

The Analysis of Rights

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“Maine’s reference to Bentham not as discovering or revealing the meaning of the expression ‘a right’, but as *giving* a clear meaning to it is accurate; and raises a methodological issue of some importance.” (Hart 1982, pp. 162-63)

“Faithfulness to the shape of common concepts is itself an act of normative significance.” (Raz 1986, p. 64)

1. Introduction

In some respects investigations into the nature of rights resemble investigations in the physical sciences. An investigation into the nature of a particular right, such as the right to remain silent or the right to pass a criminal sentence, will seek to describe the right in terms of its logical structure and its normative functions. This is analogous to an investigation of a particular chemical compound, which will attempt to describe the compound in terms of its physical structure and its standard causal properties.

Within the philosophy of science it is controversial whether scientists’ generalizations should be interpreted as causal or nomic.¹ However all sides of this dispute agree that one scientific theory will be more powerful than another if it

¹ Compare (Hempel, 1965, Salmon, 1984, Kitcher, 1989).

accounts for more phenomena, and if it accounts for the same phenomena using fewer basic concepts and relations. *Comprehensiveness* and *simplicity* are two primary dimensions along which scientific explanations should be measured. There is also broad consensus on which scientific theories have more explanatory power, at least for inter-paradigmatic comparisons. To take an obvious example, there is near-universal agreement that the explanatory framework of modern chemistry is superior to the medieval earth-air-fire-water-aether framework that it replaced. Although the modern periodic table of elements is not as simple as the medieval diagram of elements, the comprehensiveness of the modern theory makes it more powerful overall.

A theory of the nature of rights will also aim for greater explanatory power, where two primary measures of explanatory power are again comprehensiveness and simplicity. All else equal, a theory of rights will be more powerful when it accounts for more rights, and when it uses fewer basic concepts and relations. As with scientific theories no one believes that there is an exact schedule for trading comprehensiveness against and simplicity. But there is no reason to think that there will be more dissensus when it comes to cases than there is in the comparison of scientific theories.

The “phenomena” that a theory of rights ultimately aims to explain is *what rights there are and what rights there could be*. However, what lies within the extension of that concept is more controversial than what lies within the extension of the analogous concepts in many physical sciences (e.g., “what chemical compounds there are and could be”). This is because what moral rights there are and could be turns on which moral theory is correct, and what legal rights there are and could be

turns on what is the correct theory of law. Which moral theory is correct, and which jurisprudential theory is correct, are matters of some dispute.

The theorist of the nature of rights therefore cannot simply set a list of the phenomena to be explained—the rights that there are and could be—without making hotly contentious assumptions outside of his domain of inquiry. Indeed there is doubled trouble here, as it will be controversial not only which moral or jurisprudential theory is correct, but also which rights are entailed by any such theory within a given set of circumstances.

In response to these difficulties rights theorists have adopted an indirect approach to their subject matter. They have tested the explanatory power of their theories not against what rights there are and could be, but against what rights *people say that* there are and could be. Theorists of rights have, in the main, taken an ordinary understanding of rights to set the phenomena to be explained. For example, a rights theorist will reject any theory that ascribes rights to tomato plants, or to ant colonies, because such a theory is incompatible with an ordinary understanding of rights. The same reason will be given for rejecting any theory that denies that it is coherent to ascribe rights to women. This indirect approach is attractive because what informed, thoughtful people believe about rights is much less contentious than what rights there actually are. Thoughtful people who are not theorists do have some familiar differences concerning what rights there are and can be—but moral and legal theorists share all of those differences and have many more disagreements as well.

The “data” of ordinary understanding are therefore significantly less contentious than the “data” of what rights there really are, and focusing on ordinary understanding allows debates over the nature of rights to refer to a common set of facts to be explained. By contrast if some theorist alleged that his theory of the nature

of rights was superior because it fit with his preferred substantive theory of rights, he would immediately be challenged to show that his preferred substantive theory was correct. A debate on the terrain of “fit with some preferred moral or jurisprudential theory” would quickly become merely a proxy for a debate over which moral or jurisprudential theory is best.

For the most part, therefore, theorists have attempted to provide a conceptual analysis of the concept of a right as this concept is ordinarily understood. In the language of the Hart quotation that begins this article, theorists been more concerned with “discovering or revealing the meaning of the expression ‘a right’”; and less concerned with “*giving*” the concept a meaning. Nevertheless, as we will see in the final section of this article, rights theorists have also surreptitiously allowed a desire to bolster substantive theories to pull them toward revisionary definitions of the concept. Indeed rights theorists have surreptitiously yielded to this desire in a way that has contributed to making the debate over the nature of rights permanently intractable up to now.

2. The will theory and the interest theory

Of the two features of rights that a theory of the nature of rights is meant to explain—logical structure and normative function—there is much more consensus on the former than the latter. The Hohfeldian framework is by far the most widely accepted analysis of the logical structure of rights, and it is used by the majority of contemporary rights theorists. Regarding the functions of rights however there is a longstanding disagreement. Proponents of the will theory and the interest theory have struggled for decades if not centuries over which theory provides the more powerful

explanation of what rights do for rightholders.² It is this debate over the functions of rights that is our main study here.

The question of the function of rights concerns what rights do for those who hold them. The will theory of rights asserts that the function of all rights is to give the rightholder choices. According to Hart's will theory, for instance, the function of a land owner's legal right is to give him the legally recognized power to waive or not to waive the duties that others have not to enter his land. As Hart describes the core idea of the will theory in the context of legal rights, "One who has a right has a choice respected by the law." (Hart 1982, pp. 171, 183-85, 188-89).³

The will theorist's view of the function of rights limits what he recognizes as a right: where there is no normatively respected choice, there can be no right. The will theorist's view also restricts the class of potential rightholders. Only those beings that have certain capacities—the capacities to exercise choice in controlling their own actions and the duties of others—are potential will theory right-holders.

The interest theory, by contrast, maintains that the function of all rights is to further their holders' interests. The most prominent interest theory analysis is Raz's: "X has a right' iff X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty." (Raz, 1986, p. 166) Here rights do not give choices; rather rights are claims on the actions of others that are justified by the interests of the rightholder.

The advocates of the each theory are deeply entrenched in their positions. At times the debate appears to be one—like the debate over Newcomb's problem—

² For some of this history, see (Tuck, 1997, Brett, 1997). See also Simmonds's reflections on the history of the jurisprudence of rights (Kramer, Simmonds, and Steiner, 1998, pp. 113-232).

