RIGHTS:
BEYOND INTEREST THEORY AND WILL THEORY?

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1. INTRODUCTION

It is common for philosophers and legal theorists to bemoan the proliferation of the language of rights in popular discourse.[1] In a wide range of contemporary public political and ethical debates, disputants are quick to appeal to the existence of rights that support their position – the 'human rights' of innocent victims of war, animals' noninterference rights, individuals' and businesses' rights to economic freedom. It is often maintained, with some plausibility, that these public disputes involve hasty and undefended reliance on assumptions that certain specific rights exist, and that such profligacy with the language of rights does little to clarify and enhance public debate. By contrast, the two prominent theoretical analyses of the concept 'a right' – the Will Theory and the Interest Theory – are both revisionary theories which, if widely adopted, would require people to revise their usage of the term 'a right'. The Will Theory is an explicitly revisionary theory, according to which rights can be held only by beings capable of waiving their rights (and hence rights cannot be held by animals or young children).[2] I shall argue that traditional versions of the Interest Theory would also require revisions of popular usage of the term 'a right' (by implying that certain property rights and promissory rights cannot genuinely qualify as rights). Such revisionary analyses of the concept 'a right' might be applauded for aiming to enhance the conceptual clarity of public debate. However, my stance in this paper is avowedly non-revisionary. My aims are to seek an analysis of the concept 'a right' that accords with the multifarious ways in which this term is used in everyday ethical and political debates, and to argue that philosophers and legal theorists would benefit from adopting such a non-revisionary approach.

Note that I will not restrict my analysis merely to morally justified rights. Some rights can have a purely legal existence, without any supporting moral justification. For example, the feudal 'droit de seigneur', if it was upheld by a particular legal system, would be a right that existed but lacked moral justification. By contrast, many legally created rights are morally justified – like my right to walk the West Highland Way. And it is arguable that certain important morally justified rights exist whether or not they are legally upheld. These would be the 'human rights', such as

[1] See, for example, L. W. Sumner, *The Moral Foundation of Rights* (Oxford: Clarendon Press 1987), p. 1; George W. Rainbolt, 'Rights as Normative Constraints on Others', *Philosophy and Phenomenological Research*, 53, 1 (1993), 93-111 at p. 93; James Griffin, 'First Steps in an Account of Human Rights', *European Journal of Philosophy*, 9, 3 (2001), 306-327 at p. 306; Susan James, 'Rights as Enforceable Claims', *Proceedings of the Aristotelian Society*, 103, 2 (2003), 133-147 at p. 133.

[2] See H. L. A. Hart, 'Are There Any Natural Rights?', *Philosophical Review*, 64, 2 (1955), 175-191 at p. 181; Sumner, *The Moral Foundation of Rights*, pp. 204-205; Hillel Steiner, 'Working Rights', in *A Debate Over Rights: Philosophical Enquiries*, by Matthew H. Kramer, N. E. Simmonds and Hillel Steiner (Oxford: Clarendon Press 1998), pp. 259-262.

my right not to be murdered. My aim is to find an analysis of the concept 'a right' that fits with these varied ways in which we use the concept.

The structure of the paper is as follows: I begin – in §2 below – by using Wesley Hohfeld's technical vocabulary in order to outline what I call the 'Normative Constraint' analysis of rights, an analysis seemingly independent of the traditional Will Theory and Interest Theory. I argue that if the Normative Constraint analysis is genuinely independent of the Will Theory and the Interest Theory, then the Normative Constraint analysis must be rejected as failing to reflect the ways in which the term 'a right' is actually used. However on an alternative interpretation the Normative Constraint analysis can be seen as incorporating the contention that rights must be of some value to their holders; the Will Theory and the Interest Theory can then be seen as rival ways of explicating the manner in which rights must be of value to their holders. I shall endorse this alternative interpretation of the Normative Constraint analysis, and in §3 and §4 I examine the Will Theory and the Interest Theory as candidates for explicating and extending the Normative Constraint analysis. Ultimately, I reject both the Will Theory and the Interest Theory: both offer unacceptably revisionary analyses of rights. Faced with this apparent impasse, I argue in §5 for the benefits of persisting in the search for a non-revisionary analysis of rights, and I go on in §6 to outline two possible ways forward for the non-revisionary analysis of rights: an Interest-Theory-with-exceptions and an Inclusive Theory. I argue that philosophers and legal theorists would be wise to adopt such new non-revisionary approaches, rather than using analyses that do not reflect all the ways in which the term 'a right' is actually used. In §7 I explore the implications of my non-revisionary approaches.

2. THE NORMATIVE CONSTRAINT VIEW

2.1 Hohfeld's technical vocabulary

Hohfeld famously defines eight related normative positions, which can usefully be used to analyse rights.[3] Hohfeld limits his analysis to legal rights, but, as Matthew Kramer points out, 'virtually every aspect of Hohfeld's analytical scheme applies as well, *mutatis mutandis*, to the structure of moral relationships'.[4] First, Hohfeld introduces the 'first-order' Hohfeldian positions: 'claims', 'no claims', 'duties' and 'privileges':[5]

- X holds a ***claim*** that Y perform act *A* if and only if Y holds a ***duty*** towards X, to perform act *A*.
- X holds ***no claim*** that Y perform act *A* if and only if Y holds a ***privilege*** against X not to perform act *A*.

The two statements above entail:

- Y holds a ***privilege*** against X not to perform act *A* if and only if Y holds ***no duty*** towards X, to perform act *A*.

While in the definition above I focus on claims, duties and privileges to perform particular *acts*, it is also possible to hold claims, duties and privileges concerning the occurrence of *states of affairs*. For example, if I promise the dentist that my child will arrive on time, then the dentist holds a claim not simply that *I perform certain actions*

[3] Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven, Conn.: Yale University Press 1964 [reprinted from *Yale Law Journal* 1913 and 1917]), pp. 35-64.
[4] Matthew H. Kramer, 'Rights Without Trimmings', in *A Debate Over Rights: Philosophical Enquiries*, by Matthew H. Kramer, N. E. Simmonds and Hillel Steiner (Oxford: Clarendon Press 1998), p. 8.
[5] Hohfeld, *Fundamental Legal Conceptions*, pp. 36-50.

attempting to make my child arrive on time, but rather a claim to the occurrence of *the state of affairs in which my child arrives on time*.[6] And thus I am under a duty towards the dentist to bring about the state of affairs in which my child arrives on time; and I hold no privilege, towards the dentist, to allow the occurrence of the state of affairs in which my child does not arrive on time.

Secondly, Hohfeld introduces the 'second-order' Hohfeldian positions: 'powers', 'disabilities', 'liabilities' and 'immunities'.[7] These second-order positions define the various ways in which people can manipulate the first-order positions of claims, duties and privileges:

- X holds a ***power*** if X holds the ability to create or to remove some ***claim***, ***duty*** or ***privilege*** (a claim, duty or privilege which might be held by X himself or herself, or by someone else).

Like the four first-order positions, the four second-order positions are logically inter-definable:

- X holds a ***power*** to create some specific duty, claim or privilege for Y if and only if Y holds a ***liability*** to have that specific duty, claim or privilege created for Y by X.
- X holds a ***disability*** to create some specific duty, claim or privilege for Y if and only if Y holds an ***immunity*** from having that specific duty, claim or privilege created for Y by X.

Hohfeld defines a disability as the absence of a power:

- X holds a ***disability*** to create some specific duty, claim or privilege for Y if and only if X holds ***no power*** to create that specific duty, claim or privilege for Y.

From this, plus the two preceding statements, we can infer:

- Y holds an ***immunity*** from having some specific duty, claim or privilege created for Y by X if and only if Y holds ***no liability*** to have that specific duty, claim or privilege created for Y by X.

Note that there can be second-order positions enabling the manipulation of second-order, as well as first-order positions. For example, my right to give away my pen to you might include not only a power to confer on you claims to noninterference with the pen, and a power to confer on you privileges to use the pen, but also a power to confer *powers* on you. For in giving you the pen, I might give you the power to give away the pen to some further person. My initial analysis of powers – in terms of which the three other second-order Hohfeldian positions have been defined – should therefore be expanded as follows:

- X holds a ***power*** if and only if X holds the ability to create or to remove some ***claim***, ***duty*** or ***privilege*** (a claim, duty or privilege which might be held by X himself or herself, or by someone else), or X holds the ability to create or to remove some ***power***, ***liability***, ***disability***, or ***immunity*** (a power, liability, disability or immunity which might be held by X himself or herself, or by someone else).

Through the remainder of this paper, I shall use the terms 'claim', 'privilege', 'power', 'liability', 'disability' and 'immunity' in their technical senses, as defined by Hohfeld. It is important to remember that these are technical terms. We can

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[6] Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, Mass.: Harvard University Press 1990), p. 301.

[7] Hohfeld, *Fundamental Legal Conceptions*, pp. 50-64.

understand their relationship to our pre-theoretical ethical and political concepts by noting that the concepts of *duty* and *ability*, in terms of which the technical Hohfeldian positions can be defined, should be understood as our pre-theoretical concepts of duty and ability. The first-order Hohfeldian positions are defined simply in terms of certain logical relations to our pre-theoretical concept of duty (e.g. I hold a claim whenever someone owes me a duty), while the second-order positions are defined in terms of certain logical relations to our pre-theoretical concepts of both duty and ability (e.g. I hold a power whenever I have the ability to create or remove some duty).[8]

It is worthwhile here to take a three-paragraph detour from my main argument, in order to explain a little further what is meant by 'our pre-theoretical concept of duty'. If I am under a duty to do *A* then, when faced with a choice about what to do, I should accord special importance to the option of *A*-ing. But this is equally true if *A*-ing is merely unusually valuable, rather than required as a matter of duty. To understand the distinctive form of special importance which *duties* involve, it is helpful to consider the possibility that duties are 'side constraints' in Robert Nozick's sense. Nozick writes:

> In contrast to incorporating rights into the end state to be achieved, one might place them as side constraints upon the actions to be done: don't violate constraints *C*. The rights of others determine the constraints upon your actions. [....] This view differs from one that tries to build the side constraints *C into* the goal *G*. The side-constraint view forbids you to violate these moral constraints in the pursuit of your goals; whereas the view whose objective is to minimize the violation of these rights allows you to violate the rights (the constraints) in order to lessen their total violation in the society.[9]

The 'side constraint' view appears absolutist: if my duty not to kill you is a genuine 'side constraint' on my pursuit of my goal of saving the world from destruction, then I cannot kill you in order to achieve this goal. Absolutism is unattractive: surely I ought to be allowed to kill you in exceptionally dire circumstances – such as when killing you is the only way to save the world from destruction.[10] Nonetheless, there is an element of truth in the 'side constraint' view: when a person holds a claim, the correlative duty-holder cannot justify violating the claim merely in order to avoid two or three similar violations. I cannot justifiably violate one person's claim not to be killed merely in order to prevent three similar killings. It is mistaken to adopt the absolutist thesis that I can *never* justifiably violate a person's claim not to be killed. But I cannot do so merely in order to minimise overall violations. Equivalently, I cannot justifiably fail to fulfil a duty merely in order to maximise overall fulfilment of duties. I call this 'the non-maximising feature' of duties. This non-maximising feature is, I believe, essential to duties. When I have a duty to perform act *A*, this implies not merely that I should accord *A*-ing especial importance (as I would if *A*-ing was merely valuable without being a matter of duty), but in particular my having a *duty* to perform *A* implies that the requirement that I perform *A* has 'the non-maximising feature'. In other words, when I am under a duty to perform *A*, I must perform *A* even in situations where I could better maximise *A*-type acts by refraining

[8] For a nuanced discussion of how the Hohfeldian positions can be understood using the notions of deontic and alethic possibility, see Sumner, *The Moral Foundation of Rights*, pp. 18-31.
[9] Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books 1974), p. 29.
[10] Nozick shies away from absolutism. He suggests that 'side constraints' might be justifiably infringeable 'in order to avoid catastrophic moral horror' (*Anarchy, State and Utopia*, pp. 29-30, footnote).

from *A*-ing. This is what distinguishes being under a *duty to do A*, from *A-type acts being valuable but not required by duty*. As this non-maximising feature is distinctive to duties, it is thereby also an essential feature of claims, privileges, powers, immunities, liabilities and disabilities.[11]

Although I have used the example of killing, the non-maximising feature of duties does not imply that duties must be morally or legally important. The non-maximising feature characterises even unimportant duties such as my duty to refrain from parking in your residents' parking bay. Suppose I have an exceptionally long car, which would occupy two standard parking bays. And suppose you hold an exceptionally long parking bay, which you have purchased and reserved for your car. Suppose I know that if I take my car home, then my unruly neighbours will steal my car and park it, occupying two other people's standard-sized parking bays, and thereby violating two people's parking-bay-based claims. In this situation, I could minimise the overall number of violations of parking-bay-based claims by parking in your parking bay. I would thereby violate one claim, but prevent the violation of two. Nonetheless, it would not be permissible for me to park in your long residents' parking bay in this situation. Parking-bay-based claims, like other more important claims, hold 'the non-maximising feature'. This is not to deny that there might often be good reasons to justify infringement of your parking-bay-based claim (e.g. in order to allow an ambulance to gain access to a person in need of medical assistance). But the mere fact that violation of parking-bay-based claims would be minimised by violating your parking-bay-based claim does not justify such violation.

