 9, 31 (1986) ("The doctrine dominant in the nineteenth century considered international law as the law dealing exclusively with the relations between States.").

219. *See, e.g.*, Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 473 (2005) (arguing that transnational law includes traditional international law).

220. *See, e.g.*, Koh, *supra* note 18, at 1401 (1999) (defining state-to-state processes as a horizontal dimension of the transnational legal process).

221. *See, e.g.*, Detlev F. Vagts, *Hegemonic International Law*, 95 AM. J. INT'L L. 843, 845 (2001) ("The received body of international law is based on the idea of the equality of states.").

222. *See, e.g.*, José E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873, 887 (2003) ("The risks that unilateral [hegemony] poses to international law and its formal principles, such as sovereign equality, are grave, but they are obvious.").

223. *See* Matt A. Vega, *Balancing Judicial Cognizance and Caution: Whether Transnational Corporations Are Liable for Foreign Bribery Under the Alien Tort Statute*, 31 MICH. J. INT'L L. 385, 413 (2010) (noting the existence of "a fundamental principle of sovereign equality [that] Vattel described as 'the natural liberty of nations'" (footnote omitted)).

Second, classically a state cannot be bound by an international legal rule to which it did not in some form consent.[224] Most obviously, in the law of treaties obligation is a matter of state assent.[225] Similarly, customary international law is premised in objective state conduct and subjective state belief that its conduct follows a rule, which is indeed legally binding.[226] Even though custom might bind a state that did not expressly assent to the customary rule, classic international law constructs tacit consent from the state's failure persistently to object to the rule.[227] While less clear, it appears that a state should be able to opt out of general principles of law recognized by civilized nations.[228] That states cannot be bound by a rule to which they did not agree flows directly from sovereign equality. States are free because they cannot be made to do anything against their will.[229]

Third, it guarantees that international law cannot interfere in the domestic affairs of any state.[230] The domestic affairs of a state are its own to organize as it pleases.[231] Paternalistically, the family father is freest in his own home—so the state in its own territory.[232]

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224. *See* VOS, *supra* note 217, at 281 (noting the link between freedom and international law formation).

225. *See, e.g.*, Omar M. Dajani, *Contractualism in the Law of Treaties*, 34 MICH. J. INT'L L. 1, 40 (2012) (noting the declaration issued by the conferees in Vienna denouncing "'the threat or use of pressure in any form, military, political, or economic, by any State, in order to coerce another Statute to perform any act relating to the conclusion of a treaty'").

226. *See* Frederic L. Kirgis, Jr., *Custom on a Sliding Scale*, 81 AM. J. INT'L L. 146, 149 (1987) (discussing the relationship between state conduct and subjective state belief that conduct is compelled by an international legal rule).

227. *See* Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 544 (1993) (arguing that customary norms form in the context of debate at multilateral fora, in which "[c]onsensus, defined as the lack of expressed objections to the rule by any participant, may often be sufficient. The absence of objections, of course, amounts to tacit consent by participants that do not explicitly support the norm.").

228. *See* Michael D. Nolan & Frédéric Gilles Sourgens, *Issues of Proof of General Principles of Law in International Arbitration*, 3 WORLD ARB. & MEDIATION REV. 505, 510 (2009) (noting that "to the extent that there is a regional nexus to a dispute – as is frequently the case in bilateral treaty disputes – reference to the legal systems of the contracting parties, as well as their state practice, may be appropriate" (footnote omitted)).

229. *See* VOS, *supra* note 217, at 281.

230. *See* Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), pmbl., U.N. Doc. A/RES/2625 (Oct. 24, 1970) (including as a principle "[t]he duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter").

231. *See id.*

232. *Compare* KATE COOPER, THE FALL OF THE ROMAN HOUSEHOLD 108–11 (2007) (discussing the role of the paterfamilias in Roman law and its use in Roman political theory), *with* G.A. Res. 2625, *supra* note 230, pmbl. (delimiting the territorial power of the sovereign). *See also* David Wippman, *Treaty-Based Intervention: Who Can*

This view of freedom dovetails most clearly with the Hobbesian view of liberty.[233] The state is sovereign, meaning that it is not obligated to anyone.[234] It can act with complete freedom because it cannot be made to do anything against its own will.[235]

Perhaps unsurprisingly, this view of freedom casts sovereigns in a dystopian "state of nature."[236] A state has no obligation to anyone—its own subjects, other states, other states' subjects—unless that state has assented to the obligation.[237] This gives free reign to states to "persuade" each other to consent so long as they have not agreed to some limits on their rights to persuade in the law of war or some other conventional or customary rule.[238] Similarly unsurprisingly, this view is closely associated with *Realpolitik*.[239] Its rhetoric of equal

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Say No?, 62 U. CHI. L. REV. 607 *passim* (1995) (discussing the principle of non-intervention in the context of requests for intervention).

233. *See* Michael W. Doyle & Geoffrey S. Carlson, *Silence of the Laws? Conceptions of International Relations and International Law in Hobbes, Kant, and Locke*, 46 COLUM. J. TRANSNAT'L L. 648, 650 (2008) ("Despite his rejection of the possibility of an international law of peace, Hobbes accepts the modern view of sovereign equality.").

234. *See* WARD, *supra* note 117, at 75 (describing Hobbes' view of the sovereign as sole uncontracted person in the social contract).

235. *But see* Isaak I. Dore, *Deconstructing and Reconstructing Hobbes*, 72 LA. L. REV. 815, 832–34 (2012) (indicating that Hobbes' only constraint on the sovereign would be God); *see also* HOBBES, LEVIATHAN: REVISED STUDENT EDITION lxiv (Richard Tuck ed., 1996) (1651) (noting the literature discussing the rather complicated religious views of Thomas Hobbes).

236. *See* Richard Falk, *Re-Framing the Legal Agenda of World Order in the Course of a Turbulent Century*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 451, 452 (1999) ("It is Hobbes' insistence that the absence of a governing authority outside the sovereign state created an anarchy resembling 'the state of nature,' which underlies the still prevalent skepticism about the very possibility of international law.").

237. *See* VOS, *supra* note 217, at 281; Charney, *supra* note 227, at 544 (highlighting the importance of consent, even if tacit, in the context of the formation of customary rules of international law); Dajani, *supra* note 225, at 40 (discussing the freedom of consent as relating to sovereign equality in international law).

238. *See, e.g.*, Elena Katselli Proukaki, The Problem of Enforcement of International Law: Countermeasures, the Non-Injured State and the Idea of International Community 125 (2009) (discussing the position that economic embargoes "derive[ed] authority from state practice and the fact that there was no rule of international law prohibiting them").

239. *See* Vakahn N. Dadrian, *Genocide as a Problem of National and International Law: The World War I Armenian Case and its Contemporary Legal Ramifications*, 14 YALE J. INT'L L. 221, 248 (1989) ("Germany was even more reluctant to act on behalf of the Armenians; but unlike the other Powers, she did not equivocate about her posture. Bismarck, who tried to dissuade England from interfering in 'the internal affairs' of Turkey, articulated that exercise of *Realpolitik* with brutal frankness." (emphasis added)). In some instances, sovereign equality—and state freedom—is juxtaposed to a view of hegemonic *Realpolitik*. *See, e.g.*, Bardo Fassbender, *The Better Peoples of the United Nations? Europe's Practice and the United Nations*, 15 EUR. J. INT'L L. 857, 858 (2004) (juxtaposing state freedom to hegemonic *Realpolitik*). Of course, this view assumes brazen hegemonic behavior rather than the use of hegemonic power to bring about a multilateral resolution in keeping with hegemonic intentions, which is far more difficult to juxtapose with sovereign equality in this manner. *See* Alvarez, *supra* note 222, at 887 (suggesting that a hegemonic power can

freedom simply masks equal impunity.[240] If there is no rule binding the state other than the one the state agreed to, a state is prohibited from blockading, embargoing, or bombarding another only if it agreed to refrain from blockading, embargoing, or bombarding.[241] In this sense, one state's freedom precisely would not end at the tip of its neighbor's nose.[242]

B. *Peoples – Self-Determination*

Understandably, post-colonial international law combines sovereign equality with a right to self-determination to avoid this consequence of Hobbesian freedom. [243] This right to self-determination attaches freedom not to the state but to the people inhabiting its territory or a portion of its territory.[244] Freedom of states thus is accompanied by a restriction that states may not subjugate peoples with impunity, after all.[245] To a point, this form of freedom has been incorporated in orthodox international law and thus the horizontal axiom of the transnational legal process.[246]

The right to self-determination followed from the break-up of the Ottoman Empire shortly before World War I and the break-up of the

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assert its influence through international organizations and that the risks associated with such power are unclear).

240. *See* Jessica Whyte, Catastrophe and Redemption: The Political Thought of Giorgio Agamben 64 (2013) (noting the impunity with which persons could be killed in the state of nature as the driving force toward the formation of the Hobbesian *Leviathan*).

241. *See* Kirgis, *supra* note 226, at 149 (describing how the International Court will deem certain state practices as legally significant without examining the state's subjective obligations to be bound by the practice or custom).

242. *See* Donald J. Kochan, *On Equality: The Anti-Interference Principle*, 45 U. RICH. L. REV. 431, 453 (2011) (discussing the place of the adage "'[y]our right to swing your arms ends just where the other man's nose begins,'" in U.S. constitutional jurisprudence (footnote omitted)).

243. *See, e.g.*, Crawford, *supra* note 82, at 603–10 (discussing the link between decolonialization and self-determination at the end of World War II); *see also* Tom J. Farer, *Harnessing Rogue Elephants: A Short Discourse on Foreign Intervention in Civil Strife*, 82 HARV. L. REV. 511, 514–15 (1969) (discussing the limits of self-determination at the height of decolonialization).

244. *See, e.g.*, Crawford, *supra* note 82, at 114–31 (discussing to what or to whom the right to self-determination attaches); *see also* Wojciech Kornacki, *When Minority Groups Become "People" under International Law*, 25 N.Y. INT'L L. REV. 59 *passim* (2012) (same).

245. *See, e.g.*, CRAWFORD, *supra* note 82, at 119 ("[I]n extreme cases of oppression, international law allows remedial secession to discrete peoples within a State . . . ."); *see also* Jordan J. Paust, *International Law, Dignity, Democracy, and the Arab Spring*, 46 CORNELL INT'L L.J. 1, 5–6 (2013) (discussing the right of self-determination, which belongs to the people, not states, governments, or political factions, in the context of oppression).

246. *See, e.g.*, CRAWFORD, supra note 82, at 119, 602–10 (noting the incorporation of these doctrines in constitutive UN documents).

Austro-Hungarian Empire following World War I.[247] The right to self-determination historically attaches to a coherent ethnic group that has settled in a clearly defined territory and is capable of self-governance.[248] For geopolitical reasons, the colonial powers victorious in World War I did not apply the principle of self-determination to their own colonies.[249] Nor did they permit the colonies of the vanquished powers of World War I to declare independence.[250] Instead, the new global architecture introduced a "mandate structure"—or colonies by another name until the sheer cost of World War II made the coercive maintenance of empire by European powers physically impossible.[251]

The age of Decolonialization aggressively sought to provide former colonies another freedom-based argument.[252] It provided these territories an argument to throw off former masters and "self-govern."[253] Frequently, the holding of a vote was required to give legitimacy to the declaration of independence.[254] But a simple majoritarian vote would do to create a new sovereign.[255] From that point forward, the new state would be free in the traditional sense—*and* free to self-govern. The Decolonialization age ultimately pushed

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247. *See* Daniel Benoliel & Ronen Perry, *Israel, Palestine, and the ICC*, 32 MICH. J. INT'L L. 73, 88 (2010) ("[S]elf-determination has been a central part of aspirations within international law since the demise of the Ottoman Empire in the wake of World War I."); Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 54 (1992) ("[T]he principle of self-determination, as championed by Wilson and the minorities released from the embrace of the German, Russian and Austro-Hungarian Empires, was applied vigorously, if sometimes imperfectly, to the vanquished lands of postwar Europe.").

248. *See* Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1, 7–8 (1993) (explaining that classical self-determination required (1) "a people," (2) "an established territory," and (3) a collective decision to self-govern (quoting Franck, *supra* note 247, at 52)).

249. *See* CARSTEN STAHN, THE LAW AND PRACTICE OF INTERNATIONAL TERRITORIAL ADMINISTRATION: VERSAILLES TO IRAQ AND BEYOND 73–75 (2008) (discussing the origin of the Mandate system).

250. *See id.* at 73.

251. *See id.* at 73–75; *see* ASHLEY JACKSON, THE BRITISH EMPIRE: A VERY SHORT INTRODUCTION 97 (2013) (noting the importance of economic bankruptcy for the decline of the British Empire after World War II).

252. *See* Alexander MacKintosh Ritchie, *Victorious Youth in Peril: Analyzing Arguments Used in Cultural Property Disputes to Resolve the Case of the Getty Bronze*, 9 PEPP. DISP. RESOL. L.J. 325, 348 (2009) (discussing the issue in the context of Egypt).

253. Paula Wolff, *McDougal's Jurisprudence: Utility, Influence, Controversy*, 79 AM. SOC'Y INT'L L. PROC. 266, 283 (1985) ("We do not have to affirm what comes out of these revolutionary experiences in the Third World, but we should, in deference to our own past and to the legal tolerances connected with self-determination, acknowledge the political autonomy of Third World countries as a reality.").

254. *See* CRAWFORD, *supra* note 82, at 620 (discussing the confused practice with regard to the holding of plebiscites).

