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Conducted by

Liam Murphy and Samuel Scheffler

Speaker: **Japa Pallikkathayil, University of Pittsburgh**
Paper: **Rethinking Rights**

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Rethinking Rights
Japa Pallikkathayil

Talk of rights permeates philosophical, legal, and everyday discourse. And yet there is surprisingly little agreement about what rights are. One source of disagreement is largely superficial. As has long been recognized by theorists, the word 'right' is, as Leif Wenar helpfully puts it, systematically ambiguous.[1] Talk of rights may refer to claims, liberties, powers or immunities, each of which relates rightholders to others in different, though related, ways. Wesley Newcomb Hohfeld's early twentieth century disambiguation of these different senses in which the term 'right' may be used has been a starting point for most theorists of rights ever since.[2] Although Hohfeld presents these distinctions specifically in the context of examining legal rights, the same distinctions are widely taken to apply to moral rights as well.

Among the different senses of 'right', Hohfeld and much of the subsequent literature treat the notion of a claim, often called a claim right, as of central significance. Hohfeld goes so far as to describe claims as rights 'in the strictest sense'.[3] I agree with this emphasis and in what follows I will be primarily focused on the notion of a claim right, although I will eventually consider liberties, powers, and immunities as well.

Hohfeld's description of claim rights can be glossed as follows:

Hohfeldian Claim Right: *A* has a claim right that *B* φ iff *B* has a duty to *A* to φ.

This formulation treats a claim right as correlative to a duty *to A*, or as Hohfeld himself puts it, *toward A*. It is now commonplace to call such duties 'directed duties'. But what is it for a duty to be directed in this sense? The two main rival accounts of rights, Will Theory and Interest Theory,

[1] Wenar (2005) 236.
[2] Hohfeld (1913).
[3] Hohfeld (1913) 30.

may be understood as offering competing accounts of the answer to this question.[4] Each theory replaces the 'duty to *A* to φ' in the Hohfeldian formulation with some relationship between *A* and the duty. Very roughly, these theories might be characterized as follows:

> **Will Theory Claim Right:** *A* has a claim right that *B* φ iff *A* has some measure of control over *B*'s duty to φ.[5]
>
> **Interest Theory Claim Right:** *A* has a claim right that *B* φ iff *B*'s duty to φ protects *A*'s interests.[6]

In due course, we will consider nuances that might complicate these characterizations. But in broad strokes, the debate between Will Theory and Interest Theory is about whether to identify rights in terms of the rightholder's interests or in terms of her control over others' duties. Unlike the largely superficial disagreements that might be occasioned by the systematic ambiguity of the word 'right', the debate between Interest theorists and Will theorists reflects fundamentally different orientations to the nature of rights.

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[4] Sreenivasan (2010) 482. Sreenivasan cites Waldron (1984) 8-9 and Sumner (1987) 24 and 39-45 as sources of this proposal.

[5] This formulation follows the presentation of Will Theory in Sreenivasan (2005) 258-259. Sreenivasan's characterization is drawn from Hart (1982) 183-184.

[6] This formulation follows the presentation of Interest Theory in Wenar (2005) 240-241. Wenar's characterization is drawn from MacCormick (1982) 192. See also see Rainbolt (2006) 14. It is worth flagging that this formulation differs in character from the version of Interest Theory prominently defended by Joseph Raz. Raz characterizes rights as follows: "'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." (Raz (1986) 166). While at first glance this formulation might seem quite similar to the one I have drawn from Wenar, Raz's rejects the Hohfeldian correlativity thesis that I have suggested much of the literature takes as its starting point: "It is wrong to translate statements of rights into statements of 'the corresponding' duties. A right of one person is not a duty on another. It is the ground of a duty, ground which, if not counteracted by conflicting considerations, justifies holding that other person to have the duty." (Raz (1986) 171). For this reason, it is somewhat difficult to place Raz's view directly in dialogue with the rest of the literature. While my main focus in the text is not on Razian Interest Theory, I consider something like Raz's view in Section 3.2, abstracting from his commitments regarding the correlativity thesis.