I suggest that 'the non-maximising feature' is all that is essential to a requirement's being a duty. On this analysis of duties, the existence of a *claim that Y perform act A* entails that Y is subject to a 'non-maximising-type' requirement to do *A* (which means that Y should perform *A* even if he or she could better maximise *A*-type actions by refraining from *A*-ing). It does not follow, however, that a Hohfeldian claim exists whenever any duty exists. Rather, the duties used in defining the Hohfeldian positions are specific sorts of duties: *relational* duties. If I decide that I ought to spend more time practising the piano, then I might see myself as under a duty to spend more time practising the piano. This duty might not be owed to anyone; I might hold that I am under a duty to practise more not because this would benefit me or my potential audiences, but rather simply because this would result in the occurrence of more beautiful piano playing.[12] By contrast, Hohfeld's analysis makes clear that the sort of duty which correlates with a claim must be a relational duty, a duty *owed to someone*. For each of the Hohfeldian positions, the sort of duties in terms of which that position can be defined are relational duties.

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[11] Thomas Nagel discusses the non-maximising feature of rights in his 'Personal Rights and Public Space', *Philosophy and Public Affairs*, 24, 2 (1995), 83-107, at pp. 87-89. He focuses solely on morally important rights, such as the right not to be murdered.

[12] It is sometimes held that all apparently non-relational duties are duties which one owes to oneself. But it is not unusual to conceive duties like my piano-playing duty as owed neither to myself nor to anyone else. Joel Feinberg gives further examples of non-relational duties (Joel Feinberg, *Justice and the Bounds of Liberty: Essays in Social Philosophy* (Princeton: Princeton University Press 1980), p. 137; see also N. E. Simmonds, 'Rights at the Cutting Edge' in *A Debate Over Rights: Philosophical Enquiries*, by Matthew H. Kramer, Nigel Simmonds and Hillel Steiner (Oxford: Clarendon Press 1998), pp. 143-144). Note that, as possessing 'the non-maximising feature', my duty to practise the piano more requires *me to practise more*, rather than requiring me simply to promote the overall incidence of piano-practising.

Having introduced Hohfeld's technical vocabulary, and explained how each Hohfeldian position can be analysed using the concepts of 'duty' and 'ability' – and, in addition, having explained how duties can be analysed as normative requirements possessing 'the non-maximising feature', and how the duties used to define the Hohfeldian positions are *relational* duties – I turn now to show how Hohfeldian positions can be used in the analysis of rights.

2.2 Using the Hohfeldian vocabulary to develop the Normative Constraint view of rights

On one view, whether a right exists depends simply on whether people's behaviour is constrained in certain distinctive ways. I shall follow George Rainbolt in calling this the 'Normative Constraint' view of rights.[13] On this view, it seems that something can be a right whether or not it is of value or benefit to the right-holder, and whether or not it protects the right-holder's will or choice. Hohfeld's technical vocabulary can be used to explain the nature of the distinctive kind of normative constraint in terms of which, according to the Normative Constraint view, the concept of 'a right' can be fully analysed. I suggest that the most plausible version of the Normative Constraint view is as follows:

X holds a right whenever:
(1) X holds:
- *(i) a claim; or*
- *(ii) a privilege; or*
- *(iii) a power; or*
- *(iv) an immunity; or*
- *(v) a liability; or*
- *(vi) some cluster involving several of one or more of positions (i)-(v),*

and
(2) if the position (or cluster of positions) of type (i)-(vi) were infringed, unenforced or not properly respected, then X would hold a claim to some form of apology or recompense.[14]

This version of the Normative Constraint view is a modified version of the view put forward by Rainbolt. Rainbolt suggests that all and only claims and immunities can constitute rights, because all and only claims and immunities place genuine constraints on others.[15] By restricting rights to claims and immunities, Rainbolt overlooks a range of ways in which the term 'a right' is actually used.[16]

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[13] Rainbolt, 'Rights as Normative Constraints on Others'.

[14] In this paper I shall not attempt to answer those critics who see the Hohfeldian approach to rights as wholly misguided. For defence of the Hohfeldian approach, see Kramer, 'Rights Without Trimmings', pp. 7-60.

[15] Rainbolt, 'Rights as Normative Constraints on Others', p. 99.

[16] Because my version of the Normative Constraint view allows certain non-constraining Hohfeldian positions (in particular, privileges, powers and liabilities) to qualify as rights, the phrase 'Normative Constraint' is not as apt to describe my version of the Normative Constraint view as it is to describe Rainbolt's. Nonetheless, my version more accurately reflects the way that the term 'a right' is actually used, and I maintain the phrase 'Normative Constraint view' in order to reveal the similarities between my version of the Normative Constraint view and Rainbolt's.

It is fairly uncontroversial to accept that many rights are constituted by Hohfeldian claims.[17] When the dentist holds a right based on my promise that my child will arrive on time, this right is plausibly analysable as a claim held by the dentist against me, correlative to a duty owed to the dentist by me, to ensure that my child arrive on time. Similarly, my right not to be assaulted is plausibly analysable as a cluster of claims entailing duties, on the part of other people, to refrain from assaulting me. And my right not to be murdered is similarly analysable as a cluster of claims entailing duties on others not to murder me.[18]

It is also fairly uncontroversial to hold that many rights are constituted by Hohfeldian immunities. Peter Jones writes: 'Perhaps the clearest examples of immunities are constitutionally entrenched rights. The constitution of the United States, for example, places some matters [e.g. freedom of speech; freedom of religion] outside the competence of Congress and, in so doing, provides US citizens with immunities on those matters'.[19]

In addition to claims and immunities, various powers seem to be rights. For example, if I hold a power to create new duties for people by imposing taxes on them, then this is plausibly describable as a 'right to impose taxes'. And my powers to place myself under new duties – and hence to create new claims for other people – by issuing promises and by entering into contracts are plausibly describable as a 'right to promise' and a 'right to enter into contracts'. Similarly, my right to vote centrally involves certain powers to create new claims, duties and powers for those I elect to public office.

In addition, in many contexts to assert that one holds a right is to assert that one holds a Hohfeldian privilege. For example, my 'right to walk the street freely' might seem centrally to involve a privilege, consisting in the absence of any duty to refrain from walking the street. It is sometimes argued that no privilege can on its own constitute a right; rather, a privilege can at most be a *component* within a right constituted by a

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[17] Hohfeld proposed that the term 'right' should be used to refer only to claims, and some writers follow Hohfeld by restricting their usage in this way (Hohfeld *Fundamental Legal Conceptions*, pp. 36-38; Kramer 'Rights Without Trimmings', p. 9). I shall not adopt this restricted usage, as my purpose is to elucidate what binds together the various ways in which the term 'a right' is actually used. We use the term 'right' in ways which are not analysable by Hohfeldian claims.

[18] Because any one Hohfeldian claim (like any one privilege or duty) involves a relation between only two parties, it follows that a right held against several parties must be analysed as involving a cluster of several Hohfeldian claims. For example, my *in rem* right not to be assaulted should be analysed as comprising a cluster of various claims – a claim that *you* not assault me, a claim that *Joe* not assault me, a claim that *Maureen* not assault me and so on. Note also that each of these constituent claims might (with suitable elaboration) in themselves merit the title 'rights', *constituent* rights within my *in rem* right not to be assaulted (e.g. my *in rem* right not to be assaulted includes my right not to be assaulted by you, my right not be assaulted by Joe, and so on) (see the related discussion in Hohfeld, *Fundamental Legal Conceptions*, pp. 76-77). This is not to say that every right held by a group or against a group must involve a cluster of claims held individually by or against each member of the group; rather, a group can constitute a *single party* which can hold a single Hohfeldian claim, and against which a single Hohfeldian claim can be held (e.g. my right that the book club invite me to their annual party does not involve a cluster of claims entailing that each member of the book club is under a duty to send me an invitation; rather, the book club *as a group* is under the duty to send me an invitation; this duty correlates with a single claim, held by me against a single party consisting of the-book-club-as-a-group).

[19] Peter Jones, *Rights* (Basingstoke: Macmillan 1994), p. 24.

cluster of Hohfeldian positions including protective claims as well as privileges.[20] This point seems fairly plausible in the case of the 'right to walk the street freely'; it is attractive to hold that this right includes various claims to noninterference as one walks the street. However, I suggest that privileges can constitute rights even without the accompaniment of protective claims. Hohfeld gives an example which can be used to illustrate this point.[21] Suppose that you tell me that you have decided to allow me to eat your salad. Then suppose that after I have eaten your salad, you accuse me of failing to fulfil my duty to refrain from eating your salad. I might reply 'you had told me I was allowed to eat the salad; therefore I had a *right* to eat the salad'. What determines whether my statement is true in this context is whether I held the privilege to eat the salad. My possession or non-possession of claims is irrelevant to the truth-conditions of my assertion in this context that I had a right to eat the salad. (Even if I were a slave who held no claims whatsoever, I could still truthfully assert that I held a 'right to eat your salad', if you explicitly allowed me to eat it.)[22] Thus my privilege to eat the salad must, on its own, constitute a right.

It is also sometimes held that only 'bilateral' or 'full' privileges (i.e. the conjunction of a privilege to do *A* with a privilege not to do *A*) can qualify as rights.[23] But in response to your query about my eating your salad, my statement, 'I had a right to eat your salad', can be true even if I had earlier promised you that I would eat the salad; hence this statement can be true even if I held no privilege to refrain from eating the salad.

Finally, I suggest that certain liabilities qualify as rights. I have not seen this contention elsewhere. But suppose that I receive a gift from you, and someone questions my ability to receive this gift. Perhaps they argue that people of my social status are not morally capable of receiving gifts. In response, I might say 'I hold a *right* to receive gifts'. This response is made true in this context if I hold a liability to receive gifts. Even if I lack a privilege to receive gifts (e.g. because I have promised my priest that I will refuse all gifts), and even if I lack any claims or immunities protecting my receipt of gifts, I might nonetheless truthfully assert that I hold a 'right to receive gifts'. In holding a liability to receive gifts, I hold the (moral or legal or conventional) status which enables me to receive gifts, and it is to this status which I refer by asserting my right to receive gifts. Similarly, such rights as one's right to stand for election to Parliament, and one's right to inherit, seem centrally to involve liabilities.

I conclude that claims can qualify as rights, privileges can qualify as rights, powers can qualify as rights, immunities can qualify as rights, and liabilities can qualify as rights. This is what the first clause of the Normative Constraint view asserts. In

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[20] H. L. A. Hart, 'Bentham on Legal Rights', in *Oxford Essays in Jurisprudence (Second Series)*, ed. by A. W. B. Simpson (Oxford: Clarendon Press 1973), pp. 181-182; Sumner, *The Moral Foundation of Rights*, p. 35.

[21] See Hohfeld, *Fundamental Legal Conceptions*, p. 41.