³ Besides Hart, influential advocates of a choice-based approach to rights include Savigny, Kelsen, Wellman, and Steiner.

where each side can scarcely imagine that the other side has a reasonable view.⁴ Thus Hart in laying out the will theory claims that “It is hard to think of rights except as capable of *exercise*,” (Hart 1982, p. 184) while Williams in opposition insists that “No one ever has a right to do something; he only has a right that someone else shall do (or refrain from doing) something. In other words, every right in the strict sense relates to the conduct of another.” (Williams, 1956, p. 1145)

These positions are entrenched despite the widely acknowledged fact that each theory is too narrow when judged against an ordinary understanding of rights. Each theory accounts for an insufficiently comprehensive range of rights, leaving large areas of commonly accepted rights unexplained. The ways in which each theory is too narrow are by now well understood. Indeed the debate between the two theories has generated a standard account of the shortcomings of each approach. Here I will just summarize this standard account of these shortcomings so as to set up a discussion of the strategies that the two groups of theorists have taken in response to the problem of narrowness.⁵

The narrowness of the will theory is apparent, first, in the types of actions that the theory can recognize as rights violations. Many important legal rights do correspond to Hart’s legally-respected choices. But many do not. For example, you have no legal discretion to alter your entitlement against being enslaved, or your entitlement against being tortured to death. The will theory therefore does not recognize that you have a legal right against being enslaved, or against being tortured

⁴ “I have put this problem to a large number of people... To almost everyone it is perfectly clear and obvious what should be done. The difficulty is that these people seem to divide almost evenly on the problem, with large numbers thinking that the opposing half is just being silly.” (Nozick, 1969, p. 117)

⁵ This summary draws from (Wenar 2005).

to death. Yet most would regard these unwaivable claims as rights, indeed as among the more important rights that individuals have.⁶ Indeed the will theory does not recognize that the criminal law confers any rights on citizens, since the power to enforce the law rests not with citizens but with state officials. (Kramer, Simmonds, and Steiner, 1998, p. 230; Wellman 1985, p. 85) Yet most citizens would find it surprising to hear that the criminal law did not ascribe to them a right against being murdered or raped.

The limitations of the will theory are also evident in its inability to account for the rights of certain kinds of rightholders: for example, for the rights of incompetent (e.g., comatose) adults, and of children. (MacCormick, 1982, pp. 154-66) The will theory can acknowledge rights only in those beings competent to exercise choices—which incompetent adults and children are not. Incompetent adults and children therefore are not possibly rightholders on this view. This result diverges significantly from an ordinary understanding of rights. Few thoughtful laymen would insist that it is a conceptual impossibility, for example, for the comatose to have rights against bodily mutilation.

Since the interest theory turns on the interests instead of choices, it can recognize unwaivable rights against enslavement and torture. The interest theory can also accept children and incompetent adults as rightholders, since children and incompetent adults have interests that rights can protect.

Yet the interest theory is also inadequate to an ordinary understanding of rights. Staying with Raz's version of the interest theory, there are many rights for which the interests of the putative rightholder are not sufficient to hold other person(s)

⁶ Despite not being able to recognize a person's claim against being tortured as a right, the will theory does recognize many negligible claims (such as your waivable claim not to be patted on the head) as rights. (MacCormick 1977, p. 197).

to be under a duty. For example, Raz himself allows that the interests of a journalist in protecting his sources is not itself sufficient reason to hold others to be under the corresponding duty. (Raz, 1986, pp. 179, 247-48) It is rather the interests of the general public in an active and independent media that grounds the journalist's right to protect his sources. Yet as Kamm observes, "If the satisfaction of the interests of others is the reason why the journalist gets a right to have his interest protected, his interest is *not sufficient* to give rise to the duty of non-interference with his speech." (Kamm, 2002, p. 485) Nor does this difficulty only affect the rights of office-holders like journalists, as Raz admits that weighty rights such as the rights of free expression and freedom of contract are not justified solely by the interests of the individual citizens who hold them. (Raz, 1995, pp. 30-43, 131)

3. Three strategies for fitting theory and data

Both the will and the interest theories are, in their standard forms, too narrow. Each theory accounts for some but not all of the rights that any ordinary understanding of rights will accept.

Will and interest theorists have wrestled with this mismatch between the scope of their theories and the range of the phenomena for a long time. They have adopted three strategies in response to the problem of narrowness. The first strategy is to claim that their theories are only meant to describe a more limited range of the phenomena than was originally supposed. The second strategy is to attempt to expand the scope of their theories in order to explain more of the phenomena. The third strategy is to replace the set of the phenomena to be explained with a different set. The three strategies could be summarized as narrowing the data, broadening the theory, and replacing the data-set.

We next examine some examples of each of the three types of strategies taken by the will and the interest theories in response to the problem of narrowness. While the three strategies are perfectly reasonable responses to the problem, the results of pursuing each of the strategies have been unsatisfactory. The reason for this repeated failure, as it turns out, is not contingent. As will be shown in the discussion afterwards, the two theories share a premise which prevents them from yielding an adequate understanding of rights, regardless of how the theories are recast.

3.1. Narrowing the range of the phenomena to be explained

The first response of rights theorists to the problem of narrowness has been to cut the domain of rights to be explained to fit the ambit of the explanatory theory. Thus Hart, when faced with counterexamples to the will theory involving constitutional immunities, confesses that his theory is satisfactory “only at the level of the lawyer concerned with the working of the ‘ordinary’ law,” and is not adequate to handle individual rights at the level of constitutional law.” Still less, Hart says, is his theory equipped to explain rights as they are understood by individualistic critics of the law and by social theorists. (Hart, 1982, pp. 185-86, 192-93)

Hart attempts to make a virtue of this limitation by asserting that his will theory is only intended to explain rights within the “ordinary” law. Yet even were we to grant Hart that his theory accounts for this limited domain, this first strategy makes a major concession. As with scientific theories, a more comprehensive account of the subject matter is always preferable to a less comprehensive account. This is particularly clear with rights. A theory that is adequate only to rights within one part of the law will at best satisfy certain specialists, and will not provide an analysis that

is useful for understanding rights as a central concept in morality, in politics, and in the law viewed more broadly.

Interest theorists face the analogous difficulty that people's rights frequently outrun their interests. To take one type of example, because of ignorance or carelessness people often enter into promissory relations that vest in them rights to receive goods or services that they have no interest in receiving. Imagine, for instance, a budding auto enthusiast who finds in a newspaper what he thinks is a fine deal on a second-hand engine, and pays to have this engine delivered to his house the following week. As it turns out, this enthusiast has erred in buying this engine: as he does not yet realize, it does not fit his (or indeed any extant) car. The enthusiast has no interest whatsoever in having this useless and hard-to-dispose engine winched onto his driveway. As he will discover when he returns home from work and tries to install the engine, the delivery has made him significantly worse off. Yet as the lorry rumbles toward his house with the bulky engine in the back, there is no doubt that the lorry drivers are fulfilling the enthusiast's claim-right. The example shows that a person's well-being does not go up merely in virtue of promises to him being kept. A promisee can be in every way better off if the deal he has foolishly entered into goes unconsummated, and so his right remains unfulfilled.