My aim in this paper is to move beyond the impasse between Interest Theory and Will Theory. I do this in three ways. First, in Section 1, I review the main objections to each theory, which take the form of challenges to their extensional adequacy. I argue that none of these objections is as decisive as critics of the relevant theory tend to make them out to be. The resulting stalemate should lead us to wonder about the value of pursuing further investigation into the nature of rights by focusing primarily on the search for counterexamples.

Second, in response to this worry, I articulate a methodology that, although compatible with traditional conceptual analysis, shifts the focus of investigation from the extensional adequacy of proposed biconditionals to the role of the certain kinds of questions in our practical lives. In Section 2, I describe this methodology, which I call practical inquiry. I then use practical inquiry to characterize the kinds of relationships Interest Theory and Will Theory take rightholders to have to duty bearers.

Finally, in Sections 3-5, I propose a distinctive account of rights, which I call Action Theory. I argue that Action Theory captures the role of rights in our practical deliberations better than either of its rivals. The result of this investigation is thus both a new approach to theorizing about rights and a new way of understanding the nature of rights.

1. Traditional Objections to Will Theory and Interest Theory

In this section, I review the prominent objections to Will Theory and Interest Theory. As I have indicated, I take these objections to be less decisive than they are often taken to be by critics. I describe what I take to be promising lines of response that have been or might be developed by proponents of the relevant theories. While these responses are not likely to satisfy

critics, they indicate why continued debate over purported counterexamples is not likely to advance discussion.

1.1 Will Theory

Will Theory is traditionally thought to suffer from two major deficits having to do with its purported inability to countenance inalienable rights and rights held by incompetent individuals like children or the comatose.[7] I consider each of these objections in turn.

1.1.1 Inalienable Rights

Some of our most fundamental rights are often thought to be inalienable, like, for example, the right not to be enslaved or tortured. By definition, inalienable rights cannot be waived. Rightholders thus seem to lack control over the duties correlative to such rights. It thus seems that Will Theory cannot countenance inalienable rights.

Examining this objection requires taking a closer look at the kind of control that is of concern to Will Theory. While descriptions of Will Theory tend to focus on the power to waive the duty correlative to a claim right,[8] this is not the only kind of control that Will theorists may invoke. In his classic presentation of Will Theory, H.L.A. Hart describes a rightholder as having a full measure of control over the duty bearer's duty when:

> (i) the rightholder may waive or extinguish the duty or leave it in existence; (ii) after breach or threatened breach of a duty he may leave it 'unenforced' or may 'enforce' it by suing for compensation or, in certain cases, for an injunction or mandatory order to restrain the continued or further breach of duty; and (iii) he

[7] For a representative discussion, See Wenar (2005) 239-240.
[8] Consider: "The will theorist recognizes as a right only those Hohfeldian incidents that confer on their bearers the discretion to alter the duties of others." Wenar (2005) 239.

> may waive or extinguish the obligation to pay compensation to which the breach gives rise.[9]

If Will Theory required that all rightholders have (i), the view would be straightforwardly inconsistent with inalienable rights. But Will Theory requires only that a rightholder have *some* control over the duty bearer's duty. It is open to the Will theorist, then, to countenance the possibility of inalienable rights as correlates of duties over which the rightholder has the second or third form of control described, perhaps as suitably modified when shifting from legal to moral discourse.

Gopal Sreenivasan criticizes N.E. Simmonds's use of this strategy, claiming that it has the implausible consequence that some of our strongest rights may be correlated with those duties over which we have the least control.[10] But it seems to me that Simmonds might reply that the strength of rights tracks the importance of the duties over which we have control rather than the extent of the control we have over them. Of course, how satisfying this strategy is may turn on how plausible it is to attribute to rightholders either of the latter two forms of control over the duties that are correlative to what are commonly thought to be inalienable rights. But what is important for my purposes is not following this line of debate further but rather observing the general strategy Will theorists might pursue, namely, complicating the notion of control that is at issue.