[22] Hart disputes the thesis that the privileges of slaves could constitute rights (Hart, 'Bentham on Legal Rights', p. 182), but if you allowed me to eat your salad then even if I was a slave it seems to me that it would be true to assert that I had a right to eat your salad; for discussion sympathetic to Hart, see Simmonds, 'Rights at the Cutting Edge', pp. 165-168; see also pp. 157-158 for examples of privileges that, without the protection of claims, constitute rights.

[23] Hart, 'Bentham on Legal Rights', p. 182; Feinberg, *Justice and the Bounds of Liberty*, p. 157; Sumner, *The Moral Foundation of Rights*, pp. 33-34.

addition, it should be clear – as the first clause of the Normative Constraint view also asserts – that clusters of claims, privileges, powers, immunities or liabilities, or mixed clusters involving both claims and privileges etc., can also qualify as rights. For example, my right to walk the streets freely involves a cluster of privileges and noninterference claims.

So far, I have defended the first clause of the Normative Constraint view. But the second clause – which I shall call the 'recompense clause' – is also necessary. This clause asserts that a holder of one of the Hohfeldian positions (or cluster of positions) mentioned in the first clause does not hold a *right* unless it is also the case that were this Hohfeldian position (or cluster of positions) to be infringed, unenforced or not properly respected, then the position-holder would come to hold a claim to some form of apology or recompense. For example, if my aunt has to go into hospital for a routine operation, it can seem natural to hold that I am under a duty to visit her. This is a relational duty, owed to my aunt. Hence Hohfeld's analysis implies that my aunt holds a claim that I visit her. But I do not think she must therefore hold a *right* that I visit her. It would seem odd to say that my aunt had a right that I visit her, if I was under no duty to apologise or make amends were I to fail to visit her. Rather, my aunt holds a right that I visit her only if she holds not merely a *claim that I visit her*, but if she also *would hold a claim that I apologise or in some other way make amends were I to fail to visit her*.[24]

While it might seem plausible to hold that claims only qualify as rights when accompanied by the recompense clause, this clause might seem incomprehensible when applied to privileges, powers, immunities or liabilities. As it consists merely in the absence of a duty, a privilege cannot be violated. Similarly, powers, immunities and liabilities are each defined in terms of the existence of abilities to create duties, and abilities cannot be violated. So it is unclear what could trigger a need for recompense in the cases of privileges, powers, immunities and liabilities. However, I believe we can make sense of the notion that privileges, powers, immunities and liabilities can sometimes *fail to be properly respected* or *fail to be appropriately enforced*, even though they cannot be *violated*. For example, if you explicitly allow me to eat your salad and then, once I have eaten your salad, you erroneously accuse me of violating a claim of yours protecting the salad from my eating it, then you have failed properly to respect my privilege to eat the salad (a privilege you conferred on me when you explicitly allowed me to eat it). Similarly, if you ignore the tax-paying duties which government officials impose on you, then not only do you violate the government's claims to tax payments, but you also fail properly to respect government officials' powers to impose taxes. Similarly again, if the legal system fails to confer on you a legal power to bequeath your property, a power which already exists as an independent morally justified 'human right' (a right to bequeath), then your moral power to bequeath your property is not appropriately enforced. These sorts of case involve failure of appropriate respect or enforcement. The recompense clause maintains that if a Hohfeldian position is a *right*, then some form of apology or recompense is owed in such cases of failure of respect or enforcement, even if such cases do not involve the violation of a claim.[25]

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[24] Note that the forms that appropriate remedies can take are various, and need not be limited to a spoken apology or a compensation payment.
[25] It might be argued that the recompense clause is superfluous because the very concepts of a claim, privilege, power, immunity or liability are analytically bound up with the notion that recompense is

I have completed my exposition of the Normative Constraint view. On the Normative Constraint view, one's holding a right merely involves (1) one's holding an appropriate Hohfeldian position or cluster of positions, for which (2) it is the case that if the position or cluster of positions were violated or not properly respected or not appropriately enforced, then one would be owed recompense. At first glance, it appears that these conditions could be satisfied by Hohfeldian positions which did not serve their holders' interests nor protect their holders' autonomy. Thus the Normative Constraint view appears to offer an analysis which sees rights as existing whenever people's behaviour is normatively constrained in certain distinctive ways, *independently of whether these constraints serve the right-holder*. I shall call this apparent implication of the Normative Constraint view the 'value-independence of rights' because on this thesis, a right can exist whether or not it is of value to its holder.

2.3 A Problem for the Normative Constraint View

Defenders of the Normative Constraint view face a dilemma: (I) Defenders of the Normative Constraint view might accept that the Normative Constraint view offers a 'value-independent' analysis of rights; if so, then they turn out to be compelled to reject the Normative Constraint approach as failing to reflect the ways in which the term 'a right' is actually used. (II) Or defenders of the Normative Constraint view might deny that their view offers a genuinely 'value-independent' analysis of rights, because the concepts of 'relational duty' and 'recompense' import into the Normative Constraint view the covert presupposition that rights must be of value to their holders in some way; on this approach while the Normative Constraint analysis can perhaps be maintained as offering accurate truth-conditions for the existence of a right, the analysis requires supplementation in order to make clear the Normative Constraint view's covert evaluative presuppositions.

I believe we should embrace the second horn of this dilemma, and use the resources of the Will Theory and the Interest Theory to develop the required explication of the Normative Constraint view's covert evaluative presuppositions. But I shall begin by examining the first horn. Theorists who embrace the first horn must maintain that the Normative Constraint view offers a genuinely 'value-independent' analysis of rights. To do this, such theorists must maintain that it is possible for someone genuinely to owe me a duty without this being of any value to me, and that it is possible for someone genuinely to owe me recompense for failing to perform an action which would not have been of any value to me. I will dispute these contentions in a moment. First, I want to spend two paragraphs pointing out the problematic implications which would follow from this 'value-independent' stance.

On this 'value-independent' stance, the Normative Constraint view would be *too inclusive*, classifying too many Hohfeldian positions as 'rights'. Here are some

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owed if the claim, privilege, power, immunity or liability were violated or not properly respected or not properly enforced. This contention is perhaps most plausible with respect to claims: maybe for a claim to exist at all, it is necessary that recompense would be owed if the claim were violated. But in my view this is false. It makes sense to assert that I can owe my aunt a duty to visit her in hospital, without its being the case that were I to fail to visit her, then I would be under a duty to apologise or make recompense. Similarly, it makes sense to assert that I can be under a duty towards my parents to work hard at school (and hence they can hold a Hohfeldian claim that I work hard at school), even if I would be under no duty to apologise or compensate them were I to fail to work hard at school.

examples of Hohfeldian positions that the Normative Constraint view would classify as 'rights', but which we would not naturally consider to be rights:

- Many legislative systems confer on people a power to incur new duties through careless driving. Kramer writes, 'someone whose careless driving leads him to collide with somebody else will have altered his legal position for the worse vis-à-vis that other person. He has exercised a legal power which he plainly did not wish to exercise'.[26] In most contexts, we would be disinclined to call this power 'a right'. But suppose that a legislative system made it the case that if the state failed to impose new duties on a driver whose careless driving led him or her to collide with somebody else, then some form of recompense would be owed *to the careless driver*. In other words, suppose that recompense were owed for failure properly to respect or enforce the careless driver's power to incur new duties through colliding with other cars. One might question whether it makes sense to owe careless drivers recompense for failing to respect powers which such drivers would not wish to be respected. But the 'value-independent' version of the Normative Constraint view that we are currently considering allows for the possibility of such *recompense for failure to bring about states of affairs which would not have been of value to those to whom the recompense is owed.* According to the Normative Constraint view, a power qualifies as 'a right' whenever, if it were not properly respected, recompense would be owed to the power-holder. Thus the Normative Constraint view would classify one's power-to-incur-new-duties-through-careless-driving for which, if not properly respected, one would be owed recompense, as 'a right'. In most contexts, this classification seems mistaken. A power-to-incur-new-duties-through-careless-driving is not a Hohfeldian position that we would naturally call 'a right', even if it was accompanied by the recompense claim described above.[27]
- Similarly, in most contexts if I held an immunity against receiving any promises (and hence an immunity against gaining the claims created by promises), it would not seem natural to describe this immunity as a 'right'. Even if people would be under a duty to apologise to me were they to attempt to issue promises to me, it would still seem incorrect to classify my immunity-from-receiving-promises as a 'right'.
- Again, many liabilities do not qualify as rights, such as my liability to be disinherited. Even if I would be owed some form of recompense, were the state to fail properly to respect my liability to be disinherited, it would still be strange to describe this liability as a 'right'.

Yet the 'value-independent' version of the Normative Constraint view would classify the above examples as involving 'rights'. Thus the 'value-independent' version of the Normative Constraint view fails to accord with actual usage of the term 'a right'.

If one embraces the first horn of the dilemma and holds the 'value-independent' version of the Normative Constraint view, then one will also allow too many *claims* to

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[26] Matthew H. Kramer, 'Getting Rights Right', in *Rights, Wrongs and Responsibilities*, ed. by Matthew H. Kramer (Basingstoke: Palgrave 2001), p. 59. Note that Kramer introduces this example for purposes rather different to mine; in particular, Kramer does not explore the Normative Constraint view of rights.

[27] We might be inclined to classify the power-to-incur-new-duties-through-careless-driving as 'a right' in cases where the careless driver would benefit from being placed under the new duties. But in most contexts, I do not believe that a careless driver would benefit in this way, and hence in most contexts I do not believe we would classify the power-to-incur-new-duties-through-careless-driving as 'a right'.

qualify as rights. Imagine a society in which slavery is legally protected. And imagine that, within this society, I am endowed with a legal claim to be enslaved, accompanied by a claim to recompense were I not enslaved. My claims here would correlate with duties held by you to enslave me, and to offer recompense if you fail to enslave me. Suppose also that enslaving me would considerably thwart my interests, and that this is widely known, even by the lawmakers who endow me with claims to be enslaved. One might question whether I can genuinely hold a claim which would thwart my own interests, and whether I can genuinely be owed recompense for violation of such a claim. But the 'value-independent' version of the Normative Constraint view would allow such claims to exist. Thus on the 'value-independent' version of the Normative Constraint view, I could genuinely hold a legal claim to be enslaved, for the 'violation' of which recompense would be owed. According to the analysis offered by the Normative Constraint view, such a claim would qualify as a legal 'right to be enslaved'. For the Normative Constraint view sees a legal right as existing whenever a person holds a legal claim to the occurrence of act *A* accompanied by a legal claim to recompense were *A* not to occur. In more weird situations, the 'value-independent' version of the Normative Constraint view might even allow the possibility of *moral justification* for endowing me with a claim to be enslaved and a claim to recompense were I not enslaved (suppose that, were I not endowed with such claims, an evil demon would kill millions of people). In such a situation, the Normative Constraint view would see me as holding a morally justified 'right to be enslaved'. But it would seem odd to say that I had a 'right to be enslaved' when this right wholly thwarted my own interests. The 'value-independent' version of the Normative Constraint view errs in allowing the possibility of such interest-thwarting rights.

It follows that the 'value-independent' version of the Normative Constraint view would not give a non-revisionary analysis of rights. Instead, the 'value-independent' version of the Normative Constraint view classifies too many Hohfeldian positions as rights, including positions such as a power to incur new duties through careless driving, an immunity against receiving promises, a liability to be disinherited, or a claim to be enslaved.

In order to revive the Normative Constraint view, one must embrace the second horn of the dilemma and reject the 'value-independent' version of this view. That is, one must hold that, in the apparent counter-example cases above, it is not possible for the Normative Constraint view's recompense clause genuinely to be satisfied, or it is not possible for the relevant relational duties genuinely to exist. It is, I think, correct to reject the 'value-independence' thesis in this way. This is because it is not possible for a person to be genuinely owed recompense for the non-performance of an action that would not have been of value to that person.[28] For example, is it genuinely possible to owe a driver *recompense* for failure to impose new duties on that driver (perhaps including duties to go to prison), if these duties would have been of no value to the driver? Is it genuinely possible to owe someone *recompense* for failure to recognise that a person was immune from receiving useful promises? One can, of course, be under a duty to *say* 'I am sorry for not imposing new duties-to-go-to-prison on you', or 'I am sorry for mistakenly thinking that I could issue promises to you', but for these statements to count as genuine apologies, I suspect that more is necessary.