255. Russell A. Miller, *Self-Determination in International Law and the Demise of Democracy?*, 41 COLUM. J. TRANSNAT'L L. 601, 609 (2003) ("[S]elf-determination has long been associated with majority rule plebiscites and referendums . . . .").

sovereign equality a step further. It affirmatively required that one state's freedom ended at least at the tip of the nose of a former colony.[256] For self-determination to be meaningful, former colonial masters would have to be prohibited from interfering in a material manner in the newly established self-governance regime.[257]

This view of freedom more closely resembles a Lockean view of freedom.[258] Freedom means that peoples must have a right to set up their own civil societies.[259] Setting up of such civil societies functions by majoritarian constitutional consensus.[260] The right to set up such civil societies has to be restricted to a meaningful group to prevent certain income groups to declare independence.[261] The most logical criterion is a people—a social group sharing in deep historical, cultural, and linguistic ties.[262] Consistent with Lockean freedom, outside interference in this constitutional process is an assault on freedom.[263] A person is not free in giving his belongings to an armed robber.[264] Similarly, a people or nation is not free in giving up anything to undo outside conquest, coercion, or duress.[265] The prohibition against recognition of acts of conquest or coercion is a

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256. Stephen C. McCaffrey, *Keynote: Sustainability and Sovereignty in the 21st Century*, 41 DENV. J. INT'L L. & POL'Y 507, 511 (2013) ("'[S]overeignty' is a correlative concept. My freedom to swing my fist ends where your nose begins."); *see* Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, G.A. Res. 2131 (XX), U.N. GAOR, 20th Sess., Supp. No. 14, U.N.Doc. 6014, at 11 (Dec. 21, 1966) (basing non-interference in domestic affairs in the "principle of self-determination").

257. *See* Robert Trissotto, *Seceding in the Twenty-First Century: A Paradigm for the Ages*, 35 BROOK. J. INT'L L. 419, 425–29 (2010) (discussing the 1970 Friendly Relations Declaration, which promotes peace and international security, and the International Covenant on Economic, Social and Cultural Rights, which promotes the right to freely pursue social and economic development, in the context of decolonialization).

258. *See* Ludsin, *supra* note 119, at 115–17.

259. *See* LOCKE'S SECOND TREATISE, *supra* note 111, at 63.

260. JEFFREY B. ABRAMSON, MINERVA'S OWL: THE TRADITION OF WESTERN POLITICAL THOUGHT 218 (2009) ("Trusting in the reasonableness of human beings, Locke saw the majority as a force for reason, and he never fully developed a theory of rights against the majority." (footnote omitted)).

261. *Cf.* Jane McAdam, *An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty*, 12 MELB. J. INT'L L. 27, 37 (2011) (positing that the Lockean right to expatriate represented a means by which one could refuse to be part of a certain political community).

262. JAMES SUMMERS, PEOPLES AND INTERNATIONAL LAW: HOW NATIONALISM AND SELF-DETERMINATION SHAPE A CONTEMPORARY LAW OF NATIONS 95 (2007) ("Although the basis for government ultimately rested with individuals, Locke explicitly grounded his theory in 'the body of the nation.'" (footnote omitted)).

263. *See* LOCKE'S SECOND TREATISE, *supra* note 111, at 91.

264. *See id.*

265. *See* G.A. Res. 2131, *supra* note 256.

constitutive principle for social contracting—it protects a free bargain being struck and maintained.[266]

Premising freedom in a more Lockean understanding moves freedom outside of the realm of *Realpolitik*.[267] Freedom is not defined purely by acquiescence to a certain state of affairs (no matter by what means it has been brought about).[268] The move away from freedom as consent gives freedom some substance. It is no longer a question of procedure (did a state give its consent) but sets parameters to determine whether the procedure itself was legitimate (does the consent interfere with the constitutional order set up in a social contract by the people in question).[269]

Doggedly, orthodox international law does not give anywhere near full effect to freedom as self-determination. Instead, the rhetoric of "territorial integrity" prevents several distinct ethnic groups from forming their own states at this point in time.[270] Kurds are one highly publicized group that should have a right to self-determination if the logic of self-determination were vigorously applied.[271] But sovereign equality—the freedom of *states* to rule in their territory—still matters.[272] It has not been *replaced* by self-determination. Freedom of states thus can still trump freedom of peoples even though the freedom of peoples conceptually was intended to replace (colonial) *Realpolitik*.

The Ukrainian crisis shows that the transnational legal process can accommodate competing claims of territorial integrity *and* self-determination. Russia supports the annexation of Crimea on the basis of self-determination of the ethnic Russian population in the area.[273] This ethnic Russian population has historical (if contentious) roots in the area.[274] It thus bears some family resemblance to other self-determination cases. The United States argues on the competing basis of territorial integrity of Ukraine.[275] Ukraine has a right to rule

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266. *See* LOCKE'S SECOND TREATISE, *supra* note 111, at 91.

267. *See generally id.* at 7.

268. *See supra* Part III.A.

269. *See supra* Part III.A.

270. *See* CRAWFORD, *supra* note 82, at 415–18 (noting the extreme reluctance in contemporary international law to recognize secession outside of the colonial context).

271. *See generally* Clovis Maksoud, *Autonomy and Minorities: The Status of the Kurds and the Palestinians*, 16 LOY. L.A. INT'L & COMP. L.J. 291, 291–94 (1994).

272. *See supra* Part III.A.

273. *See* Russian Ministry of Foreign Affairs, Crimea Statement, *supra* note 9 (discussed in Part II.A.).

274. *See* Volodymyr Yevtoukh, *The Dynamics of Interethnic Relations in Crimea*, *in* CRIMEA: DYNAMICS, CHALLENGES AND PROSPECTS 69, 73–74 (Maria Drohobycky ed., 1995) (noting the significant Russian ethnic population in Crimea and its correlation with the earlier depletion of the local Tartar population by the central government).

275. *See, e.g.*, Ambassador Powers March 19, 2014 Statement, *supra* note 29 (deeming Russia's military intervention in Crimea as a violation of its territorial integrity).

the ethnic Russian population in its borders because this population lives in its borders.[276] The transnational legal process does not exclude either possibility but simply seeks to establish family resemblances to past international law problem solutions.[277]

This flexibility seems to come at a price. Thus far, the transnational legal process threateningly seems to treat freedom as a historico-political shell rather than an independent value.[278] Or differently put, it so far does not appear able to answer *why* freedom of states and freedom of peoples are relevant without pointing to political choices as to which it appears entirely agnostic.

C. *People – Individual Freedoms*

Since the end of World War II, international law has increasingly pushed its own sphere of application beyond simply the relationship between states.[279] The atrocities committed against civilians during World War II spawned an enthusiasm within the state-to-state context for recognition of individual human rights in international law.[280] And the appetite of some former Great Powers to wield military muscle to protect geopolitical interests in the name of protecting the property interest of its nationals created the necessary space to contemplate depoliticizing property disputes and providing international economic actors direct international legal rights.[281]

In pushing the boundaries of international law, human rights in particular have shifted the subject of freedom from the state, or even a people, to individuals.[282] Individuals are subject neither to the absolute rule by a state nor to the majoritarian constraint of the civil

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276. *See id.*

277. *See supra* Part II.D.

278. *See generally* KOSKENNIEMI, UTOPIA, *supra* note 10, at 67 (illustrating how the contradictory dynamics of international legal arguments, with respect to competing doctrines, make it impossible to prefer either side of the argument).

279. *See, e.g.*, Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM U. L. REV. 1, 1 (1982) ("Just as the French Revolution ended the divine rights of kings, the human rights revolution that began at the 1945 San Francisco Conference of the United Nations has deprived the sovereign states of the lordly privilege of being the sole possessors of rights under international law.").

280. David Kennedy, *Spring Break*, 63 TEX. L. REV. 1377, 1413 (1985) ("Modern human rights advocacy was born in a burst of energy after the Second World War to people who wanted to respond to nonmilitary atrocities that seemed unthinkable, incomprehensible, even banal . . . .").

281. *See, e.g.*, ANTONIO PARRA, THE HISTORY OF ICSID 23–24 (2012) (noting the involvement of the World Bank to settle claims arising out of the nationalization by Egypt of the Suez dam and the failed invasion of Egypt by French and British forces).

282. *See* Kirsten Matoy Carlson, *Jurisdiction and Human Rights Accountability in Indian Country*, 2013 MICH. ST. L. REV. 355, 368 (2013) ("Human rights treaties usually recognize rights of individuals and impose obligations on state parties to ensure and respect those rights." (footnote omitted)).

society to which they belong.[283] Human rights instruments instead establish that individuals are *immediately* free as a matter of international law.[284]

The most celebrated freedoms in human rights instruments give individuals an international legal right to be free from the arbitrary imposition of power.[285] The individual thus is guaranteed minimum protections against the use of coercive force by governments.[286] The individual further is guaranteed rights to participate in the formation of his or her government and to petition that government.[287] The individual has a right to resist any majoritarian consensus that would force the individual to give up his or her religion, language, or cultural heritage.[288] The ideal behind this conception of freedom steps beyond the Lockean social contract.[289] It requires that states and peoples treat individuals as ends in themselves rather than means to an end.[290]

The most coherent theoretical justification for treating individuals as ends in themselves rather than means to other people's ends is Kantian deontology, or obligation-based morals.[291] Modern social theorists relying on the Kantian tradition submit that all forms

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283. *See* Mykola Sorochinsky, *Prosecuting Torturers, Protecting "Child Molesters": Toward a Power Balance Model of Criminal Process for International Human Rights Law*, 31 MICH. J. INT'L L. 157, 175 (2009) (noting the anti-majoritarian function of human rights instruments).

284. *See* JAMES GRIFFIN, ON HUMAN RIGHTS 48 (2008) ("Human rights, it seems, must be universal, because they are possessed by human agents simply in virtue of their normative agency.").

285. David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 937 (2004) ("[H]istorically, international human rights law has developed as a tool to protect individuals from the arbitrary use of power by states . . . .").

286. *Cf. id.*

287. *See* Franck, *supra* note 247, at 58–59.

288. *See* Lillian Aponte Miranda, *Indigenous Peoples as International Lawmakers*, 32 U. PA. J. INT'L L. 203, 259 (2010) ("Pursuant to the human rights discourse, indigenous peoples are not recognized as possessing attributes of inherent sovereignty pre-dating the modern nation-state, but rather, are recognized as deserving human rights protection because of their distinct religious, cultural, and political ways of life." (footnote omitted)).

289. *See* ABRAMSON, *supra* note 260, at 218 ("Locke saw the majority as a force for reason, and he never fully developed a theory of rights against the majority." (footnote omitted)).

290. *See* CLARK BUTLER, HUMAN RIGHTS ETHICS: A RATIONAL APPROACH 203 (2008) (suggesting that the UN Declaration on Human Rights requires the recognition of persons as ends in themselves).

291. *See* Daniel R. Williams, *After the Gold Rush – Part II: Hamdi, The Jury Trial, And Our Degraded Public Sphere*, 113 PENN. ST. L. REV. 55, 82 (2008) (arguing that Kant, who placed "the source of all authority in the rationality of the individual" rather than in the state, is the "locus of classical liberal Western human-rights discourse").

of social organization must be rational.[292] To be rational, they submit that a person would have to assent to the form of social organization even if he or she did not know which place he or she would inhabit in it.[293] As the person may end up in the worst position in the social organization, a rational actor would choose to impose material protections for these weakest participants. [294] These material protections are rational minimal conditions of freedom for all in international civil society.[295]

Kantian and neo-Kantian theory posits these requirements of rational civic organization do not stop at the threshold of international borders.[296] Rather, Kantian and neo-Kantian theory aspires to a cosmopolitan government guaranteeing these basic minimum conditions of freedom to all of humanity.[297] To Kantian and neo-Kantian theorists, birth into a nation-state or ethnic group is mere accident.[298] The person in the hypothetical original position determining how to organize society would in fact not even know which ethnic group or nation-state he or she would ultimately end up living in.[299] A rational actor therefore would require not only that a *specific* state or civil society enact the rational minimum conditions of freedom[300] but also that these minimum conditions be put in place as a universal norm binding all states and peoples.[301]

Arguments premised in individual freedoms recognized by international law are strongly on display in the Ukrainian crisis. United States arguments point to significant human rights abuses of

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292. *See id.*

293. *See* RAWLS, A THEORY OF JUSTICE, *supra* note 110, at 136–45 (discussing the veil of ignorance in the original position of social deliberation as a direct derivative of Kantian deontology).

294. *See id.* at 149–57.

295. *See, e.g.*, Stelios Andreadakis, *The European Convention on Human Rights, The EU and the UK: Confronting a Heresy: A Reply to Andrew Williams*, 24 EUR. J. INT'L L. 1187, 1188–90 (2013) (suggesting that human rights instruments, such as the European Convention on Human Rights, operate "as minimum standards" of protection).

296. Vlad Perju, *Cosmopolitanism in Constitutional Law*, 35 CARDOZO L. REV. 711, 714 (2013) (noting a study that "draws specifically on Kant to define a cosmopolitan legal order as 'a transnational legal system in which all public officials bear the obligation to fulfill the fundamental rights of every person within their jurisdiction, without respect to nationality or citizenship.'" (footnote omitted)).

297. *See id.*

298. RAWLS, A THEORY OF JUSTICE, *supra* note 110, at 311–12 ("[T]he initial endowment of natural assets and the contingencies of their growth and nurture in early life are arbitrary from a moral point of view.").

299. *See id.* at 137 (explaining that in the original position, "[N]o one knows his place in society, his class position or social status").

300. *See id.* at 457 (noting the limitation of theories of justice in the first instance to "a self-contained national community").

301. *See generally* JOHN RAWLS, THE LAW OF PEOPLES 30–35 (1999) (discussing the application of the original position to a law of peoples).

dissidents at the hands of the ousted Ukrainian government.[302] The United States argument is not just—or even principally—that the Ukrainian government had counteracted the will of the majority of Ukrainians but that it undermined basic protections for Ukrainian citizens to be free from political persecution.[303] Russian arguments similarly rely upon human rights concerns—be it the human rights of the ethnic Russian population throughout Ukraine.[304] The Russian argument submits that the successful protesters are anti-Russian and thus would discriminate against ethnic Russian Ukrainian citizens.[305] This argument is relevant to an international legal argument not just in the case of self-determination of a geographically distinct area with strong historical ethnic Russian majorities—such as Russia argues is the case in Crimea.[306] It is relevant throughout Ukraine particularly in areas in which ethnic Russian Ukrainians are in the minority—and thus need legal protections against an allegedly oppressive majority.[307]

Transnational legal process theory can make sense of this new theoretical input for the internalization of proposed interpretations of freedom advanced by the United States and Russia. In fact, current legal arguments draw on all three incommensurable theories as to who is free—Ukraine, ethnic groups within Ukraine, or individual Ukrainian residents. Transnational legal process theory therefore needs to provide a coherent explanation how all three—state, peoples, and people—can be relevant to a freedom analysis.