1.1.2 Incompetent Rightholders

The second traditional objection to Will Theory concerns the class of beings that Will Theory takes to be potential rightholders. This concern stems from what it takes to have any of

[9] Hart (1982) 184.
[10] Sreenivasan (2005) 260-261.

the powers Will Theory associates with having a right. Matthew Kramer provides a helpful introduction to the problem:

> Legal or moral authorization entails legal or moral competence… formal authorization is not in itself sufficient for the holding of a genuine power, as opposed to nominal power. In addition to being formally authorized to make a choice, a person with a genuine power must be factually *capable* of making the choice.[11]

If Kramer is right that having a power requires having the ability to use the power, then Will Theory will not straightforwardly countenance children, incompetent adults, or animals as potential rightholders.

But perhaps Will Theory can make use of Hart's suggestion that incompetent rightholders may have rights exercised on their behalf by representatives.[12] Leif Wenar objects that this maneuver comes at the cost of "suppressing the central Will Theory thesis that a rightholder is sovereign over the duty of another."[13] But this is both a substantively and a methodologically puzzling retort. Substantively, sovereignty is quite often taken to be consistent with representation in the political context. Of course, the devil will be in the details, but it is at least not obvious that introducing a potential relation of representation must be at odds with conceiving of rights as importantly tied to the notion of sovereignty.

More importantly for my purposes, though, is a methodological concern about Wenar's critique. Much as in the case of inalienable rights, it is up to Will theorists to tell us what kind of control they take to be relevant to the identification of rights. If they take control exercised on behalf of another to suffice, who are we to accuse them of insufficient fidelity to their central motivation?

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[11] Kramer (1998) 63-64.
[12] Hart (1982) 184, fn. 86.
[13] Wenar (2005) 240 fn. 26.

The general lesson to be drawn from this discussion of both the traditional objections to Will Theory is simple. The natural response to purported counterexamples will be refinement of the central concept on which Will Theory focuses, that of control. As we will see, much the same lesson will emerge when we consider Interest Theory.

1.2 Interest Theory

Interest Theory has been thought to be both under- and over-inclusive. It is purportedly under-inclusive in virtue of failing to recognize the rights of officeholders, like judges. And it is purportedly over-inclusive in virtue of countenancing the rights of third-party beneficiaries of contracts or promises. I consider each of these objections in turn.

1.2.1 Officeholders

Wenar provides a helpful characterization of the objection to Interest Theory based on the rights of officeholders:

> There are many rights the purpose of which is not to further the well-being of the rightholder, even in the general case. This is clearest with rights that define occupational roles. A judge has a (power) right to sentence criminals, but this right is not designed to benefit the judge… The existence of such role-defining rights establishes that the Interest Theory is implausibly narrow.[14]

Here we purportedly have a case of a right that bears no noteworthy relationship to the rightholder's interests.[15] But this objection seems to me to involve a confusion about how to

[14] Wenar (2005) 241-242.

[15] While this objection is typically framed in terms of powers, like the judge's in Wenar's example, or immunities, like a journalist's right not to reveal her sources, rather than in terms of claim rights, I see no reason why it could not be so formulated. But since we will eventually want an account of liberties, powers, and immunities as well, the objection is worth considering in any case.

think about an officeholder's interests.[16] It would be a mistake to construe a judge's right to sentence criminals as a right that protects the judge's interests as a natural person. But the right is not held by the judge as a natural person but instead as an officeholder. And it is entirely sensible to take offices to define their holders as having certain interests, which are given by the purpose of the office. Construed in this way, there is nothing especially implausible about taking the rights of judges to protect their interests. Of course, this proposal involves an expansive conception of interests. But much like in the discussion of Will Theory, I take it that there is nothing amiss in Interest theorists refining the conception of interests that they take to be relevant. Indeed, that is precisely what we should expect them to do.