[28] See §6.1 for an important modification of this thesis.

In particular, in most contexts a genuine apology can only be issued for failure to perform some action that would have been of value in some way to the recipient of the apology. If this is correct, then the counter-example cases introduced above are not genuine counter-examples to the Normative Constraint analysis, because the cases do not involve genuine claims to recompense or apology, and hence the cases do not satisfy the Normative Constraint view's recompense clause.

In addition, I doubt that a relational duty can be owed to a person without the performance of that duty being in some way of value to that person.[29] In the example of a claim-to-be-enslaved, it was assumed that a legislative system could create such a claim by placing someone (say, Fred) under a legal duty, owed to me, to enslave me. It seems clear that a legislative system could place Fred under *a legal duty to enslave me*; all that is necessary, for this to be the case, is that lawmakers enact a law requiring that Fred accord especial non-maximising importance to the task of enslaving me.[30] What is much less clear is that Fred's duty-to-enslave-me could be *a relational duty owed to me*. If being enslaved would wholly thwart my interests and would limit my autonomy, then it is doubtful that Fred's duty-to-enslave-me could be a duty *owed to me*; instead, it might be understood as a non-relational legal duty, or perhaps as a relational duty owed to the lawmakers or the legal system. But unless Fred's duty-to-enslave-me is a relational duty owed to me, then I will hold no claim-that-Fred-enslave-me. Hence unless Fred's duty-to-enslave-me is a relational duty owed to me, then Fred's duty will not satisfy the first clause of the Normative Constraint view (and hence I will not qualify as counter-intuitively holding a 'right to be enslaved'), as Fred's duty will not correlate with a claim held by me.

I endorse the theses introduced above, to the effect that (i) if one owes someone X recompense for failure to do *A*, then it must be the case that one's doing *A* would have been of value to X in some sense, and (ii) if one is under a relational duty, owed to X, to perform act *A*, then one's performance of *A* must be of value to X in some sense.[31] If these theses are accepted, then the Normative Constraint view is not an excessively inclusive theory; the counter-example cases (e.g. immunities from receiving promises, claims to be enslaved) turn out correctly to fail to qualify as rights according to the Normative Constraint view. But if these theses are accepted, then the Normative Constraint view is also not a 'value-independent' analysis of rights. Instead, despite its presentation in apparently neutral language, the Normative Constraint view turns out, through its use of the concepts of 'relational duty' and of 'recompense', covertly to require that rights must be of value to their holders in some sense.

How should we understand the notion that rights must be of value to their holders? What exactly is involved in *a duty's being owed to one*, or in *one's being owed recompense*? It is not obviously necessary that for a duty to be owed to one, one must have one's *interests served* or one's *choices protected* by that duty. Perhaps a duty can be owed to one merely as a *deserved mode of treatment*, independently of whether this serves one's interests or one choices. Similarly, it is not obviously necessary that for one to be owed recompense for someone's failure to perform *A*, one must have held some interest in the performance of *A*, or the performance of *A* must have

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[29] Again, see §6.1 for an important modification of this thesis.

[30] Note that my contention here requires commitment to some form of legal positivism.

[31] Remember that a modification to these theses is introduced in §6.1 below. This modification does not affect my argument at this stage.

protected one's choices. Nonetheless, I shall look initially at the traditional Will Theory and Interest Theory as ways of explicating the manner in which rights must be of value to their holders.

3. THE WILL THEORY

3.1 The Will Theory as extending the Normative Constraint view

Will Theorists hold that a right essentially gives effect to or protects the right-holder's freedom of will with respect to a particular issue.[32] Will Theorists typically assert that X holds a *right that A occur* only when X holds both a claim-that-Y-perform-*A*, and a power to choose whether to waive or enforce this claim. Taking one's cue from this thesis, one might attempt to explicate the evaluative presuppositions of the concepts of 'relational duty' and 'recompense' as follows: (i) relational duties can only be genuinely *owed* to people who hold powers to waive or enforce these duties, and (ii) *recompense* can only be genuinely owed to someone for failure to respect Hohfeldian positions over which that person held a power of waiver or enforcement. On this basis, one might offer the following analysis of rights, building on the Normative Constraint view:

X holds a right whenever:
(1) X holds:
- *(i) a claim; or*
- *(ii) a privilege; or*
- *(iii) a power; or*
- *(iv) an immunity; or*
- *(v) a liability; or*
- *(vi) some cluster involving several of one or more of positions (i)-(v),*

and
(2) if the position (or cluster of positions) of type (i)-(vi) were infringed, unenforced or not properly respected, then X would hold a claim to some form of apology or recompense,
and
(3) X also holds a power of waiver-or-enforcement concerning the position (or cluster of positions) of type (i)-(vi).[33]

If the Will Theory is to be understood as an explication of the evaluative presuppositions of the Normative Constraint view, then clause (3) should here be understood as implied by the concepts of 'relational duty' and 'recompense' that underpin clauses (1) and (2).

On this Will Theory approach, one could hold a *claim* to be enslaved, a claim *owed to one*, only if one held powers enabling one to choose whether to waive or enforce one's claim to be enslaved; thus such powers would be necessary for one to hold a 'right to be enslaved'. And on this Will Theory approach, one's power to get oneself sent to prison for careless driving would not qualify as a right if one held no powers to choose to annul this power-to-get-oneself-sent-to-prison-for-careless-driving (e.g. one might wish to annul this power if one wished to avoid prison; if one held no such

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[32] Hart, 'Are There Any Natural Rights?', p. 178 and 'Bentham on Legal Rights', pp. 191-192; Sumner, *The Moral Foundation of Rights*, pp. 42-43; Hillel Steiner, *An Essay on Rights* (Oxford: Blackwell 1994), pp. 57-58; Simmonds 'Rights at the Cutting Edge', p. 218.

[33] Perhaps it is not possible to make sense of the notion of waiving or enforcing a privilege, but I believe the notion of waiver-or-enforcement makes sense regarding the other Hohfeldian positions.

power of annulment, one's power-to-get-oneself-sent-to-prison-for-careless-driving would not be a right). Similarly, on this approach one's immunity from receiving promises would only qualify as a right if one held powers to choose to waive this immunity. And one's liability to be disinherited would only qualify as a right if one held powers to choose to annul this liability and replace it with an immunity from being disinherited. My version of the Will Theory maintains that only if accompanied by powers of waiver-or-enforcement would one's power, immunity or liability *protect one's choices*; hence (according to my version of the Will Theory) only in such situations would it make sense to offer *recompense* if one failed to respect one's power, immunity or liability.

3.2 Problems for the Will Theory

The Will Theory must be rejected. It seems doubtful that the concepts of 'relational duty' and 'recompense' must be understood as proposed by my version of the Will Theory. Instead, it seems possible to make sense of the notion that a duty could be *owed to a person* even if that person lacked the power to waive or enforce that duty. Ordinary usage of the term 'a right' allows the possibility that people could hold unwaivable claim-based rights under certain circumstances (e.g. it seems conceptually coherent to countenance the possibility that one's right not to be tortured – constituted primarily by various claims not to be tortured – is unwaivable). In addition, it seems possible to make sense of the notion that recompense could be owed to a person for failure to respect some Hohfeldian position, even if the person lacked powers of waiver-or-enforcement over the Hohfeldian position in question (e.g. if the claim-not-to-be-tortured is unwaivable, it still makes sense to offer recompense to people if one violates this claim).

The Will Theory has been frequently accused of error in excluding the possibility of people holding unwaivable rights.[34] Young children, adults with mental health problems and animals lack the ability to waive or enforce their claims, but it seems misguided to infer simply on this basis that young children, adults with mental health problems and animals therefore lack rights.[35] Instead, actual usage of the term 'right' is consistent with the possibility that young children, adults with mental health problems and animals might hold rights. And actual usage is also consistent with the possibility that mentally capable adults could hold unwaivable rights. The Will Theory is mistaken to rule out such possibilities as conceptually incoherent. Because I seek a non-revisionary analysis of the term 'a right', I reject the Will Theory as presented above.

4. THE INTEREST THEORY

4.1 Raz's Interest Theory as extending the Normative Constraint view

The Interest Theory can be understood as offering an alternative explication of the evaluative presuppositions of the Normative Constraint analysis. On this view, the Interest Theory maintains that for a relational duty to be owed to someone X, the performance of that duty must serve X's interests in some sense. And for someone X

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[34] Neil MacCormick, 'Children's Rights: A Test-Case for Theories of Right', in his *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (Oxford: Clarendon Press 1982), pp. 154-158; Kramer 'Rights Without Trimmings', pp. 69-70.

[35] Hart has been willing to grasp the nettle and accept that children and animals must lack rights (Hart, 'Are There Any Natural Rights?', p. 181).

to be genuinely owed recompense for failure to respect some Hohfeldian position, that Hohfeldian position must have served X's interests in some sense.

Joseph Raz offers one version of the Interest Theory. He writes that '"X has a right" if and only if 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'.[36] Raz's theory applies only to *claims* (because Raz defines a right as existing only when a *duty* is justified), and Raz himself eschews the Hohfeldian vocabulary.[37] But Raz's account can be expanded to cover the other Hohfeldian positions present in the Normative Constraint view. An expanded Razian Interest Theory analysis is as follows:

X holds a right whenever:
(1) X holds:
- *(i) a claim; or*
- *(ii) a privilege; or*
- *(iii) a power; or*
- *(iv) an immunity; or*
- *(v) a liability; or*
- *(vi) some cluster involving several of one or more of positions (i)-(v),*

and
(2) if the position (or cluster of positions) of type (i)-(vi) were infringed, unenforced or not properly respected, then X would hold a claim to some form of apology or recompense,
and
(3) the position (or cluster of positions) of type (i)-(vi) is justified because it serves X's interests.

If the Interest Theory is understood as offering an explication of the evaluative presuppositions of the Normative Constraint view, then clause (3) should here be understood as implied by the concepts of 'relational duty' and 'recompense' that underpin clauses (1) and (2).[38]

In most cases, duties to enslave me would not serve my interests; for this reason the Interest Theory, as I have presented it, would deny that in most contexts I could hold claims to be enslaved (and hence it would correctly deny that in most contexts I could

[36] Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press 1986), p. 166.
[37] One reason why Raz rejects the Hohfeldian approach is because Raz thinks that *rights justify duties*, while on the Hohfeldian account *rights are logically correlative to duties*, and these two theses can seem inconsistent (see Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press 1988), p. 84). But on closer examination, it turns out that these two theses are not inconsistent, and hence it turns out that one can accept that rights justify duties, without rejecting the Hohfeldian approach. Consider Kramer's example of someone who enjoys the downward perspective that a slope would provide in his yard - his desire for the downward perspective can *justify* introducing the slope, and thus also justify introducing its logical correlative, an upward perspective from the bottom of the slope; as this example seems unproblematic, similarly it should be unproblematic to suppose that a right can justify the existence of a duty even when that duty is the logical correlate of the right (Kramer, 'Rights Without Trimmings', p. 39; see also J. E. Penner, 'The Analysis of Rights', *Ratio Juris*, 10, 3 (1997), 300-315 at p. 311).
[38] Note that Raz does not present his Interest Theory as entailed by the concepts of 'relational duty' and 'recompense'; rather, Raz presents his theory independently of these issues (see *The Morality of Freedom*, pp. 165-192).

hold ‘rights to be enslaved’).[39] Similarly, in most contexts powers to incur new duties through careless driving, immunities from receiving promises and liabilities to be disinherited would not serve their holders’ interests and hence the Interest Theory, as I have presented it, would deny that genuine recompense can be owed for failure to respect such powers, immunities or liabilities. Thus the Interest Theory plausibly classifies powers to incur new duties through careless driving, immunities from receiving promises and liabilities to be disinherited as not genuinely rights (except in those rare cases where such Hohfeldian positions are justified by how they serve their holders’ interests). Thus the Interest Theory offers a plausible extension and explication of the Normative Constraint analysis.