In response to counterexamples where rights outrun interests, several interest theorists have framed their theories around weak generalizations, which only attempt to explain some but not all rights. MacCormick, for example, phrases his central thesis in terms of "normal circumstances: "To ascribe to all members of a class C a right to treatment T is to presuppose that T is, *in all normal circumstances*, a good for every member of C." (MacCormick, 1982, p. 160, emphasis added). Similarly, Kramer presents his theory in terms of what is "*generally* beneficial for any *typical*

human being or collectivity or non-human creature.” (Kramer and Steiner, 2007, p. 290, emphasis added) The qualifications “normal circumstances,” “generally,” and “typical” limit the domain of rights that these theories will attempt to explain to a domain with certain rights (specifically, the counterexamples) removed.⁷

Weak generalizations are unsatisfying because of their lack of comprehensiveness. A linguist studying English will not rest content with the rule that *in all normal circumstances, ‘i’ comes before ‘e’*. Nor will a toxicologist be satisfied with the thesis that *mushrooms are generally harmless when eaten*. It is unlikely that the best theory of rights takes the form: “All rights have feature F (except for those that lack feature F).”⁸ A weak generalization can be better than another generalization that is weaker still, or better than no generalization at all. Yet a theory based on a weak generalization will always be discarded once a theory with greater explanatory scope is found.

3.2. *Expanding the scope of the theory*

The second strategy of rights theorists for overcoming the problem of narrowness has been to attempt to modify their theories so as to capture more rights. Both will and interest theorists have taken this path.

For example, Steiner has found new rights within the scope of the will theory in response to the charge that the will theory fails to recognize the rights of the “powerless.” (Kramer, Simmonds, and Steiner, 1998, pp. 258-62) Steiner’s will theory cannot recognize the rights of children, comatose adults, and animals, because

⁷ See also (Raz, 1986, pp. 173-76).

⁸ It is of course possible to try to recapture universal application by specifying some property specially rigged for the purpose, for example “All rights share the property of belonging to a set whose members generally have feature F.” But the weak spot in the generalization will always remain.

these beings lack the power to waive or enforce the duties of others. Nor can the will theory recognize the rights of criminal defendants, since such defendants do not have the power to waive others' duties against assaulting them, killing them, and so on. Yet Steiner argues that his will theory *can* acknowledge rights that protect these unempowered beings—so long as those rights are seen to reside in beings besides those who have traditionally been taken to be the rightholder.

On Steiner's interpretation of the will theory the rightholder in these cases will not be the citizens, children or animals who are protected by certain duties. Rather, the rightholders will be the "power-possessors" who have the authority to waive or enforce those duties. So, for example, Steiner says that the right that a citizen not be assaulted is held not by that citizen, but by the magistrate who can decide whether to charge an assailant of that citizen. The right that the citizen not be assaulted is the magistrate's right. Similarly, the right that a particular child not be abused is vested not in that child, but in the judge who will decide whether to punish a person convicted of child abuse. It is the judge, not the child, who has the right that the child not be abused.

In response to the unnatural feeling of this location of rights in the case of children, the comatose, and animals, Steiner writes:

What scintilla of a practical or analytical difference can it make if we construe the rights correlative to those protection duties as one held *by those power-possessors* rather than one held by unempowerable creatures? As far as I can see, none. And if those power-possessors are indeed the holders of those rights, then, as we saw in the previous discussion of criminal law, the rights they hold are none other than will theory rights. (Kramer, Simmonds, and Steiner, 1998, p. 261)

The difficulty that Steiner faces here is that he is both appealing to an ordinary understanding of rights to support his interpretation of the will theory, and also claiming that it makes no difference that this interpretation continues to conflict with such an ordinary understanding. Steiner's will theory acknowledges a greater number of rights than do other versions of the will theory, since on his interpretation it can be said that there are rights that protect citizens, children and so on. This fits Steiner's will theory more closely to an ordinary understanding of rights. Yet Steiner's revised theory locates these extra rights in what are, on any common appreciation of rights, entirely the wrong places. Within Steiner's theory citizens still have no rights against criminal assault, children have no rights against abuse, and so on. So here there are more rights, which is welcome from an ordinary perspective; yet these rights are said to be vested in the wrong individuals, which is not. Steiner can legitimately commend his interpretation of the will theory for the ways in which it better captures an ordinary understanding of rights, but he can hardly then maintain that the ways in which his interpretation still conflicts with an ordinary understanding make no difference.

Kramer similarly considers expanding his interest theory to accommodate rights that seem beyond its reach.⁹ Kramer suggests that within a “capacious” version of his interest theory (which he discusses but does not endorse) the powers and privileges belonging to various offices are properly classified as rights because those powers and privileges usually promote certain interests of the office-holders. This suggestion does not have much immediate appeal. For example, consider the fact that a judge’s power to sentence criminals is properly classified as a right. It would sound odd to say that this fact is explained by the fact that the possession of this power is generally beneficial for the judge. Similarly with the fact that a policeman’s liberty to detain a suspect is properly classified as a right. One might not think that this fact is explained by the fact that the possession of such a liberty is generally beneficial for the policeman.¹⁰

⁹ I hesitate to address Kramer’s interest theory, as Kramer has not yet had the chance to set out his evolving theory fully. This is evident in Kramer’s last published writing on his interest theory (Kramer and Steiner, 2007). For example, Kramer makes philosophically significant modifications to his theory without having space to explain fully why he has done so or what the further implications might be, such as when he declares that a large class of interests (which he labels “vicarious”) are irrelevant to what rights there are (302-04). More broadly, Kramer has yet to set out a usable method for applying his theory’s distinctive test for locating claim-right holders. Kramer’s test says that X holds a claim-right if X’s detriment is sufficient to establish a breach of a duty, yet Kramer has not yet said how one can tell whether X’s detriment is in fact sufficient to establish a breach of a duty (without begging the question by surreptitiously relying on one’s beliefs about whether X holds a claim-right). A full treatment of Kramer’s interest theory must wait until Kramer has had the opportunity to present a complete statement of his revised theory, by explaining what he believes are the necessary and sufficient conditions for the ascription of a right, and by offering some systematic account of how one can tell whether these conditions have been met.

¹⁰ Unlike Raz’s interest theory, on the expansive version of Kramer’s interest theory the interests of a right-holder are not necessarily what justifies the establishment of a right: they are not necessarily what justifies the imposition of duties or the creation of norms or roles. This can be seen from Kramer’s test for right-holding (on the extended interpretation of his view): “If a norm or decision bestows a Hohfeldian entitlement on Q, and if the possession of that entitlement would usually be beneficial for someone in Q’s situation, then Q is a right-holder under the norm or decision.” (Kramer and Steiner, 2007, p. 290). Here the interest (what “would usually be beneficial for someone in Q’s situation”) does not necessarily have any justificatory relation whatsoever to the norm. Rather the interest (partly) explains the fact that Q has a right by usually being present when the norm that bestows the relevant Hohfeldian entitlement is present: that is, by satisfying the second conjunct in the antecedent when the first conjunct is also satisfied. This is the sense in which, for example, the fact that a policeman’s liberty to detain a suspect is properly classified as a right is explained by the fact that the possession of such a liberty is generally beneficial for the policeman.