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302. *Human Rights Report Ukraine*, *supra* note 210, at 1 ("The third major [human rights] problem was the practice of politically motivated prosecutions and detentions, including the continued imprisonment of former prime minister Yuliya Tymoshenko."); *see also* State Department January 15, 2014 Testimony, *supra* note 57 (reporting increased pressure on and violence towards the media).

303. *See State Department January 15, 2014 Testimony*, *supra* note 57; *see also Kerry Statement*, *supra* note 7 (quoted above).

304. *See generally* Editorial Board, *Mr. Putin's Power Play*, N.Y. TIMES, Apr. 16, 2014, at A24, *available at* http://www.nytimes.com/2014/04/16/opinion/mr-putins-power-play.html?_r=0 [http://perma.cc/7JCG-N9Q5] (archived Jan. 20, 2015) (critiquing Russia's human rights based arguments as hypocritical and unfounded).

305. *See id.* (highlighting Putin's belief that Russians are threatened in Eastern Ukraine).

306. *See* Russian Ministry of Foreign Affairs, Crimea Statement, *supra* note 9 (noting that the Crimean push for independence is supported by both international and legal justifications).

307. *See* Lally & Englund, *supra* note 69 (discussing Putin's defense of Russian intervention in Ukraine).

D. *The Transnational Moment – People in Society*

Transnational law transcends orthodox international law by pushing law all the way down to people in civil society. [308] Transnational law is precisely premised in rejecting that states or potential states have a claim to exclusivity in establishing world order.[309] Instead, the transnational legal process, or processes, "are manifold, simultaneous, and iterative, involving disparate actors, applications, and flows in multiple directions." These directions include horizontal processes between states and states, and between states and potential states. They also include vertical processes between states and people and diagonally between people across transnational transactions.[310]

This premise of the transnational legal process means that freedom cannot be defined by reference to states or peoples.[311] To do so would deprive its key insight that the transnational legal process operates vertically as well as horizontally and thus completely permeates national borders, depriving them of ultimate meaning or significance.[312] As discussed below, the transnational legal process thus *must* answer the question "who is free" with "people."

To avoid self-contradiction, the transnational legal process now owes us an explanation: if "freedom" is about people rather than peoples or states, why are arguments premised in territorial integrity of the state or self-determination meaningful propositions in the transnational legal process?[313] If the transnational legal process is about people, then other arguments about peoples or states should simply be translated into the metric of individual rights and compared according to this single common denominator.[314]

This question poses significant procedural problems for transnational legal process theory.[315] Transnational legal process

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308. *See* Koh, *TLP*, *supra* note 14, at 184 ("[T]he actors in this process are not just, or even primarily, nation-states, but include nonstate actors as well.").

309. *See, e.g.*, PHILIP C. JESSUP, TRANSNATIONAL LAW 3 (1956) (noting the heterogeneity of the subjects of transnational law).

310. *See* Shaffer, *Process*, *supra* note 14, at 235.

311. *See, e.g.*, Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 671 (1998) (discussing the incorporation of human rights norms in domestic English law by reference to the transnational legal process).

312. *See* Shaffer, *Process*, *supra* note 14, at 235.

313. *See supra* Part III.A.

314. In other words, there would be a universal standard of reason that could be used in order to unite the apparent plurality of value commitments. For further discussion, see generally SUSAN MENDUS, IMPARTIALITY IN MORAL AND POLITICAL PHILOSOPHY (2002).

315. *See, e.g.*, GREGORY SHAFFER, TRANSNATIONAL LEGAL ORDERING AND STATE CHANGE 39 (2012) (noting that "[c]onflicts among transnational legal processes often reflect political struggles both among and within states").

maintains that it does not impose its own conception of value but relies upon the value structure of its participants.[316] If the transnational legal process turns out to be exclusively about human rights, it would be hard to resist the tug of a comprehensive neo-Kantian theory of justice.[317] The transnational legal process in that case would be a different means of viewing international relations through the goggles of political liberalism rather than being the meaningfully apolitical theory it claims to be.[318]

The substantive problem of adopting the human rights rationale outright is that human rights discourse deems certain values of process participants to be irrational—and thus invalid.[319] These values are irrational because the person in question is simply blinded by his or her social position into accepting them.[320] Without being born into the social position in question, rational self-interest would suggest that the person in question simply is being hoodwinked into supporting the social interests of others without receiving much of anything in return.[321] The position is invalid because it is prejudiced and ultimately oppressive to the person holding it.[322]

This view of rationality arguably assaults deeply held religious beliefs and moral convictions of large swaths of the world's population as irrational and invalid.[323] The measure of irrationality by which these beliefs and convictions are deemed invalid has a distinct European pedigree.[324] Imposing this European value structure as the only measure of rationality for world society is deeply problematic for the simple historical reason that it is the same European value

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316. *See* Harold Hongju Koh, *Jefferson Memorial Lecture Transnational Legal Process After September 11th*, 22 BERKELEY J. INT'L L. 337, 339 (2004) [hereinafter Koh, *After 9/11*] (noting the reliance of the transnational legal process on the internalized normative codes of its participants).

317. *See supra* Part III.C.

318. *See* Part III.C (pointing out the inherent conflict of "right and might" in the context of the Ukraine).

319. *See, e.g.*, Naz K. Modirzadeh, *Taking Islamic Law Seriously: Ingos and the Battle for Muslim Hearts and Minds*, 19 HARV. HUM RTS. J. 191, 193–94 (2006) ("Islamic law, as currently applied in many countries, violates international human rights law.").

320. *Cf.* NUSSBAUM, FOG, *supra* note 41, at xxvii (noting the distorting effect of social experience and the ability to rationally critique socially internalized injustice).

321. *Cf.* RAWLS, A THEORY OF JUSTICE, *supra* note 110, at 328–29 (discussing the limitation of cultural theories as perfection by the rationality of the original position).

322. *Cf.* NUSSBAUM, FOG, *supra* note 41, at 158–64 (noting that Plato attempts a similar move in the *Republic* to (partly) move people beyond the merely human point of view on value).

323. *See, e.g.*, Modirzadeh, *supra* note 319, at 193–94 (discussing the inconsistency between Islamic law as currently applied and human rights norms).

324. *Cf.* JOHN M. HEADLEY, THE EUROPEANIZATION OF THE WORLD: ON THE ORIGINS OF HUMAN RIGHTS AND DEMOCRACY (2008) (discussing the rise of the notion of humanity as a "single moral collectivity" among the religious class and how the idea spread to a wider, more secular audience during the Renaissance).

structure which suggested that Colonialization was a good idea in the first place. As critiques of international law have long pointed out, international law as "*Gentle Civilizer of Nations*" is deeply morally suspect given the atrocities committed in its name.[325]

Transnational legal process avoids this problem by avoiding to cast people as "individuals."[326] Individualism suggests that it is possible to meaningfully remove people from their immediate social context to determine the justice or injustice of their respective social situation.[327] This is the guiding premise of Kantian rationalism and influential modern political theory based upon it—most notably John Rawls' *Theory of Justice* and Ronald Dworkin's legal constructivism.[328] By rejecting this premise, transnational legal process takes social attachments seriously.[329] People form part of networks—religious communities, peoples, linguistic communities, regions, and states.[330] These value structures are not static but, as the transnational legal process itself demonstrates, dynamic.[331] Rather than deeming social practices *per se* invalid as irrational, the transnational legal process takes a longer view.[332] It confronts these social practices with different interactions, different alternative interpretations of the overall social fabric of which they form part, and thus would bring about internalization of new norms in the context of the old.[333]

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325. *See* MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960, at 146–47 (2001).

326. *See* H. H. Koh, *Transnational Legal Process Illuminated*, *in* TRANSNATIONAL LEGAL PROCESS 327, 328 (Michael Likosky ed., 2002) [hereinafter *TLP Illuminated*] (placing participants in the process in the context of their relevant interpretive communities).

327. *See* THOMAS POGGE, JOHN RAWLS: HIS LIFE AND THEORY OF JUSTICE 185–89 (2007) (discussing the rational individualistic underpinnings of Rawls' neo-Kantian theory of justice).

328. On the link between Rawls, Dworkin and Kant, see VICTOR SEIDLER, KANT, RESPECT AND INJUSTICE: THE LIMITS OF LIBERAL MORAL THEORY 128–32 (2010).

329. *See TLP Illuminated*, *supra* note 326, at 328 (quoted above).

330. *See id.* at 331–32 (highlighting the importance of governmental communities); Koh, *After 9/11*, *supra* note 316, at 339 (highlighting the importance of religious communities in people's internalization of moral codes); Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT'L L. 125, 188–89 (2005) (discussing the importance of networks to transnational legal process theory).

331. *See* Koh, *TLP*, *supra* note 14, at 184.

332. *See id.*

333. It is in this sense that "reason" can critique social processes while also remaining anchored in the very same process it critiques. *See* NUSSBAUM, FOG, *supra* note 41, at xxviii (noting that a theory premised in a holistic process of self-appraisal "protects our judgments against becoming the dupe of self-interested rationalization; and it extends our thought into areas that we may not have explored or experienced").

This subtle positioning of people in society is consistent with linguistic structures more generally.[334] Language provides communal structures within which a person acts. In this context, a person will feel as if he or she records private, individual experiences.[335] But this is an illusion because the private experience is reflected in the superstructure prepared by a social practice: language itself.[336] Thought, speech, and writing are always anchored in a social practice from which they simply cannot be divorced.[337]

Language still remains a tool for personal inquiry and critique. By engaging in a linguistic practice, participants "make room" for their contribution.[338] But this contribution only "makes sense" if it uses the techniques accepted within the discourse in which it participates.[339] Contribution is "interpretation" of an existing set of rules and cultured experiences.[340] If this contribution is internalized by others, the interpretation accepted, the entire social fabric changes—not just the world of the contributor.[341] Interpretation and internalization thus cannot step out of existing discourse structures because statements have meaning only in the context of that discourse.[342] This structure of discourse means that to take persons seriously one must take the social context in which they act seriously. Persons are socialized.[343] But, due to language, their socialization works in both directions.[344] Persons are not just defined by the

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334. *See* Wittgenstein, *supra* note 134, at 356 (setting out the private language argument); Alec Walen, *Criticizing the Obligatory Acts of Lawyers: A Response to Markovits's Legal Ethics from the Lawyer's Point of View*, 16 YALE J.L. & HUMAN. 1, 20–21 (2004) (explaining that the point of the private language argument "is this: for S to be a sign for a private concept, the speaker still has to be able to say what it is a concept of. But once he starts down that road, he is on the road to using a public language, full of public concepts").

335. Wittgenstein, *supra* note 134, at 361 ("[M]uch must be prepared in language for the act of naming itself to make sense.").

336. *Id.*

337. *Id.*

338. *Id.* ("For example, when we say that someone names his pain the grammar of 'pain' prepares the way for that assertion; it shows the place the new word can inhabit.")

339. *See id.* at 363 (noting that a person wishing to give a personal definition relies on preexisting naming structures).

340. *See* Koh, *TLP*, *supra* note 14, at 184 (describing a process of interaction where new laws emerge, which are interpreted, internalized, and enforced in the international arena).

341. *See id.*

342. Wittgenstein, *supra* note 134, at 369.

343. *Cf.* ARISTOTLE, POLITICS 4 (C.D.C. Reeve trans., 1998) (350 BCE) ("[A] human being is by nature a political animal . . . .").

344. *See id.* ("[A] human being is more of a political animal than a bee or any other gregarious animal [because] no animal has speech except a human being.").

discourse in which they participate, they actively transform any discourse in which they themselves act by contributing to it.[345]

Transnational legal process thus can hold without self-contradiction that people are free rather than states or peoples.[346] But it can also maintain that the lens of the freedom of peoples or the freedom of states is relevant to determining what the substance of freedom is.[347] As any FIFA World Cup demonstrates, people value belonging to a state and assign value by reference to their national identity.[348] State freedom less trivially simply is a real factor affecting the conduct of international affairs and the relationship of people to international affairs.[349] It represents a relevant horizon of interpretation for that reason alone.[350] The same is true with regard to cultural belonging to ethnic non-state groups.[351] Because people hold value structures by means of their internalizations of the social and political, any conception of freedom similarly must internalize these commitments.

Mediating between individual, social, and political identities, the transnational legal process plausibly reflects our every day experience of freedom. To be free is always to be free in the context of society. To say "I'm free" makes sense precisely when one's various social commitments conflict.[352] There is more than one plausible action one can take.[353] One must choose between them.[354] Being free does not mean the absence of choice or the presence of arbitrary will. Rather, it describes a state of being in society affecting one's ability to choose and act in society. For a person to be free, the transnational legal process would posit, society has to allow one to act and take seriously the ethical dilemmas that any of one's more important choices can entail.

The transnational legal process reconciles the apparently disparate arguments about who is free in transnational law, states,

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345. *See* Koh, *Obey*, *supra* note 14, at 2646.

346. Shaffer, *Process*, *supra* note 14, at 246–47.

347. *See supra* Parts III.A & III.B.

348. *See* Philip Oltermann, *German World Cup Winners Welcomed Home by Hundreds of Thousands*, GUARDIAN (July 15, 2014), http://www.theguardian.com/football/2014/jul/15/germany-world-cup-winners-return-home (last visited July 15, 2014) (reporting that half a million people greeted the World Cup-winning German football team upon the team's return to Berlin).

349. *See TLP Illuminated*, *supra* note 326, at 331–32 (discussing the importance of government officials in transnational law).

350. *See id.*

351. *See id.*

352. *See* NUSSBAUM, FOG, *supra* note 41, at 79–82 (discussing deliberation in the context of incommensurable values in the context of Tiresias' advice in Sophocles' *Antigone*).