However, like the Will Theory, the Interest Theory rules out too much as not qualifying as ‘a right’. The Razian Interest Theory fails on two counts. First, it fails to offer an account of unjustified rights. According to Raz, a right exists when an interest justifies a duty; this leaves no room for unjustified rights with a purely legal or institutional existence. Yet such unjustified rights surely can exist (the feudal ‘droit de seigneur’ would exist if it was legally enshrined, even though it would not be justified).

Secondly, the Razian Interest Theory implies that every right must serve its holder’s interest. But this is incorrect. Some rights can exist without serving their holders’ interests. It will take several paragraphs to make this criticism clear. One might mistakenly take my criticism here to be based on the fact that certain rights, while *prima facie* serving their holders’ interests, do not do so *on balance* in certain situations. For example, my right to walk freely along the streets prima facie serves my interests; but in certain situations it might turn out that my overall interests would be better served on balance by disallowing me to walk freely along the streets. This might happen if I was so clumsy that I risked seriously damaging myself were I allowed to walk freely along the streets. In this case, my right to walk freely along the streets would serve *an interest of mine* (my interest in my freedom to act as I choose), but would not serve *my interests on balance*. An important and plausible feature of the Razian Interest Theory is that it does not require that a right must, on balance, promote its holder’s interests overall. Instead, the Razian Interest Theory requires only that a right must serve *some interest* of the right-holder (an interest which justifies the right), without necessarily serving the right-holder’s interests on balance. Thus the fact that certain rights (such as a clumsy person’s right to walk the streets freely) only serve *some interest* of their holders is accommodated by the Interest Theory.

The difficulty for the Interest Theory is that there can be some rights which do not serve their holders’ interests *in any way*. For example, suppose that I hold property rights in some ugly and worthless garden gnomes. Given their worthlessness, I cannot sell the gnomes, nor engage in aesthetic appreciation of their appearance. Suppose that I am not sentimentally moved by the manner in which I came to acquire them (perhaps I inherited them from a relative for whom I held no concern). My property rights in my gnomes do not serve my interests in any way; they do not serve *some*

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[39] There might be exceptional cases where being enslaved would serve my interests. In these cases, I might hold a ‘right to be enslaved’.

interest of mine, nor do they serve my interests *on balance*.[40] We can arrive at parallel examples involving promissory rights. If you promise me that you will have a cup of tea with your supper, and I accept your promise, then this gives me a right to your having a cup of tea with your supper. I acquire this right whether or not my interests are served in any way by your having a cup of tea with your supper. (There is no guarantee that, simply because I accept your promise, your having a cup of tea with your supper must serve my interests.)

One might retort that my property rights in my gnomes serve my interests in an indirect sense, in that my property rights in the gnomes are parts of an overall property system whose existence serves my interests. Similarly, one might retort that my promissory right that you have a cup of tea with your supper serves my interests in an indirect sense, in that I have an interest in people generally keeping their promises to me, and further I have interests served by the existence of the institution of promising.[41] But we should be wary of holding that when the existence of a system of a certain class of rights (e.g. a system of property rights or promissory rights) serves one's interest, then every member of that class must serve one's interests. If my gnomes really are useless, then it seems strange to say that my property rights over the gnomes nonetheless serve my interests, albeit in an 'indirect sense'; it seems more natural to say that they do not serve my interests at all, even though the overall institution of property rights does serve my interests.

Furthermore, Interest Theorists in particular should be wary of adopting the thesis that when the existence of a system of a certain class of rights serves one's interests, then every member of that class of rights must serve one's interests. For if one is committed to this thesis, then it would be difficult for one to deny the more general thesis that when the existence of a system of a certain class of *Hohfeldian positions* (which might or might not include rights) serves one's interests then every member of that class of Hohfeldian positions must serve one's interests. This latter thesis has the problematic implication that, for almost every person X, all *legally created* Hohfeldian positions will be classified as 'serving X's interests'. This is because, for almost every person, the existence of a system of legally created Hohfeldian positions serves that person's interests (this is for the familiar reason that almost everyone – including even those in very lowly social positions – is better off with a system of law, than they would be in a law-free 'state of nature'). It would follow from this that when Fred holds a legal duty to enslave me then, even though I hold no interest whatsoever in being enslaved, nonetheless Fred's duty to enslave me serves my interest in the 'indirect sense' that it is a member of a class of duties – legal duties – the overall existence of which serves my interests. Given that we have already seen reason to abandon the reference to *justification* used in the Razian Interest Theory, the work of explicating (i) what is involved in a relational duty's being *owed to someone*, and (ii) what is necessary for *recompense* to be genuinely owed for failure to respect a Hohfeldian position, falls on the Interest Theorist's requirement that rights serve their holders' interests. From this, it would appear that Fred's duty to enslave me could be

[40] See also Neil MacCormick's example of inherited rights over slum properties, in his 'Rights in Legislation' in *Law, Morality and Society*, ed. P. M. S. Hacker and Joseph Raz (Oxford: Clarendon Press), p. 202. This example differs from my gnomes case in that property rights over slums would probably serve their holders' interests in *some* respect (e.g. because they could be sold at some price, or rented out), although they would not serve their holders' interests *on balance*.
[41] For a version of this retort, see Raz, *The Morality of Freedom*, p. 175.

seen as *owed to me* (because, in the 'indirect sense' this duty serves my interests). And from this, it would appear that I could hold a *claim to be enslaved*. In addition, it would appear that because this is a claim which serves my interests in an 'indirect sense', it is a claim for which, if not properly respected, I could be owed *recompense*. Therefore if we understand 'serving interests' in the 'indirect sense' under consideration, then the Razian Interest Theory would incorrectly classify Fred's legal duty to enslave me as correlative to a *right to be enslaved*, held by me. It follows that Interest Theorists cannot support their theory by adopting the 'indirect' understanding of the serving of interests; while such an approach might allow Interest Theorists to classify my property rights over my ugly and worthless gnomes as 'serving my interests', it unhelpfully also classifies Fred's duty to enslave me as 'serving my interests'.[42]

4.2 Modifying the Razian Interest Theory

I have outlined two difficulties for the Interest Theory: (a) there can be unjustified rights; (b) there can be rights that do not serve their holders' interests in any way. One might try to modify the Razian Interest Theory to accommodate these difficulties. To accommodate difficulty (a), one should abandon the link to justification which Raz builds into his Interest Theory. Instead of holding that rights must be justified by their holders' interests in some way, one should hold merely that a right must serve, or in some way be linked to, its holder's interests, even though its relationship to its holder's interests need not *justify* the right. This non-justificatory approach would accommodate cases like the 'droit de seigneur'.

To accommodate difficulty (b), one might try to modify the Interest Theory in various ways. One might hold that rights need not serve their holders' *actual interests*, so long as they serve *what lawmakers take to be people's interests*. On this approach, I can be understood as holding property rights in my worthless garden gnomes because lawmakers take such property rights to serve my interests. But this approach would make whether a Hohfeldian position qualified as a right overly dependent on lawmakers' judgements about people's interests. In most contexts, we would be disinclined to call my liability to be disinherited 'a right' even if lawmakers deemed such liabilities to serve their holders' interests.[43] Alternatively, one might hold that a Hohfeldian position can qualify as a right if and only if holding that Hohfeldian position would serve the interests of *the typical person*. Then if the typical person enjoys worthless garden gnomes, I can thereby be understood as holding property rights in such gnomes although I do not enjoy them. But this approach would wrongly disallow the possibility that there could be unusual rights, protecting things

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[42] It is worth pointing out that even if one *embraced* the 'indirect' understanding of the serving of interests, there would still be some examples of rights which would not serve their holders' interests in any way (not even in the 'indirect' way). For example, the legal claims and privileges which I hold concerning my useless gnomes would constitute rights even if these claims and privileges did not serve my interests in the 'indirect' way. Suppose I was a 'lover of mayhem' who would greatly enjoy the disordered society in which I would live if there were no property system in existence; in this situation, my interests would not be served by the existence of a property system – and hence my property rights in my gnomes would not serve my interests in the 'indirect' way. As the gnomes are worthless and ugly, they would also not serve my interests in any more 'direct' way. In sum, my property rights over the gnomes would not serve my interests in any way whatsoever. But they would still constitute property *rights*.

[43] In addition, this approach is problematic for the analysis of non-legal moral rights. Who is the relevant lawmaker for non-legal moral rights?

in which the typical person has no interest. For example, people sometimes claim rights to be injured, tortured or maimed. I believe we must allow that in certain contexts these assertions that unusual rights exist can make sense, and also can be true. If such Hohfeldian positions are sometimes to qualify as rights, then we must reject the analysis based on the interests of the typical person.

Note that I am wary of any theory that would rule out certain *types* of relevant Hohfeldian position (e.g. claims to be injured, powers to create duties which would humiliate the power-holder) as never able to qualify as rights. I would even want to allow that in certain specific contexts, a duty to enslave X could correlate with a 'right to be enslaved' held by X. This might be the case if X held a central, autonomously formed interest in being enslaved. My concern about the 'value-independent' version of the Normative Constraint view's treatment of the duty to enslave people is not that such a duty could *never* correlate with a right-to-be-enslaved, but simply that in *most conceivable contexts* a duty to enslave would not correlate with such a right. In odd contexts, the duty to enslave might correlate with a right-to-be-enslaved; the 'value-independent' Normative Constraint view errs by classifying this duty as correlating with a right in all contexts; the version of the Interest Theory based on 'the interests of the typical person' errs by disallowing such a duty to correlate with a right in any context.

4.3 The Kramer/MacCormick Interest Theory

A further alternative version of the Interest Theory holds that a claim, privilege, power, immunity or liability qualifies as *a right* if and only if it *protects some aspect of the right-holder's situation which would serve the interests of a typical bearer of such an aspect*. Versions of this view have been developed by Matthew Kramer and Neil MacCormick.[44] The Kramer/MacCormick approach can accommodate cases like my property rights in ugly and worthless gnomes, for these rights protect an *aspect* of my situation – my holding control over an external object – which serves the interests of the typical bearer of such an aspect. In addition, Kramer shows how his form of Interest Theory (unlike, for example, the view that I consider above, whereby a Hohfeldian position can qualify as a right if and only if holding that Hohfeldian position would serve the interests of *the typical person*) is compatible with the existence of unusual rights to be tortured or injured, as such rights protect *aspects* of their holders' situations (such as their holders' participation in lifestyles that they enjoy) that serve the interests of the typical bearer of such aspects.[45]

The Kramer/MacCormick theory would be acceptable, I think, if one accepted Kramer's contention that all and only claims are rights.[46] But I reject this contention as inconsistent with our actual usage of the term 'a right'. Instead, in my view not all claims are rights, and Hohfeldian positions other than claims can qualify as rights. On my approach, the Kramer/MacCormick thesis that a right must *protect some aspect of the right-holder's situation which would serve the interests of a typical bearer of such an aspect* is therefore needed in order to discriminate between those claims, privileges, powers, immunities and liabilities which are *rights* and those which are *not*. I do not think it makes this discrimination accurately. This is because for *any*

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[44] See especially Kramer, 'Rights Without Trimmings', pp. 93-97, and MacCormick, 'Rights in Legislation', p. 202.
[45] Kramer, 'Getting Rights Right', pp. 81-89.
[46] Kramer, 'Rights Without Trimmings', p. 9.