Yet that is what the “expansive” version of Kramer’s interest theory holds.¹¹ Within this expansive theory, if a norm (here a role) bestows a normative ability (a Hohfeldian power or privilege) on a person, then the fact that that normative ability is properly classified as a right is explained by the fact that their having this ability will normally make them better off. Within this theory the fact that a judge’s power to sentence criminals is properly classified as a right is explained by the fact that having this power allows a judge “to carry out his judicial responsibilities with smoothness and efficiency.” Within this theory the fact that a police patrolman’s liberty to detain a suspect is properly classified as a right is explained by the fact that his having this liberty enables the patrolman to “fulfill his duty to detain [the suspect], without exposing himself to penalties for so doing.” (Kramer and Steiner, 2007, pp. 290, 291) Judges and policemen are made better off, the theory holds, by having the normative abilities to carry out their responsibilities. So these normative abilities further the interests of these role-bearers, and are therefore rights.

Such appeals to smooth and punishment-free discharge of responsibilities cannot help an interest theory to explain why the powers and privileges of offices are rights. For this line of reasoning simultaneously relies upon and misunderstands the norms that are roles. It is not as though there is a coherent role described as “judge who has the responsibility to sentence but no power to sentence” – and then we make

¹¹ Kramer sets out the “expansive” version of his interest theory at some length, and says it may be worth developing further, but in the end does he not accept it (Kramer and Steiner, 2007, 290-95). This expansive version of the interest theory would need further explication in any case. For example, in setting out this theory Kramer appeals to a distinction between “intrinsic” and “extrinsic” effects of legal norms without defining these terms or saying how one might distinguish one from the other (293). Kramer also appeals to the purpose of legal norms to make sense of these cases (293), where a few pages earlier he had said that purposes had no “determinative bearing” and were “quite immaterial” in his theory (289, 290). I discuss the expansive version of Kramer’s interest theory here because it is a serious attempt to broaden an interest theory so as to encompass the rights of offices and positions. Without some modification like this one, there seems little hope that Kramer’s interest theory will be able to capture these rights.

a separate determination that the life of someone filling that role would go better if they gained the power to sentence. The original description makes no sense: a role that assigns a responsibility to *phi* but with no normative ability to *phi* is not a role that fits into any recognizable human practice.¹² Similarly with the patrolman. There is no intelligible job that is “policeman who has the duty not to detain suspects whenever he has the duty to detain suspects.” Such a job could be imagined only at the edges of a fantasy, if there; speculation about the interests of such a job-holder are moot. In reality, offices such as judge and policeman always pair the responsibilities of office with the normative abilities appropriate for carrying out these responsibilities. “Rights of office” are not optional add-ons that help a person do a job; rather, rights of office are an integral part of every job’s description.¹³

The expansive version of Kramer’s interest theory cannot account for the fact that role-bearers’ powers and liberties to do what they have duties to do are rights. Nor can it account for the fact that their discretionary liberties are rights. For example, a parent has the liberty either to punish or not to punish her child. Kramer attempts to

¹² Kramer might rather claim that a judge’s responsibility is not *to sentence* but rather *to see that sentences are passed*. Yet imagining someone who has a responsibility to see that sentences are passed, but who has no power of his own to sentence, would not fit Kramer’s words: such a person would not have “judicial responsibilities” in this respect. Such a person would rather be the holder of some sort of administrative office. The powers of that administrative office (to see that sentences are passed) would presumably include powers to appoint, or perhaps simply to discipline, the judges who have the power pass sentences. Whether it would be in the interest of someone holding such an administrative office for his office to be redefined so that he himself gains the power to sentence depends entirely on how we imagine his office to be currently defined (e.g., how many judges he is responsible for overseeing, whether he is expected to have detailed understanding of sentencing procedures, what oversight he himself faces for discharging his responsibilities, etc.). Within any well-designed system of roles there will be no presumption that overseeing officers have any such interest in their roles being redefined. (This reasoning applies also to the cases of the traffic warden and the army captain (Kramer and Steiner, 2007, p. 290).)

¹³ It might be noted here that this discussion is not concerned with whether it is in any individual’s interests to hold a particular office in the first place. It may be beneficial for an individual to occupy some office, or it may be entirely a burden. It may or may not be in Jane’s (or anyone’s) interest to be a judge, but in either case Jane will have the rights of a judge if she is a judge. It might also be mentioned that this discussion remains neutral concerning what justifies the creation of offices that are defined by specific duties and rights.

explain why this first liberty (the liberty to punish) is a right as follows. Imagine a world in which a parent has no liberty to punish her child (i.e., she has a duty not to punish), but in which she retains the liberty not to punish her child. In such a world, Kramer says, the parent would be better off if she gained the liberty to punish her child because then she would no longer be liable to penalties whenever she did punish. (Kramer and Steiner, 2007, pp. 291-92)¹⁴

In Kramer's imagined world parents are prohibited from punishing their children. In this world parents also have no duty to punish their children. Why in this world would a parent be better off if she gained a liberty to punish her child? She will be better off gaining a liberty to punish her child only if she has some reason to punish her child. Yet there is no reason that Kramer can depend upon here.

Kramer appears to suggest that in his imagined world a parent would have a *role-based* reason to punish her child, and so would be better off with the liberty to punish. He says that with this liberty she would "not have to worry about being penalized for taking steps which she reasonably deems necessary for the effective performance of her role as a parent." (Kramer and Steiner, 2007, p. 292) Yet within this imagined world parents are prohibited from punishing their children, so their role is quite different than in our world. In this imagined world, the role of parent could at best be described as "raising one's children well, so far as one can do so without punishing them." Punishing one's child could not be a step reasonably deemed necessary for the effective performance of *that* role. In the imagined world, discipline

¹⁴ Kramer notes that his reasoning is the same across two variants of this example. The discussion here concerns the variant in which the parent has a Hohfeldian privilege not to punish the child, and Kramer considers why the parent's privilege to punish is a right. The analysis of the other variant, where the parent has a duty to punish the child, is captured by the police patrolman example above.

is no part of a parent's job description. So Kramer has no role-based reason available to explain an interest in gaining the liberty to punish.

Kramer might instead venture that a parent in his imagined world would have some *non-role-based* reason to discipline her child.¹⁵ Yet this depends entirely on how we imagine this world to be. For example, in this imagined world where parents have no duty to discipline their children and indeed are prohibited from doing so, the responsibility for disciplining children might well be (indeed likely would be) assigned to someone else. Were we to posit that parents have an interest in punishing their children even when someone else is effectively doing so, we would seem to be making parents out to be simply cruel. Or again: parents in Kramer's imagined world might be just as glad, all things considered, to be legally prohibited from punishing their children. They might think that gaining the liberty to punish would result in their having endless headaches (familiar from our world) that they would just as soon avoid.¹⁶

An interest-theoretical approach such as this one cannot be the path toward understanding the rights of offices and positions. Rights of office cannot be explained by the interests of the individuals who occupy the office as currently defined. An

¹⁵ As mentioned in note 9 above, Kramer does not allow appeals to "vicarious" interests within his theory (i.e., interests that "reside wholly in the furtherance of somebody else's interests." (Kramer and Steiner, 2007, 303)). So whatever reason to discipline Kramer might posit here, it cannot be the reason that a parent has to discipline her child for the child's own good.