1.2.2 Third-Party Beneficiaries

Sreenivasan provides a helpful formulation of this familiar objection to Interest Theory: "Suppose you promise your brother to give your sister £100."[17] Theorists of rights agree that promising endows your brother with a claim right to your doing as you promised. But what about your sister? Here the matter is less settled, with some insisting that your sister has no right to your doing as you promised, while others hold the opposite.[18] But Sreenivasan points out that everyone should agree that your promise does not endow your sister's daughter, on whom she will spend the £100, with a claim right against you. Can Interest Theory deliver this verdict? I

[16] I develop this proposal at length as an interpretation of Raz in Pallikkathayil (2016). Although, as I indicated in footnote 6, Raz's version of Interest Theory has commitments that place it outside of the dialectic on which I am focused, those differences do not seem to me to bear on the viability of this proposal for Interest theorists more generally.
[17] Sreenivasan (2005) 262.
[18] Hart denies that third-party beneficiaries are right holders (Hart (1982) 187). Kramer disagrees (Kramer (2024) 187-193). For what it is worth, contract law in many places now inclines in Kramer's direction.

have thus far characterized Interest Theory as focused on whose interests a duty protects. That loose characterization seems to generate the wrong answer in this case since it seems that your duty to give your sister the promised money also protects her daughter's interests.

But interest theorists may well appeal to a more sophisticated understanding of the relationship between a rightholder's interests and the duty bearer's duty. Kramer's most recent characterization, for example, holds that the duty correlative to a claim right of *X*'s "deontically and inherently protects some aspect of *X*'s situation that on balance is typically beneficial for a being like *X*..."[19] Kramer takes this characterization to provide the resources for blocking the conclusion that your sister's daughter has a claim right against you in Sreenivasan's case. I will not attempt to work through the details here.[20] The general strategy of response is clear. While the response I sketched to the problem of officeholders involved refining the conception of interests, here Kramer refines the conception of protection. Again, this is just the kind of response one should expect when faced with counterexamples.

1.3 The Lesson

It is unsurprising that the debate between Will Theory and Interest Theory has unfolded in the way that it has. The central notions both theories invoke are malleable enough to be stretched to cover what might seem to be hard cases. It may be worth, then, considering what would happen if we simply granted extensional adequacy to both theories for the sake of argument. Would they then simply be notational variants of each other? I think not. Each theory

[19] Kramer (2024) 179.
[20] Sreenivasan argues against an earlier version of Kramer's view, but he takes Raz's version of Interest Theory to appropriately handle third party beneficiaries. His objection to Raz's view then focuses on the officeholder objection, which I have already discussed. (Sreenivasan (2005) 262-266.

conceives of the role of rights in our practical deliberations in radically different ways. There must be some way of bringing out the tension between them that does not turn on counterexamples. I articulate such an alternative methodology in the next section.

2. Practical Inquiry

The methodology that I propose takes inspiration from Rawls's distinction between concepts and conceptions. Christine Korsgaard gives an especially illuminating gloss of this distinction:

> [In *A Theory of Justice*] the *concept* of justice refers to a problem, or if you prefer, refers in a formal way to the solution of that problem. The problem is what we might call the distribution problem: people join together in a cooperative scheme because it will be better for all of them, but they must decide how its benefits and burdens are to be distributed. A *conception* of justice is a principle that is proposed as a solution to the distribution problem. How are we to distribute the benefits and burdens of cooperative living? 'So that aggregate happiness is maximized' is the utilitarian conception of justice. 'So that things are as good as possible for the least advantaged, in so far as that is consistent with the freedom of all' is Rawls's. The concept names the problem, the conception proposes a solution. The normative force of the conception is established in this way. If you recognize the problem to be yours, and the solution to be the best one, the solution is binding upon you.[21]

Although Korsgaard here talks of problems and their solutions, notice that the problem takes the form of a practical question. This is the formulation of the concept/conception distinction that I find particularly helpful: normative concepts identify practical questions, questions that normative conceptions answer. I call the investigation of normative phenomena guided by this distinction *practical inquiry*.