353. *See id.*

354. *See id.*

peoples, or people, by placing the problem in a different light.[355] It posits that the transnational legal process is about personal freedom.[356] But it takes a meaningfully different view of what it means to be an individual.[357] Rather than setting up the individual in juxtaposition to his or her social context, as enlightenment individualism so frequently does,[358] the transnational legal process conceives of people as acting in, and defined by, the communities to which they belong.[359] A person is not an atomistic "individual" coming into the world as a blank slate.[360] A person is of necessity a participant in a rich web of processes he or she was born and socialized into—and a person could not meaningfully choose to opt out of the process as even that choice would be made in the terms and against the background of these very processes in question.[361]

Transnational legal process passes the first hurdle—it has a cogent theory of who is free. It is ultimately a theory of personal freedom. It thus can balance arguments about freedom in the Ukrainian crisis not because it lacks value but because it internalizes the incommensurable attachments people in society have to the various groups to which they belong. So far, process thus is resilient to critique that it has engaged merely in evasion of an ultimately political conclusion. And it has done so by embracing at its core the social nature of human beings as constitutive of any legally meaningful definition of freedom. Having determined who is free, thus clears the way for the final question: what is the value of freedom in transnational legal process scholarship? Or, more directly, what is freedom in transnational law?

IV. WHICH FREEDOM: PRIVACY, AUTONOMY, OR DIGNITY?

Contemporary political theory sets up a dichotomy between negative freedom and positive freedom.[362] Negative freedom means

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355. *See supra* Part III.

356. *See supra* Part III.D.

357. *See* supra Part III.D.

358. *See* ALASDAIR MCINTYRE, AFTER VIRTUE 62 (3d ed. 2013).

359. *See* NUSSBAUM, FOG, *supra* note 41, at 5 (setting up the same distinction between Kantian and Neo-Kantian philosophy and Ancient Greek philosophy).

360. *See, e.g.*, JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 51 (T. Tedgg & Son 1836) (1689) ("Let us then suppose the mind to be, as we say white paper, void of all characters, without any ideas . . . .").

361. *See* Wittgenstein, *supra* note 134, at 361.

362. *See* Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 207 (2011) (discussing the concept of dignity and its connection to negative freedom); Peter Westen, *'Freedom' and 'Coercion' - Virtue Words and Vice Words*, 1985 DUKE L.J. 541, 550 (1985).

that a person either could be free from the state or *from* others;[363] this conception of freedom sets up a zone of protected privacy.[364] Alternatively, under positive freedom, a person could be free *to* achieve goals, typically with the help of others;[365] this conception of freedom sets up a commonwealth that governs itself in accordance with the conception of freedom—or literally in accordance with the principle of *auto-nomos* (self-rule) or autonomy.[366]

As the Ukrainian crisis shows, transnational legal arguments about freedom invoke both conceptions at the same time. Both the United States and Russia rely upon negative freedom when they accuse each other of inappropriately interfering in Ukrainian internal affairs, thus premising their arguments in the negative freedom of the *state*.[367] Both the United States and Russia rely upon negative freedom when they accuse each other of violent and arbitrary oppression of political dissidents, thus premising their arguments in the negative freedom of the *individual*.[368]

At the same time, Russia relies upon the positive-freedom-regarding right of areas with majority ethnic Russian populations, such as Crimea, to self-govern (at the exclusion of the rights of minorities in the areas to continue to belong to the larger territorial sovereign previously controlling the territory in question).[369] Similarly, the United States relies upon a similar argument to justify the overthrow of the constitutional government in Kyiv—this overthrow is legitimate because it reflects the direct will of the people

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363. See Westen, *supra* note 362, at 550 ("Negative freedom is freedom from; it is the 'absence of obstacles to possible choices and activities—absence of obstructions on roads along which a man can decide to walk.'" (emphasis omitted) (footnote omitted) (quoting ISAIAH BERLIN, FOUR ESSAYS IN LIBERTY xxxix (1969)).

364. See Rao, *supra* note 362, at 207 ("In America, privacy interests are often characterized as being a form of negative freedom—freedom from interference by the government in one's home or over personal decisions.").

365. *See* J.L. Hill, *The Five Faces of Freedom in American Political and Constitutional Thought*, 45 B.C. L. REV. 499, 508–09 (2004) (discussing the various overlapping uses of "positive freedom" in legal and philosophical literature).

366. *See* 1 PHILOSOPHY OF LAW: AN ENCYCLOPEDIA 72 (Christopher Berry Gray ed., 1999) ("The etymology of 'autonomy' (*auto-nomos*) indicates its general meaning: '*self-rule.*'").

367. See Rubin March 6, 2014 Statement, *supra* note 207 (quoted in footnote above); Taylor, *supra* note 207 (Putin "blamed the West for interference in Ukraine").

368. *See, e.g.*, State Department January 15, 2014 Testimony, *supra* note 57 (voicing U.S. support for "the Ukrainian people . . . in their struggle for fundamental human rights and a more accountable government"); Tom Cohen, *Is Crimea Gone? Annexation No Longer the Focus of Ukraine Crisis*, CNN (Apr. 1, 2014, 5:40 AM), http://www.cnn.com/2014/03/31/politics/crimea-explainer/ [http://perma.cc/P97B-GT6C] (archived Jan. 19, 2015) ("Putin claimed ethnic Russians in Crimea faced oppression and needed Moscow's protection . . . .").

369. *See, e.g.*, Russian Ministry of Foreign Affairs, Crimea Statement, *supra* note 9 (discussed in Part II.A above).

to be free, meaning to govern themselves.[370] More to the point, both sides, the United States and Russia, appear to clash about the freedom of Ukrainians to decide upon a geopolitical alignment with the West or with Russia.[371] This question is quintessentially one of positive freedom—one concerning the choice of collective identity rather than individual claims to go against the grain of that collective.[372]

The Ukrainian crisis also shows that these arguments meaningfully conflict. A negative view of freedom would condemn the actions of the Russian separatist government in Crimea and Eastern Ukraine to expropriate swaths of property and arrest people of the wrong political persuasion.[373] Similarly, a negative view of freedom would condemn the actions of the new Ukrainian government to issue arrest warrants for politicians like President Viktor Yanukovych within days of taking power.[374] But these actions are precisely defensible under a positive view of freedom—a view of freedom which has as its goal to create conditions sufficient to allow self-government by civic society.[375] In short, to negative freedom the individual has primacy over civil society.[376] To positive freedom, the reverse is true.[377]

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370. *See, e.g., id.*; Kerry Statement, *supra* note 7 (quoted above).

371. *See* Editorial Board, *Ukraine Faces a Key Decision on Alignment with Europe*, WASH. POST (Nov. 12, 2013), http://www.washingtonpost.com/opinions/ukraine-faces-a-key-decision-on-alignment-with-europe/2013/11/12/075d36f4-470d-11e3-bf0c-cebf37c6f484_story.html [http://perma.cc/89QM-TUM3] (archived Jan. 19, 2015).

372. *See* Hill, *supra* note 365, at 508–09; Westen, *supra* note 362, at 550 (asserting that positive freedom "is not freedom *from*, but freedom *to*"); *Rao*, *supra* note 362, at 207 (describing the conflict between conceptions of dignity and the balance between individual liberty and social or political goals).

373. *See Expropriations Will Cost Crimea Ports Traffic*, LLOYDS LIST (London) (Mar. 19, 2014), http://www.lloydslist.com/ll/sector/ports-and-logistics/article438701.ece (noting the decision of Crimea "to confiscate Ukrainian state infrastructure"); *Russia Plans to Re-Start Expropriated Crimean Wind Farms*, EXPROPRIATIONNEWS.COM (May 21, 2014), http://expropriationnews.com/2014/05/21/russia-plans-to-re-start-expropriated-crimean-wind-farms/ [http://perma.cc/HYE5-3CW8] (archived Jan. 19, 2015) (reporting on Russian efforts to re-start wind farms in newly-annexed Crimea); John Reed, *Arrests and Disappearances on Rise in Eastern Ukraine*, FIN. TIMES (U.K.) (Apr. 23, 2014, 5:06 PM), http://www.ft.com/intl/cms/s/0/61285c88-caf0-11e3-9c6a-00144feabdc0.html#axzz3SDgeY3UZ (describing a trend of Russian political opponents disappearing in eastern Ukraine).

374. *See* Ralph Ellis & Nick Paton Walsh, *Ukraine Issues Arrest Warrant for Ousted President Viktor Yanukovych*, CNN (Feb. 24, 2014, 4:04 PM), http://www.cnn.com/2014/02/24/world/europe/ukraine-politics/_[http://perma.cc/YU5W-ZGEU] (archived Jan. 20, 2015).

375. *See* Hill, *supra* note 365, at 508–09.

376. *See* ALI MADANIPOUR, PUBLIC AND PRIVATE SPACES OF THE CITY 160 (2003) ("This is a tension between the primacy of the individual and the primacy of the group, as manifested in many layers of debate.").

377. *See id.*

Again, the transnational legal process appears to accept facially contradictory conceptions of freedom; it makes sense of arguments premised in negative freedom (or freedom as privacy) and in positive freedom (or freedom as autonomy). How then can the transnational legal process incorporate both concepts of freedom without becoming devoid of substance? The answer lies in its conception of the person as acting in, but also transforming, the community of which he or she belongs, introduced in the previous Part.

A. *Privacy – The Concept of Negative Freedom*

Orthodox international law defines freedom negatively.[378] For a state to be "free" means that no other state has the right or the authority to interfere with that state's exercise of sovereignty.[379] This orthodox definition of the freedom of states applies similarly in the human rights context: the state must not interfere with an individual's basic choices relating to his or her own life.[380]

The importance of a negative conception of freedom for orthodox international law is unsurprising for both intellectual and pragmatic reasons. As a matter of intellectual history, the Western political theory informing the formation and development of international law predominantly relies upon a negative definition of freedom.[381] The negative definition of freedom is paradigmatic for Hobbesian political theory.[382] A person is free if he or she is not physically hindered from applying his or her will.[383] Liberal political theory rejected this narrow scope of Hobbesian freedom, adding to it the requirement that physical or mental duress not hinder application of will.[384] But liberal political theory by and large has adopted the definition of freedom as defending the ability to choose—to apply will—rather than its positive counterpart of achieving a common purpose.[385]

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378. *See, e.g.*, Paul W. Kahn, *The Question of Sovereignty*, 40 STAN. J. INT'L L. 259, 262 (2004) (noting that sovereignty based on negative freedom "was such a powerful norm in modern international law because the character of positive sovereignty had been redefined by the experience of revolution").

379. *Id.* On what "interfere" means, that is, which conception of freedom underlies it, see *supra* Part III.

380. *See* Costas Douzinas, *The End(s) of Human Rights*, 26 MELB. U. L. REV. 445, 462 (2002) (noting the negative definition of freedom in the human rights context).

381. *See, e.g.*, DOMENICO LOSURDO, HEGEL AND THE FREEDOM OF MODERNS 272 (2004) (framing "negative freedom" as the "*leitmotiv* of the Anglo-Saxon tradition").

382. *See* SKINNER, HOBBES, *supra* note 95, at 35 (2008) (noting the negative terms in which human freedom is defined).

383. *See* LEVIATHAN, *supra* note 87, at 148 ("A [f]ree [m]an, is he . . . which by his strength and wit he is able to do, is not hindered to do what he has a will to.").

384. *See* MATTHEW H. KRAMER, THE QUALITY OF FREEDOM 245–52 (2003) (discussing the relationship between negative freedom and coercion or duress in contemporary liberal political theory).

385. *See* LOSURDO, *supra* note 381, at 272 (quoted above).

The historical roots of liberal thought are particularly easy to transpose to international law for pragmatic reasons. Pragmatically, states would have to agree to a common goal—and appropriate means to achieve this goal—in order to abide by a positive definition of freedom.[386] There would need to be an agreement *ex ante* what "international civic society" is about.[387] Pragmatically, there simply is no such agreement;[388] a negative definition of freedom is far more in keeping with the day-to-day experience of many participants in the transnational legal process.[389] This day-to-day experience is that individuals and states alike make claims that they have a right to privacy. In the context of constitutional jurisprudence to which participants in the transnational legal process would be accustomed from their own domestic law experience, negative freedom—freedom from—presumes a sphere in which an individual has complete authority.[390] It is a place from which a person may exclude others.[391] This sphere in which a person has such complete authority typically is his or her home, his or her body.[392] Claims to, and discussion of, such "privacy" are at the forefront of much of the current American

386. *See* Kahn, *supra* note 378, at 272–73.

387. *See id.*

388. *See* ROBERT W. MCELROY, MORALITY AND AMERICAN FOREIGN POLICY: THE ROLE OF ETHICS IN INTERNATIONAL AFFAIRS 17 (2014) (explaining that divergence of interests leads to divergence on the view of the goals of international society).

389. *See id.* at 17–18 (arguing that nations in the international system are unwilling to act upon the principle "that the good of the whole . . . should take precedence over the good of the individual nation").

390. *See* Evelyn Keyes, *The Just Society and the Liberal State: Classical and Contemporary Liberalism and the Problem of Consent*, 9 GEO. J.L. & PUB. POL'Y 1, 56 (2011) ("[R]espect for negative liberty requires that 'a frontier must be drawn between the area of private life and that of public authority,' creating a zone of privacy, or area of personal moral liberty secured against governmental intrusion." (emphasis omitted) (footnote omitted)).

391. *See* Nita A. Farahany, *Searching Secrets*, 160 U. PA. L. REV. 1239, 1261–65 (2012) (discussing the right to exclude in the context of Fourth Amendment jurisprudence).