Hohfeldian position whatsoever, held in any context, it seems likely that there will be *some aspect* of the position-holder's situation that is protected by this position and that is in the interests of the typical person. For example, all powers that one holds will protect the following aspect of one's situation: *one's having the ability to create new Hohfeldian positions*. It is in the interests of the typical person who holds the ability to create new Hohfeldian positions, to hold this ability. Hence any power whatsoever will protect some aspect of its holder's situation – the ability to create new Hohfeldian positions – which is in the interests of the typical bearer of this aspect. It follows that all powers – *including my power to incur onerous new duties through careless driving* – will qualify as rights on this analysis. Thus this latest version of the Interest Theory allows too many Hohfeldian positions to qualify as rights.[47]

In response to the argument above, one might dispute the contention that it is in the interest of the typical person to have the ability to create new Hohfeldian positions. Perhaps if one looked expansively at *all* the legal powers that the typical person actually holds – including all the many ways in which a person can incur unpleasant new duties by violating laws – then one would be less confident that the ability to create new duties is in the typical person's interests (and hence one would be less confident that all powers must satisfy the Kramer/MacCormick requirement). However, even if the Kramer/MacCormick approach thereby correctly avoids classifying all powers as 'rights' in the actual world, it attains this result only as a matter of luck. In nearby possible worlds, the Kramer/MacCormick approach goes awry. One can imagine a possible situation in which it is true that the ability to create new duties is in the interests of the typical person. For example, one can imagine a situation in which there are very few punishable offences other than careless driving, and in which almost all legal powers involve the ability to create duties which are beneficial to the power-holder. In *this* situation, all powers would protect an aspect of the power-holder's situation – the ability to create new duties – which was in the interests of the typical person. In this situation, even the power to incur onerous new duties through careless driving would protect an aspect of the power-holder's situation which was in the interests of the typical person. Thus in this imaginary possible situation, the Kramer/MacCormick approach would deliver the wrong result by classifying the power-to-incur-onerous-new-duties-through-careless-driving as 'a right', even when this power in no way served its holder. Similar possible situations can be imagined in which the Kramer/MacCormick approach wrongly classifies other Hohfeldian positions (e.g. in a world where almost all liabilities were beneficial, a rare harmful liability – such as a liability-to-be-disinherited – would qualify as a right).

5. IMPASSE

None of the analyses considered so far correctly classifies as 'rights' all and only those claims, privileges, powers, immunities and liabilities that people actually term 'rights'. The Will Theory incorrectly rules out the possibility of rights being held by beings who lack the capacity to make choices, while the Interest Theory incorrectly rules out the possibility of rights that do not serve their holders' interests – and attempts to modify the Interest Theory by appealing to lawmakers' judgements about

[47] Note that I do not contend that a power-to-incur-onerous-new-duties-through-dangerous-driving should necessarily never be classified as 'a right'. Such a power might qualify as a right in contexts where it is of value to the power-holder. But in most contexts this will not be the case, and in these contexts I do not think it is correct to classify such a power as 'a right'.

people's interests, or by appealing to the interests of the typical person, also fail to reflect actual usage of the term 'a right'. To theorists suspicious of attempts to offer conceptual analyses faithful to ordinary language, such an impasse might seem inevitable. The failure to attain a successful analysis here might be understood as revealing the futility of attempting to offer a single set of necessary and sufficient conditions that will encompass all the varying ways in which we use the term 'a right'.

In the face of this type of criticism, it is worth reminding ourselves of the benefits of attaining a non-revisionary analysis of rights. Revisionary approaches to rights risk irrelevance. It is fairly common to see significant political or moral conclusions drawn from revisionary analyses of rights. For example, L. W. Sumner infers from his revisionary Will Theory analysis of rights to the conclusion that there can be no 'natural rights'. Among the reasons that Sumner offers for this conclusion is the contention that the Hohfeldian structure which the Will Theory accords to rights would be too complex to constitute a 'natural' deontic category.[48] Here a conclusion with profound ethical and political consequences – that there can be no 'natural rights' – is inferred from a revisionary analysis that fails to accord with actual usage of the term 'a right'. Thus while Sumner might be correct to hold that *what he refers to as 'rights'* cannot be 'natural', it does not follow that *what participants in everyday public disputes refer to as 'rights'* cannot be 'natural'. By premising his argument on a revisionary analysis, Sumner cannot be confident that his conclusion refers to that to which most people are referring when they talk about rights. In my view, before we start drawing inferences concerning the ethical or political importance and role of rights, we should ensure that we are discussing those things which most people mean by 'rights'. And to do this we should seek a non-revisionary analysis of rights.

In addition, the proliferation of the language of rights – which I noted at the start of this paper – is clearly here to stay. Revisionary analyses would judge many of these proliferating assertions that certain rights exist as conceptually mistaken. For example, I have noted that the Will Theory would judge it conceptually mistaken to ascribe rights to animals or young children, and Raz's Interest Theory would judge it conceptually mistaken to ascribe to people rights that served none of their interests. These judgements seem, unattractively, to rule out certain moral positions by conceptual diktat. In response to this charge, Hart defended his Will Theory by noting that even if it entails that we cannot correctly ascribe *rights* in certain cases (e.g. babies' rights), we can nonetheless see people as under *duties* in the cases in question.[49] But this still seems conceptually imperialist, favouring the theory-driven analysis of rights over the way the term is actually used. If people refer frequently to babies' rights (as they do), then why not allow such references to be conceptually acceptable? No doubt people sometimes make statements in which the term 'a right' is used conceptually incorrectly (for example, it would at present be not merely a moral but also a conceptual mistake to assert that computers or other machines have rights). Non-revisionary analyses of rights do not have to imply that every actual use of the term 'a right' must be conceptually coherent. But the non-revisionary approach assumes that *many* of the currently proliferating assertions about rights are conceptually coherent. This is not to say that such assertions are true; but non-revisionary analyses entail that whether these assertions are true is not a matter that

[48] Sumner, *The Moral Foundation of Rights*, p. 126.
[49] Hart, 'Are There Any Natural Rights?', p. 181.

can be resolved by conceptual analysis; it is, rather, a *morally or legally substantive* matter dependent on factors such as whether the relevant relational duties exist. In my view, this is the correct way to classify contemporary debates about whether animals or children have rights, and what rights they have. For these reasons, I shall persist in seeking a non-revisionary approach to rights.

6. TWO NON-REVISIONARY WAYS FORWARD

I can see two alternative new routes that a non-revisionary theorist might take, in improving on the analyses of rights considered so far.

6.1 Interest Theory with exceptions for institutional rights

On this view, one would accept that it is not possible to find a single analysis of the concept 'a right', as it is used in ordinary language. But one would hold that a version of the Interest Theory gets us close. On this view, in *most* cases where X holds a right, the following is true:

(1) X holds:
- *(i) a claim; or*
- *(ii) a privilege; or*
- *(iii) a power; or*
- *(iv) an immunity; or*
- *(v) a liability; or*
- *(vi) some cluster involving several of one or more of positions (i)-(v),*

and

(2) if the position (or cluster of positions) of type (i)-(vi) were infringed, unenforced or not properly respected, then X would hold a claim to some form of apology or recompense,

and

(3) the position (or cluster of positions) of type (i)-(vi) serves X's interests.

I shall call this the 'non-justificatory Interest Theory'. It is akin to the Razian Interest Theory, differing only in that it does not require rights to be *justified* by their holders' interests.

On the view under consideration, the theorist will accept that for *some* cases where X holds a right, clause (3) will be false. These exceptional cases are exemplified by my property rights over ugly and worthless gnomes, or my useless promissory right that you have a cup of tea with your supper. Importantly, the theorist can offer some explanation of what is going on in these exceptional cases: these cases arise because users of the term 'a right' have decided that certain duties, *when conferred by certain specific institutions* (such as property systems, or the institution of promising), will qualify as correlating with rights whether or not these duties serve the interests of the people to whom they are owed, and similarly certain privileges, powers, immunities and liabilities *when conferred by certain specific institutions* (such as property systems, or the institution of promising), will qualify as constituting rights whether or not these powers, immunities or liabilities serve their holders' interests. Language-users' decision to classify people as holding 'rights' whenever there exist certain Hohfeldian positions falling within certain specific institutions seems to arise from the fact that the institutions demarcate a clear type of Hohfeldian position (e.g. duties of noninterference with property and powers over property; or duties to perform what one promised and powers to waive promissory duties), the majority of whose tokens

do serve the interests of the recipient of the duty or the holder of the power, privilege or immunity.

It is important to notice that to endorse this Interest-Theory-with-exceptions, one must refrain from seeing the theory's clause (3) as implied by the concepts of 'relational duty' and 'recompense' that underpin clauses (1) and (2). For the Interest-Theory-with-exceptions allows that clauses (1) and (2) could sometimes be satisfied without clause (3) being satisfied - for example, clauses (1) and (2) are satisfied when I hold useless property rights over worthless garden gnomes, although clause (3) is not satisfied by these rights. This means that to support the Interest-Theory-with-exceptions, one is faced with two options: (a) One could partially retract the opposition – developed in §2.3 above – to the 'value-independence' thesis. Instead, one would allow that in certain exceptional cases (as exemplified by my useless property rights over worthless garden gnomes) a person can be owed relational duties that would be of no value to him or her, and a person can be owed recompense for others' failure to perform actions whose performance would have been of no value to him or her. On this approach, one would maintain that *in most situations*, relational duties must serve their holders' interests, and recompense must only be owed for failure to perform actions whose performance would have served the interests of those to whom the recompense is owed; but in *exceptional* or '*non-core*' cases, these theses do not hold. (b) Alternatively, one could maintain wholesale opposition to the 'value-independence' thesis, and hold that although in the exceptional or 'non-core' cases the right-holder is owed a duty which does not serve his or her *interests*, or is owed recompense for the non-performance of actions which would not have served his or her *interests*, nonetheless the performance of the relevant duty, or the performance of the actions necessary to avoid triggering a recompense requirement, would be *of value* to the right-holder in some wider sense of 'value'.

For reasons outlined in §6.3 below, I am doubtful that an appropriate conception of 'value' can be found to underpin approach (b). Therefore, I believe that proponents of the Interest-Theory-with-exceptions should allow that in the exceptional cases - though not in other cases - relational duties are sometimes owed to people for whom the performance of such duties is of no value whatsoever, and compensation is owed to people for failure to perform acts whose performance would have been of no value whatsoever to those owed compensation. This is not to make a full return to the 'value-independence' thesis that characterised my initial interpretation of the Normative Constraint view, and that I rejected in §2.3. Rather, it is to accept that in certain exceptional cases, and only in such exceptional cases, we apply the concept 'a right' to normative positions which are of no value to their holders - such as property rights over useless garden gnomes. And we can offer an explanation for how such deviant cases arise.

To defend the Interest-Theory-with-exceptions, it is attractive to argue that we should be unsurprised to discover that there is no unitary analysis of the 'ordinary-language' English term, 'a right'. Many 'ordinary-language' concepts are similarly insusceptible to analysis in terms of necessary and sufficient conditions. Wittgenstein famously writes:

> Consider for example the proceedings that we call "games". I mean board-games, card-games, ball-games, Olympic games, and so on. What is common to them all? – Don't say "There *must* be something common, or they would not be called 'games'" – but *look and*

> *see* whether there is anything common to all. – For if you look at them you will not see something that is common to *all*, but similarities, relationships, and a whole series of them at that. […] Are they all ‘amusing’? Compare chess with noughts and crosses. Or is there always winning and losing, or competition between players? Think of patience. In ball games there is winning and losing; but when a child throws his ball at the wall and catches it again, this feature has disappeared. Look at the parts played by skill and luck; and at the difference between skill in chess and skill in tennis. Think now of games like ring-a-ring-a-roses; here is the element of amusement, but how many other characteristic features have disappeared! […].
>
> And the result of this examination is: we see a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail.
>
> I can think of no better expression to characterize these similarities than “family resemblances”; for the various resemblances between members of a family: build, features, colour of eyes, gait, temperament, etc. etc. overlap and criss-cross in the same way. – And I shall say that ‘games’ form a family.[50]

The current approach to the concept ‘a right’ sees more similarities between most rights than Wittgenstein sees between most games. In particular, it sees the non-justificatory Interest Theory as giving the *core meaning* of the term ‘a right’. The majority of instances in which we use the concept satisfy the non-justificatory Interest Theory. But there are also subsidiary cases that deviate from the core cases. Such a subsidiary case would be my property rights over some ugly and worthless garden gnomes. This subsidiary case holds sufficient ‘family resemblances’ to the core cases for the subsidiary case to be classified as involving rights. In particular, this subsidiary case involves certain *types* of Hohfeldian position (claims, privileges and powers conferring direct control over external objects, accompanied by claims to recompense if these claims, privileges and powers are infringed, unenforced or not properly respected), the majority of whose tokens satisfy the non-justificatory Interest Theory. For the majority of claims, privileges and powers conferring direct control over external objects serve some interests of the holders of such claims, privileges and powers. Totally useless token property rights are rare. Thus we have grown to classify all duties conferring direct control over external objects as correlative to rights of a certain sort, and we have grown to classify all privileges and powers conferring direct control over external objects as constituting rights of a certain sort: ‘property rights’. Given this linguistic development, Hohfeldian positions of the relevant type qualify as property rights whether or not they satisfy the non-justificatory Interest Theory. A similar story can also be told about promissory rights.