In this section, I clarify three aspects of practical inquiry. First, I explain why we should be open to the possibility of disagreement about concepts and not just conceptions. Second, I

[21] Korsgaard (1996) 113-114.

situate this methodology with respect to the more familiar method of conceptual analysis. And finally, I suggest that one can investigate normative concepts via their associated practical questions without incurring any substantial metaethical commitments. With this understanding of practical inquiry in hand, I turn to using practical inquiry to investigate Will Theory and Interest Theory.

2.1 Disagreement About Concepts

Let us begin by considering disagreement about concepts. If one takes on board the distinction between concepts and conceptions, one might be tempted to conclude that philosophical disagreement primarily focuses on the latter. This is, after all, where Rawls situates his dispute with the utilitarian. But I take this framework to also reveal what is involved in disagreement about normative concepts. Does the question 'how are we to distribute the benefits and burdens of cooperative living?' occupy the place in our practical reasoning that we associate with the language of justice? Rawls does not take up this question and one might suspect this is in part why it is difficult to put Rawls in dialogue with some rival views about justice, like the libertarian view. The libertarian view is not very attractive when framed as an answer to a question about how we are to distribute the benefits and burdens of cooperative living. But we might instead think of the libertarian as disagreeing with Rawls about the concept of justice. The libertarian does not recognize the question answered by a conception of justice to be one about social cooperation. In this way, there can be meaningful disagreement about both normative concepts and normative conceptions. We can disagree both about which practical questions shape our thinking in the relevant ways and about how to answer those questions. I take the main

rival accounts of rights to be rival accounts of the practical question we should take rights to raise, rather than as competing answers to the same question.

2.2 Practical Inquiry and Conceptual Analysis

Next, let us briefly consider how this methodology relates to the standard philosophical enterprise of conceptual analysis, i.e., seeking the necessary and sufficient conditions for falling under a concept. We can, if we like, translate both practical questions and their answers into the formula of necessary and sufficient conditions. We might say, for example, that Rawls holds that justice obtains if and only if the benefits and burdens of social cooperation are appropriately distributed. Of course, as should come as no surprise, this is not a very illuminating characterization of justice since all the heavy lifting is done by 'appropriately'. As Korsgaard emphasizes, the concept refers only in a formal way to the answer to the practical question. We can also say that Rawls holds that justice obtains if and only if the benefits and burdens of social cooperation are distributed so as to benefit the least advantaged so long as that is consistent with equal basic liberties and fair equality of opportunity (or, as Korsgaard puts it, 'the freedom of all'). In this way, there is no incompatibility between the search for practical questions and answers and the search for necessary and sufficient conditions. But I take the former orientation to be more productive for two reasons. First, practical inquiry enables us to perspicuously evaluate the place of a question in our practical reasoning. We can sensibly consider whether we are trying to answer a particular practical question and how answering it interacts with other practical questions we face. In contrast, the relevant biconditionals are at one remove from practice. In the first instance, these biconditionals present us with a classificatory rather than a practical question. And that means that the truth of a such a biconditional does not by itself

display how the concept in question matters to us and how its mattering relates to other things that matter.

Second and relatedly, conceptual analysis orients us to testing our views via the search for counterexamples. We have just encountered the limitations of this approach. Conceptual analysis misses what is at stake between views that agree about cases as it overlooks the possibility of important differences that would persist in the face of extensional equivalence. In contrast, practical inquiry is alive to the possibility of important differences between views even when they agree about cases. As we will see, two views might agree in their treatment of all the cases about which we are most certain and might even be rendered wholly extensionally equivalent but still orient us to their subject matter in importantly different ways. I take making this possibility perspicuous to be an advantage of practical inquiry.