392. *See id.* at 1265 ("The right to exclude others is the strongest when officials search the home or body and weaker when the government searches property voluntarily and ordinarily exposed to the public."); *see also* Rebecca Rausch, *Reframing Roe: Property over Privacy*, 27 BERKELEY J. GENDER L. & JUST. 28, 58–62 (2012) (proposing a similar frame of reference in the context of constitutional protections regarding abortions).

debate about political freedoms in civil rights.[393] It similarly informs the human rights discourse.[394]

This understanding of freedom as privacy is included in a strong definition of sovereignty.[395] Such a theory prescribes that sovereigns have ultimate—that is, unchallengeable—authority against all outsiders.[396] This theory directly transposes the privacy concern from the individual sphere to the state-to-state sphere.

The Ukrainian crisis is replete with such arguments about privacy both on the state-to-state and individual level. Russia thus casts the support by Western leaders of the Ukrainian revolution as an "invasion of privacy" of Ukraine.[397] The United States on the other hand raises similar arguments with regard to the annexation of Crimea by Russia for the ostensible purpose of protecting the local ethnic Russian population.[398] Both look to privacy invasions of individuals as further support for their respective legal cases.[399]

Given the importance of the negative conception of freedom of international law, the transnational legal process must internalize arguments premised upon it.[400] Transnational legal process scholars in fact appear to have internalized, or permit internalization of, such negative freedom norms.[401] But problematically, the negative concept of freedom is deeply at odds with the core theoretical commitment of transnational legal process. Transnational legal process works

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393. *See generally* Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431 (1992) (discussing privacy in America in the context of the *Hardwick* case); Yishai Blank & Issi Rosen-Zvi, *The Geography of Sexuality*, 90 N.C. L. REV. 955, 1011 (2012) (arguing to move away from a purely negative conception of freedom in the context of gay rights).

394. Mart Susi, *Delfi AS v. Estonia*, 108 AM. J. INT'L L. 295, 301 (2014) (discussing the right to privacy in the context of a recent European Court of Human Rights judgment).

395. *See* Marcella David, *Grotius Repudiated: The American Objections to the International Criminal Court and the Commitment to International Law*, 20 MICH. J. INT'L L. 337, 339 & n.6 (1999) (discussing Henkin's criticism of privacy-based strong sovereignty).

396. *See generally* Frédéric Gilles Sourgens, *Positivism, Humanism, and Hegemony: Sovereignty and Security for Our Time*, 25 PENN. ST. INT'L L. REV. 433 (2006) (discussing the historical development of sovereignty in international law).

397. *See* Taylor, *supra* note 207.

398. *See* Rubin March 6, 2014 Statement, *supra* note 207 (outlining the U.S.'s belief in protecting the sovereignty of Ukraine).

399. *See id.* (emphasizing that "the democratic transition that occurred in Ukraine was an expression of will of the Ukrainian people"); Taylor, *supra* note 207 (explaining Russia's resistance to the West as arising out of a desire to insulate the people of Russia and Ukraine from outside interference).

400. Failure to do so would simply make the transnational legal process substantively untenable. *See* Kahn, *supra* note 378, at 262.

401. *See* Oona Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821, 1840 (2003) (discussing negative liberty); Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 135 (2009) (discussing negative liberty).

through process participation.[402] A negative view of freedom would precisely stipulate that freedom means the absence of process—that is, the right to be free *from* the transnational legal obligations process itself entails.[403]

This problem is not trivial.[404] Transnational legal process assumes and requires that it can ascribe meaning to *any* problem.[405] The question is *how* the transnational legal process would internalize the current situation into an existing web of past cultured experience.[406] Internalization requires a comparison of the current problem to past instances of process application.[407] This in turn means that there is no factual areas that are *a priori* beyond the reach of transnational legal process—process reaches as far as our experience and our imagination can proceed.[408]

Worse still, the point of process theory is that even the decision to opt out of process only makes sense through the lens of process itself.[409] In the same way that there is no fully private language because all language relies upon a prefabricated social grammar, there is no fully private space because the conception of this "space" relies upon a prefabricated social grammar as well.[410] Process precisely means, as Wittgenstein would suggest, the *absence* of privacy and thus the rejection of negative freedom.[411]

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402. Harold Hongju Koh reinterprets sovereignty as representing "a nation's capacity to participate in international affairs." Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1480 (2003) [hereinafter Koh, *Exceptionalism*] (footnote omitted).

403. *See* Keyes, *supra* note 390, at 56.

404. *See* Margaret Jane Radin, *Presumptive Positivism and Trivial Cases*, 14 HARV. J.L. & PUB. POL'Y 823, 829–30 (1991) (defining trivial cases as those in which "nothing of much importance is at stake" either "because nothing of much moral importance to the judge is stake" (morally trivial) or "no one will lose a lot of money, be incarcerated for a long time, or have her life strongly affected in some other way" (consequentially trivial)).

405. *Compare* Koh, *TLP*, *supra* note 14, at 207, *with* NUSSBAUM, FOG, *supra* note 41, at 70 (noting the open-endedness of complexity).

406. *See, e.g.*, Koh, *TLP*, *supra* note 14, at 203–06 (discussing interaction and internalization in the transnational legal process).

407. *See id.*; *see also* NUSSBAUM, FOG, *supra* note 41, at 69 (characterizing the process of interpretation as "burrowing with horizontal drawing of connections").

408. *See, e.g.*, Ian Ward, *The End of Sovereignty and the New Humanism*, 55 STAN. L. REV. 2091, 2106 (2003). Ward writes:

> Perhaps the most compelling account of a such [sic] a 'process' is captured in William Twining's suggestion that there must be a 'remapping' of law. What we need, according to Twining, is a map that properly 'emphasizes the complexities and elusiveness of reality, the difficulties of grasping it, and the value of imagination and multiple perspectives in facing these difficulties.'

Id. (quoting WILLIAM TWINING, GLOBALIZATION AND LEGAL THEORY 49, 243 (2000)).

409. *See supra* Part III.C.

410. Wittgenstein, *supra* note 134, at 356.

411. *Id.*

The inclusion of negative freedom in the vocabulary of the transnational legal process poses a puzzle. Negative freedom appears inconsistent with the process' premise. There is no privacy in process. A theoretical account of freedom therefore will have to reconceptualize and explain how traditional negative conceptions of freedom can be reconciled with the process perspective—or risk devolving into an arbitrary justification for politically predetermined results.

B. *Autonomy – The Concept of Positive Freedom*

Transnational legal process at first blush appears far more compatible with a positive definition of freedom.[412] Positive freedom is about the ability to achieve goals.[413] The person who is free is free because he or she can overcome contingency and fortune.[414] Of course, to respond to contingency or fortune, to escape a state of nature, requires more than just one person—it requires the participation of those daring to be free in a political community.[415]

Recent scholarship submits that John Locke defended a positive definition of freedom within the liberal tradition:

> Rather than being a supporter of negative liberty in the Hobbesian sense, Locke was working from a conception of freedom that focuses on the positive aspects of what the law can accomplish. According to Locke, just laws do not restrict freedom. For example, Locke referred to people's beliefs about virtue and vice in a given community as a "law of opinion" since there were reputational sanctions for deviating from it. If opinions about virtue and vice in a given community are sound, the freedom of people is not restricted. Locke's position was that legitimate law does not restrict but rather increases the freedom of the subject.[416]

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412. *See* Koh, *Exceptionalism*, *supra* note 402, at 1480 (quoting Margaret MacMillan describing the "two sides" of American exceptionalism: "the one eager to set the world to rights, the other ready to turn its back with contempt if its message should be ignored" (PEACEMAKERS: THE PARIS CONFERENCE OF 1919 AND ITS ATTEMPT TO END WAR 22 (2001))).

413. *See, e.g.*, Gregory S. Alexander, *Property's Ends: The Publicness of Private Law Values*, 99 IOWA L. REV. 1257, 1269 (2014) ("[A] person is not truly free until his desires, plans, and goals are stabilized so that there is continuity between the plans and actions of his past and those of his future.").

414. *See id.* ("The person who acts on the basis of whim, who flits from one impulse to another, is not truly free but instead is a hostage to such unstable urges. Such a person has no real sense of enduring identity. Even his moral agency is subject to doubt.").

415. *See* Hill, *supra* note 365, at 510 (noting the link between communitarianism and positive liberty); on the "daring" to be free meme, see, for example, POCOCK, *supra* note 41, at 193 (linking the concepts of civic virtue, daring, and fortune in Renaissance civic humanism).

416. ALEX TUCKNESS, LOCKE AND THE LEGISLATIVE POINT OF VIEW: TOLERATION, CONTESTED PRINCIPLES, AND THE LAW 105 (2002) (citations omitted). *But see, e.g.*, Isaiah Berlin, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118–72 (1969)

The transnational legal process has significant points of overlap with such a positive conception of freedom for at least two reasons. First of all, the transnational legal process is expressly normative.[417] The transnational legal process does not export norm creation to some parliamentarian body or majority rule.[418] It has no political constitution.[419] Instead, process results generate norms precisely because these results came out of the process.[420] Process creates norms and strives towards ends independently of any other constitutional structure.

Process legitimacy therefore crucially depends upon the ultimate ends it serves because it cannot point to any other external point of reference that would lend it *additional* legitimacy.[421] Process legitimacy, dauntingly, is entirely internal to the process itself.[422] Legitimacy appears to depend upon the simple question: do more process norms make process participants freer? This question is almost nonsensical from the point of view of negative freedom—more norms precisely equal less freedom as talking heads so frequently remind us.[423] The question makes sense—and arguably only makes sense—from the vantage point of positive freedom.[424]

(placing Locke in the camp of negative liberty); John Inglis, *Freiheit, Liberté, or Free Choice: The Recovery of Aquinas After 1848 as Interpretation or Misinterpretation?*, *in* AQUINAS AS AUTHORITY 109, 116 (Paul van Geest et al. eds., 2002) (noting a correlative negative definition of freedom in Lockean thought). The project of freedom as mastery over contingency or fortune certainly predates the liberal tradition. *Cf.* QUENTIN SKINNER, LIBERTY BEFORE LIBERALISM (1998) (outlining the rich history of freedom before the liberal era). Stabilizing the "wheel of fortune" through constitutional design is one of the key themes of Renaissance political theory—a theme more familiar to modern readers as the mastery of market and political cycles. *Compare, e.g.*, POCOCK, *supra* note 41, at 197–218, *with* DANTE ALIGHIERI, THE DIVINE COMEDY 51–55 (Henry Wadsworth Longfellow trans., Boston, Houghton, Mifflin & Co. 1886) (describing the wheel of fortune in canto vii of hell). It is a central element of Plato's ethical project, too—and a problem central to the entirety of Greek literature in the broadest sense. *See* NUSSBAUM, FOG, *supra* note 41 *passim*.

417. *See* Koh, *TLP*, *supra* note 14, at 184 ("From this process of interaction, new rules of law emerge, which are interpreted, internalized, and enforced, thus beginning the process all over again.").

418. *See id.* ("Transnational law transforms, mutates, and percolates up and down, from the public to the private, from the domestic to the international level and back down again.").

419. *See id.* (describing the transnational legal process as "dynamic, not static").

420. *See id.* (explaining that "international interaction among transnational actors shapes law" and that "law shapes and guides future interactions").

421. *See, e.g.*, Waters, *Normativity*, *supra* note 27, at 465–67 (2007) (noting the countermajoritarian problems of the transnational legal process).

422. *See id.*

423. *See, e.g.*, Steve Forbes et al., *Will New Regulations Spike Consumers' Energy Costs?*, FOXNEWS.COM (Feb. 15, 2014), http://www.foxnews.com/on-air/cost-of-freedom/2014/02/17/will-new-regulations-spike-consumers-energy-costs [http://perma.cc/J2L6-CKXP] (archived Feb. 14, 2015) ("Steve Forbes: It shouldn't be a bureaucrat deciding what energy you use. Let the free markets work. Free markets are free people. . . . It's freedom.").

424. *See* TUCKNESS, *supra* note 416, at 105.

Second of all, the transnational legal process has an independent ultimate end consistent with the positive freedom project. It, too, seeks to place its domain of application beyond the scope of contingency, whim, or fortune.[425] It seeks to place its domain of application under *law*, that is, the paragon of order.[426] In this sense, the transnational legal process in every sense of the word seeks to "domesticate" the apparently wild frontier of all cross-border transactions be they between states, multinational corporations, and individuals.[427] It precisely appears to take up the mantle of Renaissance theorists seeking to halt or slow political and market cycles by legal innovation.[428] Transnational legal process is about the sustainable self-governance of the international community under law and thus about the banishment—as far as possible—of contingency, whim, or fortune from commanding the international scene.

Again the current arguments traded between the United States and Russia demonstrate how a positive conception of freedom works within the transnational legal process. Thus, the Russian arguments for self-determination of the ethnic Russian population in Crimea and Eastern Ukraine rely upon a positive conception of freedom: the freedom of ethnic groups to govern themselves.[429] Similarly, the United States' view that popular will can unseat a constitutional government that has suppressed political freedoms similarly draws upon positive rather than negative ideas of freedom.[430] These arguments are about an international community governed under law (as opposed to brute force).[431] They are arguments that go to the heart of what process participants think the process should be about in the first place—sustainable self-governance.

Problematically, the clear theoretical preference for a positive, participation-based conception of freedom in the transnational legal process runs headlong into the acceptance of negative freedom-based

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425 *See* Koh, *TLP*, *supra* note 14, at 183 ("That question -- why nations obey -- centrally challenges scholars of both international law and international relations.").

426. *See, e.g.*, Frederick Schauer, *The Generality of Law*, 107 W. VA. L. REV. 217, 233–34 (2004) (noting the distinctiveness of law as stability).

427. It both tames and internalizes these transactions by placing them within a legal structure. *See* Koh, *TLP*, *supra* note 14, at 183–84.

428. *See* POCOCK, *supra* note 41, at 317–18 (discussing the importance of cycles for Renaissance political thought).

429. *See, e.g.*, Russian Ministry of Foreign Affairs, Crimea Statement, *supra* note 9 ("[U]nilateral announcement of independence by a part of a state does not violate any provision of international law.").

430. *See* Kerry Statement, *supra* note 7.