¹⁶ This example here resembles the case of John (Kramer and Steiner, 2007, p. 292-93). Kramer addresses this case by invoking his weak generalization about what is generally in people's interests, and then asserting that it will be "extremely rare" for people to be better off for facing a legal prohibition that disinclines them from doing something risky or difficult that they would otherwise do. But as the parent example shows, Kramer must face this kind of question all the time. Moreover, reflection on paternalistic legislation gives further reason to doubt Kramer's assertion. Paternalistic legislation just is an attempt to make people better off by instituting a legal prohibition that disinclines them from doing something risky or difficult that they would otherwise do. For Kramer to establish that it is extremely rare for a legal prohibition to further the interests of those restricted by it, he would need to show that it is extremely rare for paternalistic legislation to achieve its aims.

interest theory needs to be expanded so as to capture these rights, but the interest framework does not provide the resources for the theory to do so.

3.3. Redefining the phenomena to be explained

The third strategy of will and interest theorists has been to assert that their theories are intended to account only for “rights” in some technical sense of that term instead of in an ordinary sense. This third strategy resembles the first strategy in altering the domain over which the theory is meant to apply. Yet this strategy, unlike the first, applauds the fit between the theory and some *artificially constructed* concept that is given the name “rights”. Interest theorists who take this path stipulate that their theories are not meant to account for rights as commonly understood, but only for “rights” defined as Hohfeldian claim-rights. Will theorists who take this tack say that their theory is only intended to explain “rights” defined as Hohfeldian claims accompanied by Hohfeldian powers of waiver or enforcement.

Thus when these theorists present their “theories of rights,” the term “rights” is intended to refer to a *technical explanandum* (such as “claims” or “claims-with-powers”). “Rights” no longer refers to the ordinary explanandum, which is the full catalogue of rights as commonly understood. As we will see, these theorists do not in the end repudiate “fit with an ordinary understanding” as a criterion of success. Yet at least initially they take the phenomena to be explained as “rights” in some specially defined sense.

This substitution of the reference of “rights” means that theorists using this third strategy speak a different dialect than that used by ordinary speakers such as judges, lawyers and laymen. Thus when Wellman is confronted with the result that his will theory cannot recognize the rights of infants, he says:

Surely it is confusing for me to insist that infants could not have legal rights as I conceive of a right but to admit that infants can and do have rights as judges and lawyers conceive of rights. Still, this confusion can be minimized, although probably not completely avoided, by distinguishing carefully between two spheres of discourse, the language of the law and the language of the philosophy of law. (Wellman, 1995, p. 135)

Wellman here distinguishes the ordinary language of the law from the language in which his technical explanandum occurs: the “language of the philosophy of law.” Kramer makes the same kind of distinction to justify a move to his own preferred technical explanandum. Kramer wishes to work within a sphere of discourse in which the referent of “rights” is claim-rights. Like Wellman, Kramer faces the difficulty that ordinary discourse does not line up with his technical definition. In Kramer’s case, one conflict is that claim-rights concern only the actions of others, while ordinary usage accepts many rights that give the rightholder themselves rights to act (e.g., speak, worship, promise). Faced with obvious cases where ordinary usage acknowledges rights to act, Kramer responds by disparaging ordinary language: “Our ordinary ways of speaking about rights as entitlements to do various things are loose.” (Kramer, Simmonds, and Steiner, 1998, pp. 13-14)

In Wellman’s “language of the philosophy of law,” the term “rights” refers to the technical concept “claims-with-powers.” In Kramer’s “strict sense,” the term “rights” refers to the technical concept “claims.” The question for the theorists of rights who deploy a technical concept is whether they can offer a rationale for moving the analysis away from ordinary language and toward their favored technical explanandum in particular. One obviously inadequate justification would be to point out that redefining the explanandum makes the phenomena to be explained fit better with their favored explanans. A will theorist, for instance, should not simply say that

he prefers his technical definition of the term “rights” because the will theory is so good at explaining “rights” so defined. Yet putting such special pleading to the side, how else could a move to some particular technical explanandum be motivated?

Rights theorists who work within a technical discourse characteristically allege that this move is necessary because the ordinary discourse of rights is hopelessly vague, or because ordinary language speakers are prone to fall into contradictions when discussing rights. (E.g., Kramer and Steiner, 2007, p. 295) As Kramer puts it in the quote above, ordinary ways of speaking about rights are “loose”. No theory, these theorists say, can hope to explain a set of assertions if the assertions have extremely indeterminate or contradictory content. So, these theorists allege, they must aim their theories at an artificially-defined domain of “rights” instead. Interest theorists are particularly likely to cite Hohfeld in motivating their move to a technical discourse of rights, as Hohfeld was also the originator of the thesis that in the “strictest sense,” all rights are claims. (Hohfeld, 1919, p. 36)¹⁷ Will theorists take a differently-defined technical concept to be the object of their explanatory theory, which is more congenial to their thesis that rights endow their bearers with discretion over the duties of others.

¹⁷ Hohfeld’s curious, unargued stipulation that “in the strictest sense” all rights are claims disables anyone who accepts it from giving a straightforward analysis of many commonly-asserted rights. For example, any analysis of legal rights should be able to explain a judge’s legal right to sentence a convicted criminal. Some who adhere to Hohfeld’s stipulation set aside the obvious analysis that this right consists in the judge’s Hohfeldian power to impose duties on the convict, and say rather that the right consists in the claims protecting the judge from the interference of others when he exercises such a power (See for example Raz, who separates the power to promise from the “right” against interference with one’s promising. (Raz, 1986, pp. 173-76)). However, construing such rights as claims against interference is strained. One can see this by imagining situations in which interference is literally impossible (e.g., where judges pass sentences from impregnable strongholds, communicate telepathically, etc.). Here a claim-right against interference makes no sense, but judges would still have a right to sentence. Similarly, anyone who accepts Hohfeld’s stipulation will have difficulties explaining many (power- and privilege-) rights that religious believers have for centuries attributed to God (God has a right to make promises, to command his creations, to punish sinners, etc.). These rights cannot possibly be construed as God’s rights against interference, for such interference is literally unimaginable.

Yet how then to decide which sub-set of the Hohfeldian incidents is the one that theories of rights should take as their focus? In fact, and surprisingly, the clearest and most repeated justification offered by the technical rights theorists for using their own favored technical definition of “rights” is that their favored definition fits better with ordinary language. (E.g., Kramer and Steiner, 2007, pp. 296-97) Having spurned ordinary understanding in order to motivate the move to a technical concept, these theorists then emphasize the overlap between their favored technical definition and an ordinary understanding in order to validate that definition. Indeed the debate between the technical will and interest theories has not infrequently turned into a debate over whether the area of overlap with common usage is greater using one technical definition of “rights” rather than the other.