2.3 Metaethical Commitments

Before turning to our main investigation, I conclude with one final clarification. Both Rawls and Korsgaard employ the concept/conception distinction in the context of constructivist projects about the normative concepts they are investigating. This is, I think, no accident. Practical inquiry is a natural way of approaching normative concepts if one takes those concepts to be essentially practical rather than descriptive. But precisely because we can translate practical questions and answers into the kinds of biconditionals that are the focus of traditional conceptual analysis, I do not think that employing this methodology requires any significant metaethical commitments. One can engage in practical inquiry without being committed to any particular metaphysical or epistemological theses about normative concepts.

2.4 Interest Theory and Will Theory Revisited

With the broad outlines of practical inquiry in view, I turn to examining the practical questions that Interest Theory and Will Theory associate with rights. Interest Theory takes the practical question identified by rights to be something like "how must I respond to your interests?" Here the question is asked in the voice of the duty bearer and it places rightholders in the position of a patient in a patient-agent relationship.

Will Theory may be understood as identifying rights with the practical question "how may I control your duties?" Here the question is asked in the voice of the rightholder and it keeps the agency of both parties squarely in view. But Will Theory characterizes the agency of each party in a distinctive way by placing rightholders in the position of a sovereign in a sovereign-subject relationship.

The contrast between the ways Interest Theory and Will Theory construe the relevant relationships is striking. It is also striking that neither theory takes the relationship between rightholders and duty bearers to be simply an agent-agent relationship. In the next section, I introduce an account of rights that attributes this character to that relationship and use that account to problematize the characterizations that Interest Theory and Will Theory suggest.

3. Action Theory

This section introduces a new account of claim rights, what I call Action Theory. I begin by identifying a distinctive practical question and suggest ways in which this practical question better captures the role of rights in our practical reasoning than either Interest Theory or Will Theory. Next, I clarify the components of Action Theory and discuss some ways in which it

departs from the Hohfeldian framework with which both Interest Theory and Will Theory begin. Finally, I give some concrete examples of how Action Theory construes familiar rights.

3.1 A Distinctive Practical Question

As embodied beings, all our actions involve the world that we share. There are at least three ways in which the world that we share might figure in our actions. First, some element in or aspect of the world might be an enabling condition for an action. Gravity enables me to walk. Second, some element in or aspect of the world might be a means to my ends. I might use a picnic blanket to keep mud off my pants. Third, some element in or aspect of the world might be a constitutive part of my actions. When I contemplate a beautiful sunset, the sunset is an element of what I am doing.

Bearing all this in mind, notice that when we ask ourselves what we ought to do, we do not typically take all the world to be at our disposal. If you ask me to give you a ride to the airport, I must consider the means I have available. And while I *might* treat anything I can physically use as a potential means, this is not how we generally approach the world. Our practical thinking typically treats the world as already carved up into *mine* and *yours* and, occasionally, *no one's*. I do not seriously contemplate stealing my neighbor's car to take you to the airport. That is not one of the means I take to be available for my use. Hence when I ask myself, "What ought I do?" in response to your request, I do not take that option to be practically salient.

My suggestion is that the concept of a claim right identifies the question "What must we make or leave available for others' potential actions?" Tellingly, if we answer that question 'nothing' we get views that exemplify the absence of rights. Hobbes famously claims that in the

state of nature one may use anything to preserve oneself, even others' bodies.[22] Of course, in any given case, even for Hobbes, it may be contrary to my own self-preservation to harm you. So, perhaps I will not end up treating you in any particularly disturbing way. Nonetheless, I am practically oriented toward you solely as a potential means to my own preservation.