431. *Cf.* Christian Marxsen, *Crimea's Declaration of Independence*, EJIL:TALK! (Mar. 18, 2014), http://www.ejiltalk.org/crimeas-declaration-of-independence/ [http://perma.cc/F7PR-A69S] (archived Feb. 19, 2015).

arguments within the transnational legal process.[432] Because of its focus on the attainment of some ultimate good, the positive freedom project competes with the negative project.[433] Positive freedom requires cooperation, participation, and coordination of civic society to achieve the good it seeks to attain.[434] Opting out by reference to a privacy right to believe in a different ethical ultimate good precisely would undermine this civic good.[435] It therefore cannot be allowed to stand—it reintroduces fortune and all of its entropic might.[436] Civic virtue and personal liberty for this reason traditionally have been cast to be at odds with each other.[437]

Perhaps even more problematically, a positive conception of freedom again appears to impose a full-blooded conception of what "good" is.[438] Plainly, the arguments relating to current events in Ukraine suggest that both the United States and Russia have very different ideas of what is good.[439] To say that one is right and one is wrong would suggest that the transnational legal process plays favorites—it imposes a norm rather than simply relying on the norms already present in process participants. The arguments of both the United States and Russia plainly make sense in the context of transnational law—they are interpretations of current events in light of recognized instances of past transnational legal problem solutions.[440] To say that one problem solution is better than the other because of an outside value or good would tend to undermine the idea of going through a process approach in the first place.[441] One approach could simply claim that the other position is deductively wrong because there is in fact a normative first principle to which one side is faithful and the other side is not.[442]

The answer to this problem must be that the good in question is not external to the transnational legal process but internal to it. It

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432. *See supra* Part IV.A.

433. *See* Berlin, *supra* note 416, at 131–34.

434. *See* Linda R. Hirshman, *The Rape of the Locke: Race, Gender, and the Loss of Liberal Virtue*, 44 STAN. L. REV. 1133, 1159 & n.165 (1992) ("Public or political liberty-or what we now call positive liberty-meant participation in government.").

435. *See supra* Part IV.A.

436. *See* POCOCK, *supra* note 41, at 98 (discussing the particular danger of decay of civic community in Renaissance Florentine thought).

437. *See, e.g.*, Ian Carter, *Positive and Negative Liberty*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Mar. 5, 2012), http://plato.stanford.edu/entries/liberty-positive-negative/ [http://perma.cc/H6BV-KEKM] (archived Feb. 14, 2015).

438. *See* Berlin, *supra* note 416, at 145–54 (articulating the process by which a positive freedom theory concludes that there is one truth or solution to the problem of injustice).

439. *Compare* Russian Ministry of Foreign Affairs, Crimea Statement, *supra* note 9, *with* Kerry Statement, *supra* note 7.

440. *See supra* Part II.

441. *See supra* Part II.

442. *See supra* Part II.

must be a condition for participation in the process to make sense, at all. This task is made the more complicated because the transnational legal process fully admits the incommensurable plurality of values in international law.[443] There is no common denominator of the "virtue of international law" but multiple competing and incommensurable virtues. [444] The clearly apparent preference for a positive interpretation of freedom therefore has to square the circle: how to make freedom positive without supplying an ultimate substantive goal or end solution toward which the transnational legal process would drive transnational law?

C. *Dignity – The Concept of Civic Freedom*

Classical thought provides a potential solution for the value problem experienced by the transnational legal process. A core tradition in classical thought conceives of freedom not in terms of the dichotomy of positive and negative freedom.[445] Rather, the positive and negative facets of liberal freedom are internalized in the concept of human dignity.[446] This conception of freedom as dignity became central to the Renaissance humanist rediscovery of antiquity.[447]

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443. *See supra* Part II.

444. *See supra* Part II.

445. *See, e.g.*, VICTOR DAVIS HANSON, THE OTHER GREEKS: THE FAMILY FARM AND THE AGRARIAN ROOTS OF WESTERN CIVILIZATION 43 (1999) ("After all, farmers themselves knew the value of banding together to preserve their own hard-won gains against the wealthy in a no-nonsense pragmatism that in every early timocratic agricultural city-state checked radicalism and, eventually, the excesses of both aristocracy and democracy.").

446. *See, e.g.*, Martha C. Nussbaum, *Foreword: Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4, 38 (2007) (discussing the Stoic roots of dignity in the natural law tradition).

447. *See* GIOVANNI PICO DELLA MIRANDOLA, DE HOMINIS DIGNITATE 9–10 (Gerd von Gönna ed., 1997) (1496) (identifying the capacity to choose—freedom—as the core element of human dignity); *see also* POCOCK, *supra* note 41, at 98–99 (discussing the work). While this conception of dignity has significant overlap with the deontological Kantian and neo-Kantian view of dignity, it is not a perfect analogue for it. For a discussion of the neo-Kantian view of dignity requiring in broad outlines that persons be treated as ends in themselves rather than as means to an end see, for example, Edward M. Andries, *On The German Constitution's Fiftieth Anniversary: Jacques Maritain and the 1949 Basic Law (Grundgesetz)*, 13 EMORY INT'L L. REV. 1, 20–22, 43–58 (1999) (contrasting a Christian natural rights perspective with a neo-Kantian perspective of dignity in the context of the German Basic Law); J.M. Finnis, *Legal Enforcement of "Duties to Oneself": Kant v. Neo-Kantians*, 87 COLUM. L. REV. 433, 439–46 (1987) (providing a natural critique of Kantian and neo-Kantian dignity); Rex Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 88–89 (2011) (discussing the neo-Kantian view of human dignity in the context of United States constitutional jurisprudence). The perhaps key distinction between a Kantian view of dignity and the view of dignity which follows is one of perspective. What follows submits that human dignity is in fact a means to an end—the self-propagation of legal process—rather than simply an end itself. The position that dignity refers to treating a

Dignity in classical thought responds to a problem that greatly resembles the problem experienced by the transnational legal process. As Martha Nussbaum's *Fragility of Goodness* explores, classic Athenian tragedy reflects the struggle between civic virtue and human social attachments in the Athenian golden age.[448] Sophoclean tragedy in particular highlights that social values remain fundamentally incommensurable—and that any attempt to tame this incommensurability through political power ends in failure and tragic loss.[449] Tragic conflict, in other words, cannot be avoided;[450] it must be addressed. Rather than rely upon a single measure of the social good, Nussbaum proposes that classical Athenian thought offers yielding deliberation as a means to addressing tragic conflict.[451] This yielding deliberation requires an acknowledgement of the difference in others and their right to being different.[452] It then requires "the preservation of the mystery and specialness of the external, the preservation, in one oneself, of the passion that take one to these mysteries. Such a life has room for love; and it also has room, as Tiresias's life shows, for genuine community and cooperation."[453]

The constituent parts of yielding deliberation form the seed of the conception of human dignity.[454] This discourse of dignity had deep political roots. It originated from the "yeoman ideology" in Athenian democracy which "impl[ied] 'that the basis for social change was deeply rooted in a firm sense of identity and self-esteem of the peasant class, and, further, that a feeling for justice, equality and common dignity formed a stratum of democratic orientation which found constant public expression during the seventh and sixth centuries'" BCE.[455]

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person as an end in him or herself and the position that dignity is the means to achieving societal ends are certainly not mutually exclusive. They are, however, intuitively juxtaposed. As the conclusion will show, what the instrumentalization of dignity tends to show is that both views of dignity—the view of dignity as the ultimate right and the view of dignity as the ultimate means—ultimately support each other.

448. *See, e.g.*, NUSSBAUM, FOG, *supra* note 41, at 61 ("Creon's plan does not permit him to respect a human opponent because of the value of that person's humanity. He or she contains only a single value, productive of civic good; lacking that, she is 'nowhere.'"). Although *FOG* does not cast the problem in terms of dignity, Martha Nussbaum's preface to the updated edition links *FOG* to the concept of Stoic dignity. *See id.* at xx.

449. *See id.* at 78 (discussing the impossibility to harmonize various conceptions of the good in *Antigone*).

450. *See id.*

451. *See id.* at 79 ("Tiresias says that good deliberation is connected with 'yielding,' with renouncing self-willed stubbornness, with being flexible." (citations omitted)).

452. *See id.*

453. *Id.* at 81.

454. *See id.* at xx (discussing the link of *Fragility* to Stoic dignity).

455. *See* HANSON, *supra* note 445, at 205–06 (footnote omitted) (quoting Walter Donlan, *The Tradition of Anti-Aristocratic Thought in Early Greek Poetry*, 22 HISTORIA 145, 154 (1973)).

Dignity in ancient Greek and Roman thought was thoroughly social.[456] It was premised upon participation—and the manner in which to respond to the participation of others.[457] Dignity required yielding to, respecting, or taking seriously the contribution of others.[458] In this sense "dignity" came to describe a duty one owed to others.[459] But like the transnational legal process, classical thought was not individualistic in the enlightenment sense as its view of dignity suggests—a view which is prima facie puzzling from an individualist enlightenment perspective.[460] On the one hand, consistent with individualism, Stoic thought considered that all human beings had "the same quantum of dignity by virtue of [their] humanity."[461] On the other hand, particularly Roman tradition ascribed greater dignity to holders of high office.[462] How could the same person be equal and more than equal? How could dignity both not take into account and depend upon social station?

Dignity as yielding suggests a common sense solution. Dignity requires in the first instance that one yields to, respects, and takes seriously the contributions of all discourse participants.[463] It is a duty strongly resembling the requirement of good faith exercise of

456. *See, e.g.*, HORST HUTTER, POLITICS AS FRIENDSHIP: THE ORIGINS OF CLASSICAL NOTIONS OF POLITICS IN THE THEORY AND PRACTICE OF FRIENDSHIP 35 (1978) (linking dignity to customary norms subject to powerful social sanction); J. E. Lendon, *Roman Honor*, *in* THE OXFORD HANDBOOK OF SOCIAL RELATIONS IN THE ROMAN WORLD 377, 379 (Michael Peachin ed., 2011) (linking dignity to revenge and honor).

457. *See, e.g.*, Joy Connolly, *Rhetorical Education*, *in* THE OXFORD HANDBOOK OF SOCIAL RELATIONS, *supra* note 456, at 101–02 (linking dignity to eloquence in public deliberation by reference to Cicero's *De Oratore*).

458. *See, e.g.*, Hebert Spiegelberg, *Human Dignity: A Challenge to Contemporary Philosophy*, *in* HUMAN DIGNITY: THIS CENTURY AND THE NEXT 39, 58 (Rubin Gotesky & Ervin Laszlo eds., 1970) (discussing the distinction between toleration and deliberation in the context of dignity).

459. *See, e.g.*, A.A. LONG, EPICTETUS: A STOIC AND SOCRATIC GUIDE TO LIFE 237 (2002) ("The correct performance of one's social roles—Epictetus' second topic—is both outwardly and inwardly oriented. It is outward in what it requires by way of sensitivity to the dignity and claims of other persons, but what it is about other persons that should concern us is not how they treat us, . . . but only how we dispose ourselves in relation to them.").

460. Kurt Bayertz, *Human Dignity: Philosophical Origin and Scientific Erosion of an Idea*, *in* SANCTITY OF LIFE AND HUMAN DIGNITY 73, 73 (Kurt Bayertz ed., 1996) (noting that Cicero used inconsistent interpretations of dignity in his writings "side by side").

461. Rao, *supra* note 362, at 201.

462. The Latin typically here should be *gravitas* rather than *dignitas*. *Gravitas* refers to the "dignified authority" of its holder. *See* Sarah Culpepper Stroup, *Greek Rhetoric Meets Rome: Expansion, Resistance, and Acculturation*, *in* A COMPANION TO ROMAN RHETORIC 23, 27 (William Dominik & Jon Hall eds., 2010). On the relationship between rank and dignity, see generally Jeremy Waldron, *Lecture 1: Dignity and Rank*, in DIGNITY, RANK, & RIGHTS 13, (Meir Dan-Cohen ed., 2012).

463. *See, e.g.*, Spiegelberg, *supra* note 458, at 58 (discussing the relationship between respect and dignity).

discretion in the United States common law of contracts.[464] This resemblance is most apparent in the context of a well-known textbook example of good faith, *Locke v. Warner Bros. Inc.*[465] *Locke* involved a messy Hollywood relationship involving Warner Brothers; Sondra Locke, an actress and movie director; and her love interest, Clint Eastwood.[466] After some thirteen years of romantic entanglement, Eastwood "terminated" the relationship and Locke sued.[467] Locke asserted that as part of the settlement agreement, "Eastwood secured a development deal for Locke with Warner in exchange for Locke's dropping her case against him."[468] The agreement provided that "Locke would receive $250,000 per year for three years for a 'non-exclusive first look deal'" requiring Locke "to submit to Warner any picture she was interested in developing before submitting it to any other studio" for a thirty-day period in which Warner could "either . . . approve or reject a submission."[469] If the project was approved, the contract provided for "a $750,000 'pay or play' directing deal . . . giv[ing] the studio [the] choice . . . either [to] 'play' the director by using the director's services, or pay the director his or her fee."[470] Eastwood apparently reimbursed Warner Brothers for its fixed expenses and, Locke alleged, instructed Warner Brothers not to accept any of Locke's submissions.[471] After Warner Brothers rejected project after project, Locke sued Warner Brothers.[472]

The *Locke* court on appeal rejected Warner Brothers' defense that Locke lacked a cause of action because Warner Brothers had complete discretion to accept or reject her proposals, reasoning:

> [W]hen it is a condition of an obligor's duty that he or she be subjectively satisfied with respect to the obligee's performance, the subjective standard of honest satisfaction is applicable. . . . Therefore, the trial court erred in deferring entirely to what it characterized as Warner's "creative decision" in the handling of the development deal. If Warner acted in bad faith by categorically rejecting Locke's work and refusing to work with her, irrespective of the merits of her proposals, such conduct is not beyond the reach of the law.[473]

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464. *See, e.g.*, Alan D. Miller & Ronen Perry, *Good Faith Performance*, 98 IOWA L. REV. 689, 706 (2013) (discussing discretion and good faith).