This appeal to ordinary language leaves the technical rights theorists in a precarious position. On the one hand, they attempt to cast enough aspersions on ordinary “rights-talk” that there will appear to be no option but to shift from an ordinary to a technical explanandum. On the other hand each camp of technical theorists appeals to the fit between their favored technical explanandum and ordinary understanding as the reason to judge their favored explanandum superior. Interest theorists argue that the technical characterization of rights as claims is “more acceptable to ordinary understanding,” while will theorists argue that this honor is more fittingly given to their technical characterization of rights as claims-with-powers. (Kramer, Simmonds, and Steiner, 1998, p. 74)

The title character in Oliver Sacks’s *The Man Who Mistook His Wife for a Hat* suffered from a certain kind of aphasia which led him to attempt to embrace his wife with his right arm at the same time as he attempted to push her away with his left. (Sacks, 1985, pp. 8-22) The technical rights theorists have something of the same

disposition toward the ordinary understanding of rights. These will and interest theorists are aware that their theories of the functions of rights cannot account for a large number of rights that are commonly accepted. They therefore insist that ordinary rights-talk is vague and inconsistent in order to attempt to shift attention toward their favored technical recharacterizations of the term “rights”. Yet when attention is so shifted, they once again attempt to embrace an ordinary understanding of rights as the guarantor of their theory’s superiority. This position holds the ordinary understanding of rights to be so irremediably vague and inconsistent as to be useless as the object of theoretical explanation, but not so corrupt as to be useless in mediating between artificially constructed definitions of “rights.”

This is an awkward posture to maintain, and in fact there is no need to assume it. The technical theorists’ stated rationale for moving to a technical explanandum was to overcome the vague and contradictory nature of ordinary assertions about rights. However, vagueness and contradictoriness in ordinary language can be no reason whatsoever to switch to an artificial concept of rights.

First, technical rights theorists have not in fact established that ordinary discourse is frequently vague and contradictory, instead of being a discourse that systematically assigns different meanings to the same word in different contexts. Such systematic variation in meaning is familiar in common speech. For example there is nothing vague or contradictory in the statement that “In a free market one is free to lend money interest-free.” “Free” in this statement takes three different but determinate meanings, the meaning of each occurrence being determined by the context. Similarly in ordinary discourse one often hears the word “right” used to refer variously to privilege-rights, claim-rights, power-rights, and immunity-rights, with the intended referent made clear by the context. Interpretations of ordinary speech that

find vagueness or inconsistency instead of precise and determinate variation in usage are often just poor interpretations of ordinary speech.

Second, any vagueness and inconsistency within ordinary discourse about rights, insofar as it exists, does not justify a radical shift to a technical explanandum. For there is a straightforward solution to any problems with vagueness and contradiction, which is for rights theorists to use Hohfeldian framework to discuss rights (as indeed most already do).

Using the Hohfeldian framework of privileges, claims, powers, and immunities gives maximum specificity to statements about rights, while simultaneously insuring against contradictions. So long as rights theorists use the Hohfeldian language correctly, they cannot commit errors of vagueness or inconsistency. Therefore once theorists are using this analytical framework, there is no further need for them artificially to designate some subset of the Hohfeldian incidents as the referent of the term “rights.” Once theorists have agreed to use the Hohfeldian terminology, there would need an *extra* argument to motivate a redefinition of “rights” either as “claims,” or as “claims-with-powers,” or indeed as anything else. Any attempt by technical rights theorists to draw on the authority of (what these theorists allege is vague and contradictory) ordinary language at this point cannot provide that required extra argument, and can only cause confusion. Rights theorists utilizing the Hohfeldian framework make precise and consistent statements about rights as they are commonly understood, so there is no further rationale for these theorists to replace the object of analysis with any technical concept.

It might nevertheless be thought that there exists an extra argument for will and interest theorists to move to a technical explanandum, beyond the limp argument

just discussed of avoiding vagueness and contradiction in ordinary language. It might be thought that a move to a technical explanandum could be justified on the ground that a theory directed toward it would be not only more comprehensive and simpler but also more *fruitful*. As Carnap says in the context of scientific explananda, “a scientific concept is the more fruitful the more it can be brought into connection with other concepts on the basis of observed facts; in other words, the more it can be used for the formulation of laws.” (Carnap, 1950, p. 6) A scientific concept is more fruitful, in other words, the better it fits into a larger system of explanatory generalizations. Perhaps a technical concept of rights could also be more fruitful in this way.

It is fairly common for scientists to move from an ordinary to a technical explanandum on grounds of fruitfulness. For example consider the concept of “fruit” itself. Within a botanist’s conceptual scheme, and in contrast to ordinary usage, a tomato is a “fruit” but a stalk of rhubarb is not. This is because botanists have substituted a technical concept of “fruit” for the ordinary one; to a botanist “fruit” means a “seed-filled ripened ovary of a flowering plant.” The botanist will prefer to work with his technical concept rather than the ordinary concept, because the technical concept fits better into the larger botanical theory of the life-cycle of plants. The botanical concept of “fruit” is, given these general theories, more fruitful.

Will and interest theorists might analogously argue that their move from an ordinary to a technical explanandum is justified by the fruitfulness of their favored concept within more general theories of morality or the law. Thus Wellman in motivating the move to his favored technical explanandum suggests that “a more restricted application of the language of rights may be theoretically required in order to provide a clearer and more revealing map of the law.” (Wellman, 1995, p. 136) While he does not elaborate upon this idea, what Wellman appears to mean is that his

avored technical characterization of rights fits better within his preferred jurisprudential theory—that is, it fits better with his view of what the nature of the law is.

However unlike in the scientific case, such appeals to fruitfulness must be illegitimate and for reasons we have already seen. As noted above, there is no agreement on which substantive theory of morality or the law is correct. Will and interest theorists cannot say that their favored concepts are more fruitful given the correct theory of morality or of the law, because unlike the theory of the life-cycle of plants these theories are not “given.” Indeed, which substantive theory of morality or law is correct is a matter of fundamental dispute. An interest theorist who is told that a will-based definition of “rights” fits more fruitfully into some controversial moral or jurisprudential will not believe that he has been given a reason to accept that definition (and vice-versa). Of course it is vital that philosophers continue their debates within normative theory about which substantive theory of morality and of the law is the correct theory. However, within a conceptual analysis any appeal to a contentious substantive theory will merely infect that analysis with the contentiousness of the substantive theory appealed to.

All of the efforts of technical will and interest theorists to move away from “fit with ordinary understanding” as the criterion for a successful analysis of the concept of a right are, finally, unsuccessful. The allegedly vague and contradictory nature of ordinary usage cannot justify such a move, nor can an appeal to fruitfulness. The only usable criterion for success in analysis remains that the analysis tracks the ways that informed, thoughtful speakers of the language use the concept—which is in fact the criterion that even technical rights theorists use, despite themselves, most frequently.