We can substitute a more altruistic end for Hobbes's focus on self-preservation – say, producing the most overall happiness – without changing the basic practical orientation toward others as at my disposal, so long as the imperative to produce the most overall happiness does not justify duties to make or leave anything available for others' actions. For this kind of crude consequentialism, the only question I must answer to determine whether to harvest your organs to save five others is whether doing so would produce the most overall happiness. Your views about this matter are relevant only insofar as they affect your happiness and in turn my calculations about what to do. In contrast, *if* the imperative to produce the most overall happiness justifies a duty to leave your body available for you to act with, your view about whether your organs should be used to save five others at the cost of your life is not merely an input into my own deliberations about what to do. Rather, your view about the matter constrains what I may do. Of course, it may still be the case that what you ought to do is to sacrifice yourself. But if I have a duty to leave your body available for you, what to do with it is simply not up to me.

Hobbes would have us relate to one another in the state of nature as potential means to our own preservation. The crude consequentialist would have us relate to one another as potential means to bringing about the most overall happiness. But the basic practical orientation toward another as a potential means can persist even in the face of other-regarding, non-aggregative ends. Suppose morality requires me to treat you in whatever way will be best for you

[22] Hobbes (1994) 80 (Ch. 14).

but does not impose on me a duty to leave your body available for you to act with. Here too my basic practical orientation toward you would be as a potential means, albeit as a potential means for securing your own good.

And that is the basic problem with Interest Theory. The patient-agent relationship that Interest Theory centers on is structurally identical to the patient-agent relationship that figures in theories that deny the existence of rights. If I see you only as an interest bearer, it may well be that your interests do not support thwarting your agency in any particularly disturbing way. But you are still at my disposal. I see all the world as available to me to promote your interests, including you.

In contrast, Will Theory is attentive to something like the question of mine or thine. But at least in the first instance, it limits the potential scope of mine and thine to duties themselves. It therefore overlooks the possibility that we might identify elements in or aspects of the world as mine or yours whether or not our duties to make or leave those parts of the world available for others are under their control. The question of mine or thine thus supplies a way of seeing the relationship between rightholders and duty bearers as the relationship between agents without requiring that those agents relate to one another as a sovereign relates to a subject.

3.2 Distinctions and Details

The question 'What must we make or leave available for others' potential actions?' can be translated into a biconditional, and it may be useful to do so to display how Action Theory relates to the other views we have considered:

> **Action Theory Claim Right**: *A* has a claim right against *B* to some object *x* iff *B* has a duty to make or leave *x* available for *A*'s potential actions.

Three clarifications are in order. First, in principle, any potential enabling, instrumental, or constitutive element of an action may be substituted for *x* in this formulation. Notice, though, that a duty to make or leave some object *x* available for another's potential actions may protect some ways of acting with x but not others. I must leave your apple on your plate for you to eat or discard as you choose. But if you are trying to poison someone with the apple, I may be permitted to snatch it from you. I doubt that we have any unlimited duties to make or leave objects available for others' potential actions, though as an account of the concept of a right rather than a conception of rights, Action Theory takes no stand on this matter.

Second, Action Theory is also silent about what justifies any duties with the relevant content. This means that for all I have said, these duties may be justified by respect for persons, the interests of rightholders, or even the greatest possible happiness. I am skeptical of some of these possibilities. But Action Theory takes no stand on this matter. Let me spend a moment unpacking the significance of Action Theory's noncommittal stance on matters of justification. Asking how we must respond to others' interests, personhood, or happiness are all instances of something like the following question: 'How must I respond to the nature of what I encounter?' Your interests, your personhood, or your happiness as an element of overall happiness may each necessitate certain ways of treating you. Notice, however, that, at least when this question is asked in full generality, this question is not plausibly identified with the concept of a right. Perhaps the nature of great works of art calls for their veneration. But great works of art do not have a right to our veneration. When asked in full generality, this question seems more aptly associated with the concept of value rather than the concept of a right.