465. *See generally* Locke v. Warner Bros., Inc., 66 Cal. Rptr. 2d 921 (Ct. App. 1997) (interpreting the implied contractual duty of good faith and fair dealing); *c.f.* DAVID G. EPSTEIN, BRUCE A. MARKELL & LAWRENCE PONOROFF, CASES AND MATERIALS ON CONTRACTS: MAKING AND DOING DEALS 518 (3d ed. 2011) (using the case in the context of good faith in contract law).

466. *See Locke*, 66 Cal. Rptr. 2d at 921–23.

467. *See id.* at 921–22.

468. *Id.* at 922.

469. *Id.*

470. *Id.*

471. *See id.*

472. *See id.* at 922–23.

473. *Id.* at 925–26 (emphasis omitted) (citations omitted).

Applied to the question of dignity, such good faith requires that one consider "the merits of [the] proposals" of others in civic discourse.[474] Proposals cannot be rejected out of hand because the proposals work an inconvenience that has nothing to do with the proposals themselves, that is, Eastwood could get upset at Warner Brothers for producing a Locke movie.[475] Or, in the context of Athenian tragedy examined by Nussbaum, Creon cannot reject Antigone's appeal to family values because in that particular instance the interest of family would create a civic inconvenience.[476] Dignity requires that one treat the proposals of others as presumptively *valid* contributions, the merits of which must be grappled with seriously and honestly.[477] This form of dignity does not mean that one must ascribe any particular *authority* to the proposals in question—they simply have to be honestly assessed.[478] This is a binary proposition—one either does or does not take a contribution seriously—one either does or does not consider the proposition in good faith.[479]

This form of dignity does not exclude that some statements have greater authority than others—and that their authority is inextricably intertwined with who makes these statements.[480] For instance, some speakers by inhabiting elected office do not speak only for themselves—and as such are entitled to the same serious consideration as everyone around them—they speak for others as well.[481] They can make authoritative pronouncements in light of the social function they fulfill.[482] The same is true of holders of religious office.[483] In fact, in many cases, antiquity intermingled religious and

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474. *See id.*

475. *See id.* at 926 (discussing evidence produced by Locke that her proposals were not even considered at Eastwood's request).

476. *See* NUSSBAUM, FOG, *supra* note 41, at 81.

477. *See Locke*, 66 Cal. Rptr. 2d at 925 (explaining that the exercise of discretion must be analyzed against the subjective standard of honest satisfaction); Teri J. Dobbins, *Losing Faith: Extracting the Implied Covenant of Good Faith from (Some) Contracts*, 84 OR. L. REV. 227, 248 (2005) (noting that the case required that "the studio could not simply decide for any reason to reject the proposals and pay the money. It could do so only if it was dissatisfied with the quality of the proposals.").

478. *See* Dobbins, *supra* note 477, at 248.

479. *See id.*

480. Stroup, *supra* note 462, at 27 (noting the link of dignity and authority in the context of "gravitas").

481. *See, e.g.*, JAKOB AAL OTTESEN LARSEN, REPRESENTATIVE GOVERNMENT IN GREEK AND ROMAN HISTORY 135 (1976) (discussing the context of gravitas in Roman government).

482. *See, e.g.*, Nathan Rosenstein, *Aristocratic Values*, *in* A COMPANION TO THE ROMAN REPUBLIC 365, 372–73 (Nathan Rosenstein & Robert Morstein-Marx eds., 2010) (explaining the role of gravitas in Roman constitutional theory).

483. LARSEN, *supra* note 481, at 135 (discussing the interweaving of religious and civic office at Rome in the context of gravitas).

civic office, such as in the case of the tribune of the plebs at Rome.[484] This tribune could veto laws on account of both his civic and religious authority.[485] The tribune further was sacrosanct in his person and an assault on the tribune was a religious and civic offense against the dignity of the plebs for whom he spoke.[486] According the tribune greater "dignity" thus simply ascribes to him a representative authoritative function that is in no way inconsistent with the general proposition of equal dignity.[487] One does not yield more to the tribune, one simply ascribes appropriate authority to his statements in order appropriately to contextualize them. Dignity as authority thus incorporates not just the immediately personal, but internalizes the social dimension of human value attachments in community. It thus incorporates the value attachments to state and ethnic community, relevant to the determination of freedom in the transnational legal process in situating and exploring personal freedom.[488]

Of course, dignity in ancient Greece and Rome was not just a duty, it also, and perhaps chiefly, described a *right*.[489] As much as one owed to others to treat them with dignity, a person has that right in return.[490] Further, one does not seem to relinquish the right to be treated with dignity simply because one failed to treat others in the same way.[491] A tit for tat seems almost by definition excluded.

An understanding of such a right implies an *ownership* interest in dignity. The "right" or entitlement to *dignitas* arises out of ownership—*dominium*.[492] A right to dignity denotes an ownership of

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484. *See* JACK J. LENNON, POLLUTION AND RELIGION IN ANCIENT ROME 51–52 (2014) (discussing the deeply religious foundations of the tribune's gravitas).

485. *See* 3 VICTOR DURUY, HISTORY OF ROME, AND OF THE ROMAN PEOPLE, FROM ITS ORIGIN TO THE ESTABLISHMENT OF CHRISTIAN EMPIRE 41–43 (J. P. Mahaffy ed.,1885) (discussing the comingled religious and civic roots of the Roman constitution).

486. HENRY THOMPSON ROWELL, ROME IN THE AUGUSTAN AGE 64 (1962) ("The person of a tribune was sacrosanct; that is, hands could not be laid upon him to restrain his actions.").

487. *See* LENNON, *supra* note 484, at 51–52 (explaining that a tribune "should [not] continue working in the law courts during his year of office" because "[a] person engaged in a sacred or inviolable office required a change in others' behaviour, which marked him or her out as separate").

488. *See supra* Part III.C.

489. Waldron, *supra* note 462, at 14 ("Dignity is intimately connected with the idea of rights—as the ground of rights, the content of certain rights, and perhaps even the form and structure of rights.").

490. *See, e.g.*, Lendon, *supra* note 456, at 379 (linking dignity to revenge and honor); HUTTER, *supra* note 456, at 35 (linking dignity to customary norms subject to powerful social sanction).

491. LONG, *supra* note 459, at 237 (discussing Epictetus' view on point).

492. *See* W. JEFFREY TATUM, THE PATRICIAN TRIBUNE, PUBLIUS CLODUS PULCHER 159 (1999) (noting the link between *dignitas, domus* and *dominium* in the context of the destruction by Clodius of Cicero's house or *domus*).

one's humanity.[493] English grammar still reflects this ancient ownership interest when we say that a person *has* dignity. Similarly one is "*entitled*" to treatment by others with dignity.[494]

The classical concerns map directly onto the problem of freedom in the transnational legal process. Like the transnational legal process, the problem of Sophoclean tragedy is the absence of a single civic good to be attained by means of positive freedom.[495] In fact, every attempt to provide such a single good precisely creates tragic conflict.[496] Like the transnational legal process, the Sophoclean tragedy provides tangible proof why a privacy alternative similarly does not work—the actions with regard to which privacy would be invoked (burial of a family member) have deep social and thus civic meaning.[497] They are not beyond the social process but central to it.[498] Thus their tragic potential.[499] Not only does the classical paradigm address a similar problem, it provides a solution that permits a reconciliation of the positive/negative freedom juxtaposition plaguing transnational legal process. Yielding deliberation and dignity ultimately combine three elements: property rights, participation in deliberation, and permanence or stability of social institutions. These three elements translate positive and negative elements of freedom in the liberal debate into a single paradigm.

Most centrally, negative freedom is no longer a matter of privacy.[500] The core concern to prevent social encroachment on the person instead is buttressed by a property rationale.[501] Society may not encroach because the person has title to and ownership of his or her own humanity.[502] Transgression of this line thus is not an

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493. *Cf. id.* ("The grand mansion was nothing less than the most visible and tangible symbol of a Roman's high birth and splendor. . . . *Dignitas* demanded, and was enhanced by, ample *aedificatio* [building].").

494. *See, e.g.*, Martha Nussbaum, *Human Dignity and Political Entitlements*, *in* HUMAN DIGNITY AND BIOETHICS: ESSAYS COMMISSIONED BY THE PRESIDENT'S COUNCIL ON BIOETHICS 351, 362–65, (2008), *available at* https://bioethicsarchive.georgetown.edu/pcbe/reports/human_dignity/chapter14.html [https://perma.cc/8D4Q-PMAV] (archived Jan. 20, 2015).

495. *See* Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT'L L. 301, 309–11 (2007) (noting the pluralist commitments of transnational legal process scholarship).

496. *See id.* at 308.

497. *See* NUSSBAUM, FOG, *supra* note 41, at 55 (discussing the social and political implication of burials at Athens).

498. *See id.*

499. *See id.*

500. *See supra* Part IV.A.

501. *See, e.g.*, TATUM, *supra* note 492, at 159 ("The *domus* was not merely a residence for the Roman aristocrat. It defined the space and range of his immediate household, over whom he exercised *potestas* or *dominium*.").

502. *Cf.* Nussbaum, *Entitlements*, *supra* note 494, at 363.

invasion of privacy—it is a coercive, even brutal, taking.[503] Treating a human being as less than human—as "mere animal"—denigrates or belittles him or her literally by taking away his or her humanity.[504] Denying that a person lacks an essential (legal) capability essential to human endeavors on account of a person's identity or chosen values commits the same vice in a more limited form.

Natural rights theories centrally rely upon this property interest to define humanity itself.[505] Medieval Christian rights theories submitted that we have "natural" rights because we have dominion over our soul.[506] These medieval Christian natural rights theories in turn mimic classical myth structures using the same property-based imagery such as the Promethean gift of reason and craft to humanity.[507]

Critically, property rights are not "private." They are and must be *social*.[508] Property rights are defined by their social sanction—just as dignity is defined by reference to its social sanction.[509] Rather than excluding the state, negative freedom in the guise of a property right precisely relies upon the social mechanism to enforce exclusion.[510] Privacy thus is not the absence of society or government. Privacy becomes the ability to claim ownership of oneself against others in society in terms central to the social process itself.[511]

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503. *See* John D. Castiglione, *Qualitative and Quantitative Proportionality: A Specific Critique of Retributivism*, 71 OHIO ST. L.J. 71, 101–02 (2010) ("'[C]onstitutional dignity,' whatever it is, stands in contrast to concepts like brutality, degradation, or other 'uncivilized or barbarous behavior.'" (footnote omitted)).

504. *See id.*; *see also* NUSSBAUM, FOG, *supra* note 41, at 36 (discussing the same concept in the context of Agamemnon's human sacrifice of his daughter in Aeschylean tragedy).

505. PICO, *supra* note 447, at 8–9 (noting that human dignity derives from God's gift to Man to choose the gift he or she desires).

506. *See generally* RICHARD TUCK, NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT (1981) (discussing the ius/dominium dichotomy in medieval and Renaissance natural rights theories).

507. VICTOR EHRENBERG, FROM SOLON TO SOCRATES: GREEK HISTORY AND CIVILIZATION DURING THE 6TH AND 5TH CENTURIES BC 342–43 (2014) (discussing the Promethean myth in the context of Platonic philosophy and its engagement Sophist tradition).

508. This of course is much of the point of entering into a "social contract"—it is necessary for the protection and enjoyment of "private" property. *See, e.g.*, James Boyle, *Legal Realism and the Social Contract: Fuller's Public Jurisprudence of Form, Private Jurisprudence of Substance*, 78 CORNELL L. REV. 371, 388 (1993) (noting the link between property, social sanction, and freedom).

509. *See, e.g.*, Lendon, *supra* note 456, at 379–83; HUTTER, *supra* note 456, at 35.

510. *See* Boyle, *supra* note 508, at 388.

511. *Cf.* Rausch, *supra* note 392, at 46–51 (discussing the use of private property rights to exert control over an individual's body and noting that "the Supreme Court has recognized the right to exclude in the context of bodily integrity" (footnote omitted)).

Property has another central quality: unlike privacy, it is not binary.[512] Ownership is frequently referred to as a "bundle of sticks" and could be referred to by other forms of synthesis.[513] This makes it possible to oppose various claims to property rights to each other—that is, the claim to a "privacy" right to the claim of a civic need to override or modify it.[514]

Similarly, positive freedom is no longer about the attainment of a single substantive goal.[515] Freedom instead is about participation in civic discourse and civic self-governance.[516] Participation is defined by reference to yielding to incommensurability, an incommensurability necessitated by the many substantive views of good held by discourse participants.[517] It requires an acceptance of all value structures in society as valid rather than replacing all value structures by reference to single unitary measure of value.[518] As Nussbaum explains, civic value exists precisely because of the various value processes making up civil society.[519] Process creates and binds society because it respects and engages this inherent difference rather than seeks to supplant it.[520]

Participation in the process thus is about enriching the social fabric and including perspectives in it rather than excluding perspectives.[521] Participation becomes valuable not because of some other outside goal but because it is valuable in its own right—because it enriches its participants and permits them to govern themselves in

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512. *See* Shaun B. Spencer, *The Surveillance Society and the Third-Party Privacy Problem*, 65 S.C. L. REV. 373, 377 (2013) (discussing binary and non-binary conceptions of privacy). On the classical binary distinction, see FRIEDRICH KARL VON SAVIGNY, JURAL RELATIONS: OR, THE ROMAN LAW OF PERSONS AS SUBJECT OF JURAL RELATIONS 322–23 (W. H. Rattigan trans., 1884).

513. *See, e.g.*, Myrl L. Duncan, *Reconceiving the Bundle of Sticks: Land as a Community-Based Resource*, 32 ENVTL. L. 773, 773 (2002).

514. *See id.* at 807 (arguing that property rights do not exist in isolation but are "rooted in a dynamic and integrated social and ecological community that changes over time").

515. *See supra* Part IV.B.

516. *See, e.g.*, Connolly, supra note 457, at 102 (discussing dignity as a critical concept in classical theories of deliberation).

517. *See* Sunstein, *supra* note 48, at 860 (noting that law rationally embraces that "[h]uman beings value goods, events, and relationships in diverse and plural ways").