4. The standoff

Neither the will nor the interest theory provides a comprehensive enough account of an ordinary understanding of rights. Neither theory succeeds, therefore, in achieving a fundamental goal of a theory of rights. Will theorists and interest theorists have explored three strategies of response to this problem in some detail. Yet as we have seen none of these lines of response—restricting the domain of application, attempting to expand the scope of the theory, or resorting to a technical discourse—has proved adequate. In this situation neither side of the debate is to be able to prevail conclusively in the main arena, nor can either side garner more resources or shift the field of play to one more favorable to its view. The result, as Wayne Sumner has said, is a kind of standoff. (Sumner, 1987, p. 51) This is a battle in which, despite the deployment of great ingenuity on each side for many years, there seems no chance that either side can emerge victorious.

Lacking the means to prove that their preferred theory superior, will and interest theorists have resorted to turning up the volume in pointing out how the rival theory conflicts with ordinary understanding. Steiner is relatively civil in casting aspersions on the interest theory, pointing only to the “grave implausibility” of its implications and how it “places considerable strain on our ordinary understanding of rights.” (Kramer, Simmonds, and Steiner, 1998, pp. 285, 287) MacCormick’s frustration with the standoff between his own interest theory and the will theory leads him to more irritated pronouncements, wondering whether we must accept a theory that “does such violence to common understanding”:

We are entitled to ask somebody who stipulates that there shall be held to be “rights” only where there are choices, whether that stipulation does not go wholly against

common understanding, and whether there is any profit derived from it. (MacCormick, 1977, p. 197)

Kramer's exasperation in being unable to dispose decisively of the rival theory results in an all-out high-decibel assault. "One can scarcely help being puzzled," he says, about the will theory's "arresting" claims and "bizarre stipulations" that are "needlessly odd" and "flout too many entrenched linguistic intuitions to be very powerful." The will theory is guilty of "gratuitous contraventions of ordinary patterns of usage," and "yields some results that tend to strike the ordinary observer as ridiculous." Finally, he reviews the will theory in language usually reserved by critics for the year's worst film:¹⁸

Many people would shrink from a theory which defines "right" in a way that commits the proponents of the theory to the view that children and mentally infirm people have no rights at all. Even when stripped of its ghastliness by being carefully explained, such a view tends to sound outlandish when stated.

When a long-running debate reaches this level of acrimony without coming any closer to producing a conclusive result, we may conclude that the debate is no longer progressing.

¹⁸ (Kramer, Simmonds and Steiner, 1998, pp. 72, 69, 72, 72, 72, 73, 75, 69). In another essay Kramer describes the conclusions of the will theory as "bizarre," "preposterous," and "jarringly and gratuitously at odds with ordinary patterns of discourse." (Kramer, 2001)

5. The shared restrictive premise

In one way, the debate over the functions of rights is presently in a bad state. Theorists of the two leading views have been contesting for so long, and have become so familiar with the limited resources available on each side, that even the most stalwart defenders seem resigned to battle for the minor honor of holding the less starkly counter-intuitive theory.¹⁹ In such a debate, as Schopenhauer said about diplomatic squabbles, each side complains about the other, and both sides are correct. Even more disheartening is when outsiders to this debate import either the will or the interest theory as a premise from which to derive further conclusions about rights in their normative theorizing. One cannot blame these outsiders for reaching for a leading theory in an area outside of their specialism. Yet these theorists do so without realizing the genetic weaknesses that their normative arguments thereby inherit.

There is, however, cause for optimism, as a broader view of the deadlock between the will and the interest theories shows where progress must come. The structure of the debate that we have seen is as follows. Each of the two theories explains some but not all of the relevant phenomena—in this case, an ordinary understanding of rights. Each of the theories has attempted predictable responses to its own narrowness. None of these responses has been adequate, even after many variations have been advanced. It seems quite likely that the correct diagnosis of this situation is that each theory captures part of the truth about the nature of rights, but that each also has within it some unremovable premise that prevents it from capturing the whole truth.

¹⁹ Thus Steiner: “Theories of rights don’t come cheap. Buying either of them [the will theory or the interest theory] involves paying some price in the currency of counter-intuitiveness. Nor, I should add, has this centuries-long debate about the nature of rights ever revealed any distinct third theory that even approaches their levels of generality, let alone promises to undercut their prices.” (Kramer, Simmonds, and Steiner, 1998, p. 298).

What could this premise be? We get an initial indication of the location of the premise by recalling two of the formal desiderata that these theories are attempting to fulfill: comprehensiveness and simplicity. Both the will and the interest theories, we have found, are insufficiently comprehensive. The natural suspicion must be, therefore, that they are excessively simple. There must be some oversimplified view of rights entrenched within these theories that prevents them from framing a thesis that would account for all of the phenomena to be explained. To put this the other way around, there must be some complexity in the nature of rights that these theories cannot acknowledge while they remain will or interest theories. If there were some way to rework these theories to capture this complexity, it seems that will or interest theorists would have found it by now.

Where more specifically is the restrictive premise within these theories? In this debate there are two theories, each professing that rights have a single function. Each of these theories appears to capture part—but only part—of the truth about what rights there are. The erroneous shared assumption must be that the rights have a single function. The correct assumption therefore must be that rights have more functions than one. The difficulty faced by both will and interest theorists throughout their long debate is that they have each been advancing a monistic theory to account for pluralistic phenomena. This explains why the debate between them has been unresolvable. Each side can claim a certain domain as its own, and cast counter-examples at the other side. But neither side can give up its focus on just one function of rights without giving up the basic character of its theory. Thus the theories are stuck in the stalemate.

This situation has precursors in the history of physical theory. The pre-Socratics put forward contending monistic theories of the physical world. The debate

between Thales's thesis "all is water" and Anaximenes's thesis "all is air" resembles the modern debate between the will thesis "all rights give choices" and the interest thesis "all rights further well-being." Progress in scientific theory came only with the abandonment of the shared monistic premise. What post-Socratic scientific theories gave up in simplicity, they more than made up for in comprehensiveness. Progress in rights theory can be expected to come along the same path.

The truth about the functions of rights is that there must be more functions than one. And as the scientific example shows, the complete set of functions may not be merely a concatenation of the monistic functions. The Pre-Socratic monistic theories eventually gave way to the five-element Aristotelian framework (earth, air, water, fire, aether), which was itself then replaced by the modern 113-elemented table of chemical elements. The Aristotelian framework is quite a bit less simple than its monistic precursors, just as the periodic table is considerably less simple than it. Yet in each case the later theory yields more powerful explanations. We are willing, it seems, to sacrifice a good deal of simplicity in order to find a theory that captures all of the phenomena. If we look for a general answer to how many basic theoretical posits will render a theory insufficiently simple, the answer seems to be "one more than in the simplest theory that explains all of the data." In physical theory five posits were better than one, and as it turns out, 113 posits are better than five.