The proponent of the Interest-Theory-with-exceptions might note that it is possible that alternative classes of right-like Hohfeldian position are currently coming to acquire the title ‘rights’ independently of whether they satisfy the non-justificatory Interest Theory. For example, perhaps this is happening to the concept ‘human rights’: perhaps contextually specific tokens of *the types of right-like Hohfeldian positions outlined in the various international conventions on human rights* would now always be classified as ‘human rights’, even when such token Hohfeldian positions did not serve their holders’ interests. We can test our linguistic intuitions about this suggestion by thinking about a legal system which places all people under an unwaivable duty not to torture anyone. Imagine John – who enjoys being tortured, and who has *no interest in not being tortured* – living within this legal system. Would

[50] Ludwig Wittgenstein, *Philosophical Investigations* (Oxford: Blackwell 1953), sections 66-67.

we allow that John holds a legal *claim*-not-to-be-tortured, a claim that qualifies as a *right*? I am not sure. It is, of course, difficult to imagine John having no interest whatsoever in not being tortured, but I do not see such a situation as impossible. In such a situation, I suspect we would be *unclear* whether to say that John holds a *claim-right* not to be tortured. This is because, although the duties not to torture John would not here satisfy the non-justificatory Interest Theory, they would constitute *duties of a type that tends to correlate with rights*, as they are duties of one of the types outlined in the international lists of 'human rights'. At present, the concept 'human rights' is perhaps not yet clearly independent of the constraints of the non-justificatory Interest Theory, in the way that the concepts of 'property rights' and 'promissory rights' are. A proponent of the Interest-Theory-with-exceptions would argue that this is reflected by our unclarity about whether our duties not to torture John correlate with a claim-based right held by him.

To summarise, the first option for a non-revisionary theorist is the Interest-Theory-with-exceptions. This view holds that a Hohfeldian position of the 'right-like' type described by the Normative Constraint view genuinely qualifies as 'a right' if and only if either (A) the Hohfeldian position serves its holder's interests, or (B) the Hohfeldian position is a member of a type (such as 'property rights' or 'promissory rights') all of whose members qualify as rights. Option (B) allows some Hohfeldian positions to qualify as rights although they are not of value in any way to their holders.

A similar strategy could be used to develop a Will-Theory-with-exceptions. On this account, in its *core meaning* the term 'a right' refers to any claim, privilege, power, immunity or liability (accompanied by claims to recompense if the claim, privilege, power, immunity or liability is infringed, unenforced or not properly respected), that is also *accompanied by a power of waiver-or-enforcement*. This approach would also allow that in exceptional ('non-core') cases, we use the term 'a right' to refer to right-like Hohfeldian positions which are unaccompanied by powers of waiver-or-enforcement (e.g. babies' claims not to be attacked), and in these cases the relevant right-like Hohfeldian positions are tokens of a type of right-like Hohfeldian position (e.g. claims not to be attacked) the vast majority of whose tokens are accompanied by powers of waiver-or-enforcement.

The Will-Theory-with-exceptions could be developed further, but it is less promising than the Interest-Theory-with-exceptions. It seems likely that there could be certain unwaivable rights that are not members of a class of rights the majority of whose members are waivable. For example, it might be that most people hold unwaivable claims-not-to-be-tortured, and that very few people (if any) hold waivable claims-not-to-be-tortured. In this situation, it would not be true that *most* instances of the claim-not-to-be-tortured are accompanied by powers of waiver-or-enforcement, and that this is why we have come to designate *all* claims-not-to-be-tortured as 'rights'. So in this situation, the Will-Theory-with-exceptions would struggle to explain why people's claims-not-to-be-tortured have come to be termed 'rights'.[51] Yet this sort of situation seems perfectly conceivable, and in this situation I think we would designate the

[51] Indeed in this situation the Will-Theory-with-exceptions would struggle to explain why people hold *claims* not to be tortured (whether or not these claims qualify as 'rights'); for the Will-Theory-with-exceptions would hold that in all cases other than 'exception cases', a person can only be owed a duty (and hence can only hold a claim) when they hold powers of waiver-or-enforcement over that duty.

claims-not-to-be-tortured as 'rights'. Because it can handle this type of situation, the Interest-Theory-with-exceptions looks preferable to the Will-Theory-with-exceptions.[52]

6.2 Inclusive Theory without exceptions

One might be unhappy with the need to leave room for 'exceptional cases' adopted in the approaches described above (and one might be unhappy with the attendant return to a degree of 'value-independence' that allows certain Hohfeldian positions to qualify as rights independently of whether they serve their holders in any way). Starting with either the Interest Theory or the Will Theory, 'exception cases' were needed in order to make the theory sufficiently inclusive – to allow the Interest Theory to accommodate certain rights which do not serve their holders' interests, and to allow the Will Theory to accommodate certain unwaivable rights. An alternative way to achieve greater inclusiveness might be to combine the Interest Theory and the Will Theory into one Combined Theory:

X holds a right whenever:

(1) X holds:

(i) a claim; or

(ii) a privilege; or

(iii) a power; or

(iv) an immunity; or

(v) a liability; or

(vi) some cluster involving several of one or more of positions (i)-(v),

and

(2) if the position (or cluster of positions) of type (i)-(vi) were infringed, unenforced or not properly respected, then X would hold a claim to some form of apology or recompense.

and

(3) either (a) X holds a power of waiver-or-enforcement concerning the position (or cluster of positions) of type (i)-(vi), or (b) the position (or cluster of positions) of type (i)-(vi) serves X's interests.

This Combined Theory allows that property rights over worthless gnomes can qualify as rights because the gnome-owner holds the power to choose what to do with his or her gnomes – including powers to waive his or her claims over the gnomes. And the Combined Theory also allows promissory rights securing worthless tea-drinking to

[52] In response to this criticism, a defender of the Will-Theory-with-exceptions might modify their theory, maintaining that in its core meaning the term 'a right' refers to any claim, privilege, power, immunity or liability (accompanied by claims to recompense if the claim, privilege, power, immunity or liability is infringed, unenforced or not properly respected), that *protects its holder's autonomy, whether or not it is accompanied by a power of waiver-or-enforcement*. (This approach would be somewhat similar to Griffin's view of human rights, though Griffin does not distinguish 'core' from 'exceptional/non-core' cases (Griffin, 'First Steps in an Account of Human Rights', pp. 318-320).) On this account, the Will-Theory-with-exceptions is structurally similar to the Interest-Theory-with-exceptions, the difference between the two theories turning simply on the fact that in the Will-Theory-with-exceptions the concept of *autonomy* takes the role played by *interests* in the Interest-Theory-with-exceptions. Which approach is preferable? I am not sure, though I suspect the Interest-Theory-based approach might involve fewer 'non-core exception cases' than the Will-Theory-based approach, because many everyday legal rights (such as my right to park in a residents' parking bay) do rather little for their holders' autonomy, although they often serve their holders' interests. In addition, the concept of autonomy is perhaps less easily and uncontroversially explicated than the concept of interests.

qualify as rights because the recipient of the tea-drinking promise holds the power to waive his or her tea-drinking claims. The theory also allows that animals and young children can hold rights, because their interests are served by these rights even though they lack the power to waive their rights. And the theory allows that unwaivable claims-not-to-be-tortured could qualify as rights, because such claims would serve their holders' interests. The Combined Theory reflects the fact that in their traditional form, both the Interest Theory and the Will Theory exclude too many Hohfeldian positions as not qualifying as rights, yet neither the traditional Interest Theory nor the traditional Will Theory is too inclusive, allowing Hohfeldian positions to qualify as rights when they should not so qualify.[53]

However, the Combined Theory is itself insufficiently inclusive. It can sometimes be conceptually coherent to ascribe rights to people even though such rights are neither accompanied by powers of waiver-or-enforcement, nor serve their holders' interests. For example, it is conceptually possible that I could acquire an *unwaivable* promissory right from you, when you promise me that you will have a cup of tea with your supper – such a right would neither serve my interests, nor satisfy the Will Theory component of the Combined Theory. Similarly, the concept of *desert* can be used to furnish examples of rights that do not satisfy the Combined Theory. For example, it might turn out that you are under a duty to award me a medal for my meritorious behaviour, yet awarding me this medal would serve no interest of mine (my well-being might be unaffected by the receipt of medals), nor would promote my autonomy (I might have no power to waive my receipt of the medal, and receiving the medal might not enhance my autonomy in any way). In this situation, I think that you could owe me a relational duty to award me the medal, even though such an award would not serve my interests nor my autonomy. And the claim that I would thereby hold – a claim to be awarded the medal – could, I think, qualify as a right (so long as the recompense clause – clause (2) – was satisfied).

These cases of rights that serve neither their holders' interests nor their holders' autonomy could be accommodated by a Combined-Theory-with-exceptions.[54] But we pursued the Combined Theory as an attempt to avoid the need for special 'exception cases'. So we should resist this route. Instead, to accommodate the cases described above the Combined Theory could be modified as follows:

X holds a right whenever:
clauses (1) and (2) of the Combined Theory are met, and
(3) the position (or cluster of positions) of type (i)-(vi) (referred to in clause (1)) is of some value to the position-holder, where this 'value' might involve protecting the*

[53] The traditional Interest Theory has been accused of being too inclusive, on the grounds that it erroneously classifies as 'right-holders' third-party beneficiaries of someone else's right (Hart, 'Bentham on Legal Rights', pp. 195-196; Steiner, *An Essay on Rights*, pp. 62-63). But this accusation has been effectively rebutted (see Kramer, 'Rights Without Trimmings', pp. 80-83); third-party beneficiaries do not qualify as right-holders because, although their interests are served by the existence of the right, they do not hold the claims, privileges, powers, immunities or liabilities which constitute the right.

[54] On a Combined-Theory-with-exceptions, it would be argued that desert-based claims are generally either waivable or serve their holders' interests (or both); for this reason, it would be held that we have come to describe *all* desert-based claims as 'rights' – including even those few desert-based claims that are neither waivable nor serve their holders' interests. Similar arguments could be used to allow the Interest-Theory-with-exceptions and the Will-Theory-with-exceptions to accommodate these 'exception cases'.

position-holder's autonomy through powers of waiver-or-enforcement, or serving the position-holder's interests, or serving the position-holder in some alternative way.

I shall call this theory the 'Inclusive Theory', and it constitutes my second promising way forward for non-revisionary analysts of rights. In addition to accommodating the cases accommodated by the Combined Theory, the Inclusive Theory allows a desert-based claim-to-be-awarded-a-medal to exist and to qualify as a right even though it does not serve its holder's interests or autonomy, because such a claim *is of value to its holder* (in the sense of being what the holder deserves), even though this value cannot be explicated in terms of interests nor in terms of autonomy. As well as this benefit, the Inclusive Theory (unlike theories with exception cases) also allows one to maintain a wholesale rejection of the 'value-independence' thesis; on the Inclusive Theory, rights must always be of value to their holders in some sense.