518. *See id.*

519. *See, e.g.*, NUSSBAUM, FOG, *supra* note 41, at 60 ("A city is a complex whole, composed of individuals and families, with all the disparate, messy, often conflicting concerns that individuals and families have, including their religious practices, their concern for the burial of kin.").

520. *See id.* at 70 ("For these people experience the complexities of the tragedy while and by being a certain sort of community, not by having each soul go off in isolation from its fellows . . . .").

521. *Cf. id.* at 421 (discussing the conflict between richness and purity in the ethical lives of Greeks).

concord where they would have failed alone.[522] By becoming yielding, participation crosses with property.[523] Yielding means to respect the property rights of *autrui* participating in discourse, to acknowledge his or her right to otherness.[524] In other words, civic participation becomes a property right of the participant.[525]

The ultimate end goal of process is not some external goal but the permanence of process *itself*.[526] Permanence of process is the permanence of self-governance.[527] Process thus does not strive toward something.[528] "It" is already there.[529] Process strives to maintain itself through change—it adapts. This adaptation is not teleological in the sense of social Darwinism. It is teleological in the sense of Renaissance conservatism—to conserve the delicate balance of self-government by civil society against the forces of fortune and thus create the social conditions for the flourishing of its members.[530]

This leaves the final question of usefulness of freedom as dignity in the transnational legal process. Can freedom as dignity help resolve actual disputes within the transnational legal process? And how would it do so?

Again, Ukraine provides a helpful example. Freedom as dignity helps to make sense of the various disparate arguments presented as part of the transnational legal process by the United States and Russia. Freedom as dignity makes all of these various arguments relevant to a common conception of freedom—be it one that does not have a single common positive good other than the perpetuation of process itself. This insight also helps to crystallize suspicions about the Russian claims and arguments in two ways. First, Russian conduct appears to make the arguments advanced in the

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522. *Cf.* Alain Pottage, *A Unique and Different Subject of Law*, 16 CARDOZO L. REV. 1161, 1173 (1995) ("[A]dmiration describes the impulse of an intentionality which encounters the world as a renewed 'advent or event of the other' [*l'avenement ou l'evenement de l'autre*]." (emphasis added) (footnote omitted)).

523. *See id.*

524. *See* Gregory H. Fox, *The Right to Political Participation in International Law*, *in* LAW AND MORAL ACTION IN INTERNATIONAL AFFAIRS 77, 100 (Michael Loriaux & Cecilia Lynch eds., 2000) (concluding that the current state of international law clearly recognizes a right to participate in governance).

525. *Cf.* Lea Shaver & Caterina Sganga, *The Right to Take Part in Cultural Life: On Copyright and Human Rights*, 27 WIS. INT'L L.J. 637, 661–62 (2010) (engaging the question of participatory rights in the context of copyrights and property rights).

526. This of course is the goal of civic humanist constitutional theory. *Cf.* POCOCK, *supra* note 41, at 94 ("Republics existed to mobilize the intelligence and virtue of all citizens; their stability was dependent on their doing so and if they failed they became governments of a few, whose intelligence and virtue were doomed to decline by their finite and insufficient character.")

527. *See id.* at 92–95.

528. *See id.*

529. *See id.*

530. *Cf. id.* at 78–79 (discussing the wheel of fortune in the project of *Rinascimento* civic humanism).

transnational legal process more transparently pretextual.[531] Rather than seeking to engage the process to maintain a solution within the transnational legal process, it appears the Russian argument simply seeks to go around the transnational legal process and achieve its aims by poorly concealed force of arms.[532] In fact, the position is made to appear the more pretextual as the moment the Russian government has achieved no realities on the ground, it tends to admit what it previously denied: the involvement of its own military in bringing about the changed circumstances in question.[533]

Second, the conduct on the ground supported by the Russian side has been highly disruptive of the property, participation, and permanence. In Crimea, strategic assets were immediately expropriated. [534] Political violence repressed all forms of civic participation.[535] And no sustainable long-term solution appears on the horizon—just geopolitical disruption.

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531. *See, e.g.*, *Walesa Says Ukraine's Maidan Gave Russia Pretext to Intervene*, RADIO FREE EUR. RADIO LIBERTY (May 23, 2014), http://www.rferl.org/content/ukraine-walesa-critical-euromaidan/25395933.html [http://perma.cc/XC57-J9XQ] (archived Jan. 20, 2015) (describing Lech Walesa's argument that the Maidan protesters' failure to negotiate with Russia gave Putin a pretext for invasion).

532. *See, e.g.*, Roman Oleacrchyk & Kathrin Hille, *Kerry Accuses Moscow of Creating 'Pretext' for Ukraine Invasion*, FIN. TIMES (U.K.) (Apr. 8, 2014, 5:11 PM), http://www.ft.com/intl/cms/s/0/0af1e45a-bee4-11e3-8683-00144feabdc0.html#axzz3SDgeY3UZ [http://perma.cc/S8KL-UWQL] (archived Jan. 20, 2015) (citing John Kerry's description of Russia's actions as "an illegal and illegitimate effort to destabilise a sovereign state").

533. *Compare* Alexander Smith & Alexandra Mazikina, *Vladimir Putin Admits Russian Forces Helped Crimea Separatists*, NBC NEWS (Apr. 17, 2014, 4:40 AM), http://www.nbcnews.com/storyline/ukraine-crisis/vladimir-putin-admits-russian-forces-helped-crimea-separatists-n82756 [http://perma.cc/SPX4-UAMQ] (archived Jan. 20, 2015) (reporting an admission by Vladimir Putin that Russian troops had been active in supporting Crimean separatists), *with* Bill Chappell & Mark Memmott, *Putin Says Those Aren't Russian Forces in Crimea*, NPR (Mar. 4, 2014, 7:05 AM), http://www.npr.org/blogs/thetwo-way/2014/03/04/285653335/putin-says-those-arent-russian-forces-in-crimea [http://perma.cc/4JV8-AN7K] (archived Jan. 20, 2015).

534. *See, e.g.*, Press Release, U.S. Dep't of Commerce Bureau of Indus. & Sec., Commerce Department Announces Move Against Russian Expropriation of Ukrainian Company (Apr. 11, 2014), *available at* http://www.bis.doc.gov/index.php/about-bis/newsroom/press-releases/107-about-bis/newsroom/press-releases/press-release-2014/660-commerce-department-announces-move-against-russian-expropriation-of-ukrainian-company [http://perma.cc/G3XF-SUPH] (archived Jan. 20, 2015) (describing an instance in which Russia had seized a Ukrainian gas company); Elena Popina, *Cargill Says Plant is Under Armed Occupation in Ukraine*, BLOOMBERG BUS. (July 11, 2014, 4:14 PM), http://www.bloomberg.com/news/2014-07-10/cargill-suspends-ukraine-processing-plant-after-armed-occupation.html [http://perma.cc/8AAM-F3YR] (archived Jan. 20, 2015) (reporting an instance in which an American company's plant, located in eastern Ukraine, was occupied by a group of armed individuals).

535. *See, e.g.*, *Hugs and Thugs*, ECONOMIST (Mar. 22, 2014), *available at* http://www.economist.com/news/briefing/21599407-some-crimeans-welcome-annexation-violence-not-far-surface-hugs-and-thugs_[http://perma.cc/X2U2-8DFM] (archived Jan. 20, 2015) (reporting political violence including torture in the run up to the Crimean referendum).

By comparison, the United States' position appears relatively more concerned with the dignity process participants. Its arguments seem less brazenly pretextual.[536] Engagement of civic leaders seems to be part of a discourse if only because no military forces have been maneuvered into place to create new realities on the ground before discourse would have even had a chance to mature and engage. Pro-Russian politicians are on the whole able to continue to work in Ukraine and engage their colleagues. And the goal on the United States' side is to find a diplomatically brokered permanent solution that protects the basic participatory rights of the Ukraine people as a whole rather than just the Western leaning portion of its electorate.

But by no means do the United States and its allies in Kyiv or Europe act like angels. Both sides have committed politically motivated violence.[537] Ukraine further is attempting to deprive Crimeans of water and electricity that are an absolute necessity for their economy to remain self-sustaining.[538] These actions cannot be condoned and do not fit within the transnational legal process. They appear on their face in violation of basic international legal norms.[539]

That being said, a dignity conception of freedom shows how the current crisis can be addressed from a legal point of view. It shows that the inductive, particularized method of the transnational legal process does not ultimately transform transnational law into pure *Realpolitik* in better clothing. It aims at a particularly legal good—but one befitting of the inherent plurality of the international community.

V. CONCLUSION: FREEDOM AS THE END OF BALANCE

Placing freedom as dignity at the core of the transnational legal process in many ways is a happy return. Earlier process theories, such as Myres McDougal's policy school, principally relied upon

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536. *See supra* Part II for a full discussion of the arguments advanced.

537. *See* Sabrina Tavernise & Noah Sneider, *Enmity and Civilian Toll Rises in Ukraine while Attention is Diverted*, N.Y. TIMES, July 28, 2014, at A9, *available at* http://www.nytimes.com/2014/07/29/world/europe/civilian-death-toll-rise-in-ukraine.html?_r=0 [http://perma.cc/Z2WD-WU2K] (archived Jan. 20, 2015).

538. *See* Iana Zagoruiko, *Vote to Join Russia Could Leave Crimea Without Water, Electricity*, FOXNEWS.COM (Mar. 16, 2014), http://www.foxnews.com/world/2014/03/16/vote-to-join-russia-could-leave-crimea-dry-in-dark/ [http://perma.cc/3Y37-XPRT] (archived Jan. 20, 2015) (outlining Ukrainian leadership's threats to Crimea in the event that a secession referendum occurs).

539. *Cf.* Michael Bothe, *Cutting Off Electricity and Water for the Gaza Strip, Limits Under International Law, Preliminary Expert Opinion*, DIAKONIA (July 18, 2014), http://www.diakonia.se/globalassets/documents/ihl/ihl-resources-center/expert-opinions/michael-bothe-july-17.pdf [http://perma.cc/6T7F-FGRX] (archived Jan. 20, 2015) (discussing the legality of similar measures in the Gaza strip).

human dignity as the end goal of legal process.[540] The end of dignity was an external goal for law—a policy prescription checking and measuring legal progress.[541] In this sense, McDougal turned law into a science—a classical *technē* in the Platonic sense.[542] Consistent with this *technē*, McDougal sought to anchor the external value of legal process empirically. He engaged in comparative legal research showing that dignity was in fact a measure or value inherent in legal systems around the world.[543] Thus, reliance upon dignity as an external value was not alien to law but rather already recognized by the participants as forming part of their legal value systems.[544] By making legal process about dignity, in other words, law would gain greater externally measurable precision as prescriptive science without imposing an entirely prescriptive regime.

Koh's transnational legal process started out by rejecting this external measure for prescription.[545] He insisted that the process must rely upon values internal to its participants.[546] It could not borrow external value goals.[547] Thus, a further development of process theory away from McDougal was needed to make process truly self-sustaining—and truly legitimate.[548]

If transnational legal process similarly is about dignity, it appears we have come full circle. Does this mean that the transnational legal process theory was simply wrong in abandoning policy science?

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540. *See, e.g.*, Reisman, Wiessner & Willard, *supra* note 42, at 576 (explaining that the school is a process school seeking "a preferred future world public order of human dignity"). For a discussion of the concept of human dignity in the New Haven School, see, for example, 2 HAROLD D. LASSWELL & MYRES S. MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE, AND POLICY 737–86 (1992) (partially specifying human dignity and providing a note on derivation).

541. *See id.* ("[T]he political elites of the globe have already committed themselves to the goal of harmonizing world public order with the dignity of man." (footnote omitted)).

542. *See* NUSSBAUM, FOG, *supra* note 41, at 79 (defining technē as "a man of art"); Reisman, Wiessner & Willard, *supra* note 42, at 576 (describing the way the New Haven School adopted analytical features of other disciplines). For a detailed discussion, see generally Hengameh Saberi, *Love It or Hate It, But for the Right Reasons: Pragmatism and the New Haven School's International Law of Human Dignity*, 35 B.C. INT'L & COMP. L. REV. 59 (2012) (discussing the development of the New Haven School's approach to dignity).

543. *See* LASSWELL & MCDOUGAL, *supra* note 540, at 737–38; *see also* Adeno Addis, *The Role of Human Dignity in a World of Plural Values and Ethical Commitments*, 31 NETH. Q. HUM. R. 403 (2013) (examining various approaches to human dignity and arguing for a new approach).

544. *See* LASSWELL & MCDOUGAL, *supra* note 540, at 737–38.

545. *See* Koh, *TLP*, *supra* note 14, at 183–84.

546. *See id.*

547. *See id.*

548. *See id.*

Quite the opposite is true. The transnational legal process demonstrates the internal necessity of dignity as the core value of process. Rather than justifying law by reference to an external measure, process can generate not only the norms that govern its participants but also develop a *Selbstverständnis* of its ultimate value.[549] Dignity is hardwired into process and not externally imposed upon it. This means that the transnational legal process would cease to operate without a dignity measure. In other words, it has achieved perhaps the most difficult feat of all—it has internalized human dignity in all of international and transnational law as a matter of functional necessity. Or, aphoristically—"As within, so without."[550]

549. Selbstverständnis refers to the "self-understanding," or, for purposes of migration into the English language, the self-directed equivalent of Weltanschauung, or "world-view." *See Selbstverständnis Definition*, DICT.CC, ENGLISH-GERMAN DICTIONARY, http://www.dict.cc/german-english/Selbstverst%C3%A4ndnis.html (last visited Mar. 5, 2015) [http://perma.cc/FNV3-9CAA] (archived Jan. 20, 2015); *Weltanschauung Definition*, DICT.CC, ENGLISH-GERMAN DICTIONARY, http://www.dict.cc/?s=Weltanschauung (last visited Mar. 5, 2015) [http://perma.cc/SLS9-AZDK] (archived Jan. 20, 2015).

550. MICHAEL MACK, SIDNEY'S POETICS: IMITATING CREATION 77 (2005).