6. The relation between analytical and substantive theories of rights

As we have seen both the will and the interest theories are based on a monistic premise, and each fails because it is so based. So far as an ordinary understanding of rights is concerned, any adequate analysis of the functions of rights must be

pluralistic. All rights perform at least one function, but there is no single function that all rights perform.

The idea of a pluralistic analysis of ordinary rights-talk is not a difficult one. Indeed for a concept such as the concept of rights, which has been deployed in so many different contexts through a long history, it might be thought that a pluralistic analysis would be the assumption by default. There is no reason, after all, that we should think that the term “rights” is in this respect different from other major normative terms that have a variety of senses, such as “freedom” or “justice”.²⁰ The struggle to claim each of these concepts for one ideology or another has been a feature of political debate throughout the modern era, and indeed even in earlier times. These struggles have left us with concepts stretched over a complex of overlapping senses, instead of with concepts that mind the strictures of some one-factored definition. Why, then, have rights theorists repeatedly presented monistic analyses?

The answer, it seems, lies in monistic theorists’ desire to advance some controversial moral or jurisprudential theory of rights. Many theorists who put forward a theory of the nature of rights have done so not as an independent exercise in conceptual analysis, but as a prelude to introducing a substantive theory of what rights there really are. So, for example, Steiner presents the will theory of rights as a preparation for his left-libertarian political theory, and Raz advances the interest theory as a step in the argument for his perfectionist account of social justice. The strategy here is to use a monistic analysis of an ordinary understanding of rights to relieve some of the justificatory burden from the substantive theory that will follow. On this strategy, if Steiner is accused of putting forward a substantive account of

²⁰ For “freedom” see Wenar (2007).

rights within which animals have no rights, he can reply that on the best analysis of an ordinary understanding of rights it is impossible for animals to have rights. If Raz is confronted by the objection that his political theory quite controversially rests the justification of rights on the interests (instead of, say, on the intrinsic dignity) of the rightholder, he can reply that on the best analysis of an ordinary understanding of rights the function of rights is to further the interest of the rightholder.

Monistic theories have continued to attract theorists, then, because such theories are useful for supporting one or another controversial substantive theory of rights. Within moral and political theory, the will theory has been used to support Kantian normative theories (which emphasize autonomy), while the interest theory has been used to support welfarist normative theories (which emphasize individual well-being). “Fit with the theorist’s preferred substantive theory” has in this way been a suppressed desideratum in presenting theories to account for an ordinary understanding of the nature of rights. As Raz himself puts it, “Moral and political philosophy has for long embraced the literary device (not always clearly recognized as such) of presenting substantive arguments in the guise of conceptual explorations.” (Raz, 1986, p. 16)

This strategy is, of course, illicit. The fact that a monistic theory can be used to bolster a controversial moral or jurisprudential theory is no reason to accept such theories as a superior account of an ordinary understanding of rights.

Indeed the susceptibility of rights theorists to the invisible gravitational pull of their substantive theories has contributed the continuing deadlock in the debate over the functions of rights. The pull of such substantive theories has dragged these theorists toward defending one of the two monistic theories as an account of an ordinary understanding of rights. Having been pulled into these positions, the debate

over the function of rights has then become a proxy debate in the battle between the substantive (Kantian and welfarist) theories. Such a proxy debate has made no more progress than has the debate between the two substantive theories themselves.

As a subject of scholarly inquiry, an analysis of an ordinary understanding of rights has its own integrity. This integrity requires that the analysis be conducted independently of the pull of controversial substantive theories. If such an analysis is so conducted then, and only then, it can become useful as part of an inquiry into which substantive theory of rights is best.

For an unbiased analysis of an ordinary understanding of rights will be useful for weighing the justificatory burden that any substantive theory or rights must bear. Suppose we had such an unbiased analysis on hand. Then when a substantive theorist claimed that the set of rights that there really are or could be differs from the set of rights that is commonly acknowledged, we could ask him to demonstrate that his substantive theory is so compelling that the common understanding of rights must be adjusted where there are conflicts. We might ask Steiner, for example, to argue on the strength of his Kantian political theory that the common idea that animals have rights must be abandoned. Or a Millian might be asked to show that Mill's reforming definition of "rights" should be accepted on the strength of Mill's utilitarian theory, despite its incomprehension of many rights assertions that would ordinarily be regarded as innocuous.²¹

²¹ In *Utilitarianism* Mill presented a famous reforming definition of "rights" as that which one has "a valid claim on society to protect [one] in the possession of." (Mill, 2002, p. 54). This definition of "rights" fits very well within Mill's normative theory: it is "worth it" in utilitarian terms to protect possession of certain things even at the cost of imposing social sanctions. However when we retain a grip on an ordinary understanding of rights we notice that Mill's reforming definition rejects many seemingly innocent rights as incoherent. There would ordinarily seem nothing amiss for example in attributing rights to people in society-less state of nature, or even in saying that every individual has the right to be free from society's protection. Yet neither of these ascriptions of rights could make sense within Mill's definition. To establish his definition of rights as the correct one, a Millian would need to

Once we have achieved an analysis of the common concept of “a right,” we will be able to judge how much of our ordinary understanding of rights we are being asked to modify by theorists who advance some substantive account of rights or other. We will that is be able better to assess the proposals of those theorists who wish (as Hart said of Bentham) to *give* the term “rights” a new meaning. We will be honoring Hart’s method for the conceptual analysis of rights:

Hart’s method implies, first, that conceptual analysis is a mode of inquiry that is distinct from and logically prior to substantive theory; and, second, that conceptual analysis aims at recovering some, perhaps idealized, common understandings, in the sense that it articulates but can never transcend the understanding already implicit in ordinary use and reflection. (Stavropoulos, 2001, p. 71)

A reliable assessment of the ways that people do think about rights is the only common starting point for arguments about how people ought to think about rights. I have argued that a pluralistic analysis of an ordinary understanding of rights will be superior to any monistic account. If that is correct, then any substantive theory of rights will need such a pluralistic analysis as the background against which to present its own arguments for revisions in usage.

It is not enough, of course, simply to say that a pluralistic analysis must be the correct one. It is unreasonable to expect a single-function theorist of either variety to give up his theory until a plural-function theory of rights is available. There must be, that is, some place to jump. In other work I have set out an analysis of an ordinary understanding of rights, in which I argue that rights have several specific functions.

show why the attractions of his normative theory are great enough to lead us to give up our ordinary understanding of rights in cases such as these.

(Wenar, 2005) That analysis is I believe a first step towards an adequate to an ordinary understanding of rights. It might be (though I do not believe it so) that this particular pluralistic analysis is mistaken, and that rights have multiple functions different than those I have suggested. However this may be, pluralistic analyses of an ordinary understanding of rights should become the main topic for investigations into the nature of rights. The history and structure of the debate between the two monistic theories of the functions of rights show that these theories will always lack adequate explanatory power. Only a pluralistic theory can provide a sufficiently comprehensive analysis of rights.

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