6.3 Comparing the two ways forward

I have outlined two alternative ways forward in the non-revisionary analysis of rights. The first is the Interest-Theory-with-exceptions. The second is the Inclusive-Theory-without-exceptions. I favour the first way forward for two reasons. First, given the heterogeneity of ordinary usage, it would be surprising if a unitary analysis of rights could be found. People's profligacy with their use of the term 'a right' should encourage us to look for an account which involves some unusual exception cases explicable in the manner of the Interest-Theory-with-exceptions. Secondly, the notion of 'value' central to the Inclusive Theory requires further clarification, and it is doubtful that such clarification can be made satisfactorily. To avoid countenancing special 'exception cases', the Inclusive Theory requires an account of *how a Hohfeldian position can be 'of value' to a person* that is broad enough to show how (a) my right to receive a deserved medal is of value to me even when this does not serve my interests nor my autonomy, (b) my property rights over worthless gnomes are of value to me although they do not serve my interests, (c) my claims not to be tortured are of value to me although I cannot waive them. Yet the Inclusive Theory's account of *how a Hohfeldian position can be 'of value' to a person* also cannot be so broad as to allow *all* the Hohfeldian positions listed by the initial Normative Constraint view to qualify as rights. The Inclusive Theory's account of *how a Hohfeldian position can be 'of value' to a person* must maintain that in most contexts a liability to be disinherited is not of value to its holder, nor is a power to incur new duties through careless driving. I am doubtful that an appropriately nuanced account of how a Hohfeldian position can be 'of value' to a person can be found; no account seems likely to be able to make the requisite discriminations between the Hohfeldian positions listed by the Normative Constraint view which do qualify as rights, and those which do not. It seems more plausible to accept a theory like the Interest-Theory-with-exceptions, which makes this discrimination in roughly the right place while allowing for the possibility of some exception cases which deviate from the theory's 'core' analysis.

7. IMPLICATIONS

Whichever non-revisionary way forward one adopts – the Interest-Theory-with-exceptions or the Inclusive-Theory-without-exceptions – the following implications are entailed.

7.1 Whether a Hohfeldian position qualifies as a 'right' is context-dependent
If the Inclusive Theory is correct, then whether a duty correlates with a right, and whether a power or immunity etc. qualifies as a right, does not depend on the type (e.g. duty *to torture someone*, power *to issue military orders*) of which the duty, power or immunity is a token. Instead, whether a duty correlates with a right, or a power constitutes a right, depends on whether that contextually specific token duty or power is of value in some way to the recipient of the duty or the holder of the power. For example, suppose that I am placed under legal duties to maim Fred and Joe. And suppose that for Fred, being maimed is an enjoyable 'lifestyle choice', while for Joe it is horrific to be maimed. In this situation, my duty to maim Fred might in certain contexts qualify as a relational duty *owed to Fred*, and as a duty the non-performance of which would trigger a duty to offer Fred *recompense*, while my duty to maim Joe cannot qualify as a relational duty owed to Joe, nor as a duty the non-performance of which would trigger a duty to offer Joe recompense. For Fred, the claim-to-be-maimed can qualify as a right, because by protecting Fred's participation in a lifestyle which he enjoys, the claim is of value to Fred. By contrast, my duty to maim Joe does not correlate with a right held by Joe. What this result implies is that, on the Inclusive Theory, whether a Hohfeldian position in a particular context involves a right depends on what would be of value to the specific parties involved.

Similarly, if the Interest-Theory-with-exceptions is correct, then whether a duty correlates with a right, and whether a power or immunity etc. qualifies as a right, does not *in most cases* depend on the type of which the duty, power or immunity is a token. Instead, it depends on whether the relevant contextually specific token duty serves its recipient's interests in some way, or whether the relevant contextually specific token power or immunity serves its holder's interests in some way. For the Interest-Theory-with-exceptions, this is not universally true: certain Hohfeldian positions qualify as 'rights' simply in virtue of their being of a certain type (e.g. property-controlling positions or promissory claims). But the Interest-Theory-with-exceptions sees *most* of the cases in which a Hohfeldian position qualifies as a right as dependent on whether that Hohfeldian position in its specific context serves its holder's interests in some way.

7.2 Rights are not necessarily morally important
It should be clear from such examples as my right to park my car in a residents' parking bay, that rights need not be morally (nor indeed legally) important. Both the Interest-Theory-with-exceptions and the Inclusive Theory are consistent with this fact. Claims, privileges, powers, immunities or liabilities which serve their holders' interests, or are of value to their holders, need not be morally important, and this possibility of morally unimportant rights fits well with actual usage of the term 'a right'.

7.3 Rights can exist independently of whether there are mechanisms to enforce them
Some contemporary writers suggest that rights can only exist when there exists some (legal or institutional) mechanism to enforce them. For example, Susan James writes:

> The creation of institutions that work well enough to implement and enforce the obligations from which rights flow is therefore an elaborate and continuous process which

must continually adapt to changing circumstances: without it, rights understood as effectively enforceable claims do not exist.[55]

In contrast to James's view, on both the Interest-Theory-with-exceptions and the Inclusive Theory a right can exist whether or not institutions exist to enforce it (because Hohfeldian positions – including the positions required by the recompense clause – can exist whether or not there exist institutional mechanisms to enforce such positions).[56] Unlike James's view, the two non-revisionary approaches are consistent with the 'natural rights' tradition, according to which at least certain rights are pre-legal moral requirements, requirements whose existence prior to the existence of legal enforcement mechanisms gives people a *reason* to introduce laws and enforcement mechanisms that were previously absent. On one interpretation of James's view, it would be mistaken to assert that the existence of 'natural rights' can give us reasons to introduce laws which are currently non-existent, for on this view if the laws and associated institutional mechanisms are non-existent, then the rights must be similarly non-existent. On this interpretation, James's view must dismiss the 'natural rights' tradition, yet this tradition is firmly embedded in ordinary language. It is common in contemporary political debates for disputants to argue that laws should be created in order to enshrine pre-existent morally justified rights. Only a highly revisionary analysis of the concept 'a right' would rule out all such arguments as conceptually incoherent.

7.4 Rights need not be compossible

Hillel Steiner has argued persuasively that a theory of justice would do well to embrace a set of rights that are 'compossible'. By this, Steiner means a set of rights each of which could be respected without violating other rights within the set.[57] It is notable that neither of my non-revisionary approaches requires that rights be compossible. Instead, my approaches are consistent with the existence of non-compossible rights. For example, they are compatible with a situation in which Joe holds a right that I provide him with a certain medicine, while Fred holds property rights protecting his control of the only available bottle of that medicine. In this situation, I cannot respect Joe's right without violating Fred's rights, and vice versa. The Inclusive Theory and the Interest-Theory-with-exceptions see nothing conceptually incoherent in this situation.

While there is not space to explore these issues in detail, I believe that it is an advantage of my two approaches that they allow rights to be non-compossible. It seems natural to maintain that the world is full of conflicting rights – legal rights conflict with pre-legal 'human rights' (consider conflicts between the property rights of slave-owners and the human rights of slaves), and even solely within the realm of morally justified rights, conflicts can occur (consider conflicts between morally justified property rights and welfare rights). A theory which ruled out such conflicts in favour of compossibility would be a highly revisionary theory.[58]

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[55] James, 'Rights as Enforceable Claims', p. 140.

[56] This is not to hold that *all* rights *must* exist independently of law and other institutions. My non-revisionary approaches are compatible with the contention that certain rights are created by law. But, unlike James's view, my views are also compatible with the contention that certain rights can exist whether or not they are legally enforced.

[57] See, for example, Steiner, *An Essay on Rights*, p. 2.

[58] It is sometimes argued that it is not genuinely logically possible for a set of non-compossible rights to exist (see Steiner, 'Working Rights', pp. 272-273). The argument looks like this:

Rejecting the requirement that rights be compossible might appear to leave little use for the language of rights. Even if one knows all the rights that people hold in a given situation, the possibility that these rights are non-compossible means that there is no guarantee that one will know what ultimately one ought to do in that situation. But this does not mean that there is nothing one can do in such a situation. The existence of rights will guide one's choice to a certain extent in such a situation. And in such a situation one should examine the *reasons* which justify rights, and use this examination to work out which rights merit greater and which rights merit lesser respect.

7.5 *Talk of rights implies little about the structure of morality*

Finally, both the Interest-Theory-with-exceptions and the Inclusive Theory imply that *the analysis of rights* is distinct from *the moral justification of rights*. On the Interest-Theory-with-exceptions, a right exists whenever a certain kind of Hohfeldian position exists, and that position either serves its holder's interests or is of a type which has come to be termed 'rights' because most members of that type serve their holders' interests. On the Inclusive Theory, a right exists whenever a certain kind of Hohfeldian position exists, and that position is of value in some way to the position-holder. Both approaches leave it open why rights might be *morally justified*: they might be justified because they serve people's interests, or they might be justified because they serve the aggregate interest, or they might be justified because they serve people's freedom, or they might be justified on various alternative grounds, or on a mixture of grounds.

This, I think, is strongly preferable to Raz's approach, on which rights are analysed as normative constraints which must be justified in a certain sort of way. The Razian approach has the implication that the moment one mentions rights, one thereby makes

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1. If a set of rights is non-compossible, then it might include both (i) a claim-right, held by Joe, that I ensure that *A* occur, and (ii) a claim-right, held by Fred, that I ensure that *A* not occur.
2. If Joe holds a claim-right that I ensure that *A* occur, then it is permissible for me to bring about *A*, and it is impermissible for me to refrain from bringing about *A*.
3. If Fred holds a claim-right that I ensure that *A* not occur, then it is permissible for me to refrain from bringing about *A*, and it is impermissible for me to bring about *A*.
4. The two statements above entail that if Joe holds a claim-right that I ensure that *A* occur and Fred holds a claim-right that I ensure that *A* not occur, then it is both permissible and impermissible for me to bring about *A*, and it is both permissible and impermissible for me to refrain from bringing about *A*.
5. It is not logically possible for it to be both permissible and impermissible for me to bring about *A*, nor for it to be both permissible and impermissible for me to refrain from bringing about *A*.
6. Therefore it is not logically possible for Joe and Fred to hold the non-compossible rights ascribed to them above.

There are two plausible ways to undermine this argument. First, one can question the contention in step 2 (and the parallel contention in step 3) that when Joe holds a claim-right that I ensure that *A* occur, it must therefore be permissible for me to bring about *A*; rather, perhaps this claim-right implies merely that it is impermissible for me to refrain from ensuring that *A* occur, without also implying that it must be permissible for me to ensure that *A* occur. If this is correct, then the non-compossible claim-rights above will entail only that it is both impermissible for me to bring about *A* and impermissible for me not to do so; this is not logically contradictory (see Peter Vallentyne, 'Two Types of Moral Dilemmas', *Erkenntnis*, 30, 3 (1989), 301-318). Secondly, the contradiction can alternatively be avoided by maintaining that the claim-rights in question generate merely *prima facie* permissibility and impermissibility (the *prima facie* permissibility of my doing *A* does not entail that my doing *A* cannot also be *prima facie* impermissible) (see David O. Brink, 'Moral Conflict and Its Structure', *Philosophical Review*, 103, 2 (1994), 215-247).

certain assumptions about how moral justification must work. In particular, the Razian approach implies that talk of rights presupposes that a person's individual interests must, considered on their own, sometimes be of sufficient importance to justify the existence of certain normative constraints. This is a fairly strong assumption to make – for example, it is incompatible with consequentialism (according to which all normative constraints are justified by how they serve the *collective* interest, rather than being justified merely by how they serve one individual right-holder's interests). I think it is mistaken to see talk of 'rights' as involving such strong moral assumptions. An advantage of my two non-revisionary approaches is that they divorce the concept of 'rights' from these issues about the structure of moral justification.

8. CONCLUSION

I have argued that neither the Will Theory nor standard versions of the Interest Theory yield accurate analyses of what people actually mean by the term 'a right'. But I have not gone far beyond the traditional Interest Theory and Will Theory in my proposals for two non-revisionary ways forward: central to my proposals is the insight, shared by the Interest Theory and the Will Theory, that the correct analysis of rights will not be wholly 'value-independent', but will rather maintain that in most cases rights must be of value to their holders in some sense. It would be interesting if the Inclusive Theory could be developed successfully, for this would show that there is a distinctive way in which all rights are of value to their holders. But, for reasons mentioned in §6.3 above, I am sceptical of this possibility. In my view, the best non-revisionary analysis is the Interest-Theory-with-exceptions.[59]

[59] My thinking on rights has profited from discussions with a great many people: at the Stirling Political Philosophy Group, the Edinburgh Philosophy Seminar, the European Consortium for Political Research, the Cambridge Forum for Legal and Political Philosophy and the Cambridge Moral Sciences Club. I am grateful to all who contributed to these seminars, and to an anonymous reviewer for *Law and Philosophy*. Especial thanks are owed to Jimmy Altham and Matthew Kramer - though this is not to imply that they would endorse the position I propose.