Nonetheless, one might try to identify the concept of a right with duties that arise from some specific feature of our nature, like our interests. This is one way of understanding a

different strand of Interest Theory than the one on which I have focused thus far. Rather than taking the distinctive feature of the duties correlative to rights to be that they protect the rightholder's interests, perhaps those duties are justified by the rightholders' interests. Something like this version of Interest Theory was famously defended by Joseph Raz.[23] Since Action Theory is noncommittal about matters of justification, there is one sense in which Action Theory is compatible with Interest Theory understood as focused on duties justified by interests. For all Action Theory says, it may be that all and only duties justified by interests have the content Action Theory identifies as distinctive of rights. But those attracted to this version of Interest Theory are likely to hold that duties justified by interests need not have this specific content. These accounts are thus likely to be in tension after all.

Insofar as this version of Interest Theory eschews commitment to the particular content Action Theory associates with rights, I take it to share the problematic commitment to construing rightholders as patients in an agent-patient relationship. But it is worth observing an additional problem with this version of Interest Theory, which is that it stakes out a partisan position in disputes about which one might have thought an account of the concept of a right should remain neutral. Frances Kamm helpfully brings this out while objecting to Raz's view:

> Persons might have a right to treatment as equals – an essentially comparative right – without our duty to them being based on their interests. Rather, I would say, this right is based on their nature as persons not necessarily related to any aspect of their well-being. Even if it turns out to be in their interest to have this nature, the right derives from their nature not their interest in having it. A person's right to treatment as an equal may even lead to levelling down (i.e. taking away from some without giving to others) against anyone's well-being. If there were an independent 'dignitary interest' in being treated as an equal (i.e. because it promotes some aspect of psychological well-being), it is not because this

[23] This is not quite Raz's view since Raz denies the Hohfeldian correlativity between rights and duties that frames my investigation. See footnote 6 for further discussion of this matter. Additionally, perhaps Raz's view is itself ambiguous between the two versions of Interest Theory I distinguished above. For discussion of this matter, see Kamm (2002) 483.

> treatment serves that interest that a person has a right to it. It may simply be fitting to treat a person no differently from anyone else.[24]

Although Kamm is skeptical here that Interest Theory has the right extension, notice that her objection is not fundamentally about extensional adequacy. She is concerned that even if Interest theorists can point to a dignitary interest to capture the right to equal treatment, that would be the wrong justification of the relevant duty.

Of course, Kamm's proposed alternative justification of the relevant duty in terms of the nature of persons is no less controversial. My aim here is not to take a stand on which justification is correct. Instead, I simply want to point out that here Raz and Kamm seem to be having a meaningful, substantive disagreement about what justifies the duties associated with a particular right. This is a question that Action Theory helpfully leaves open.[25]

Third, and finally, let me clarify the relationship between the biconditional associated with Action Theory given above and the Hohfeldian biconditional with which we began. Action Theory holds that all claim rights have the form depicted in the above biconditional. This biconditional departs from the Hohfeldian biconditional in two related ways. Action Theory's biconditional removes the action variable φ in the Hohfeldian biconditional and introduces an object variable x. First, consider the removal of the action variable φ. Action Theory holds that the duties correlative to claim rights are all duties to make or leave something available for another. Since the required actions are all makings or leavings, there is no need for an action

[24] Kamm (2002) 486-487.

[25] I go on to discuss how Action Theory construes rights to others' actions in detail in Section 3.3.3. Let me preview, however, that if the right to equal treatment is a construed as a claim right, Action Theory will gloss the duty correlative to this right as a duty to make equal treatment available to others for their potential actions. That is, equal treatment is something that rightholders ought to be able to treat as an enabling condition for their actions, or treat as a means to their ends, or form a constitutive element of their ends.

variable. Instead, Action Theory introduces an object variable. Different rights take different objects to be those that must be made or left available.

Where does Action Theory leave the concept of a directed duty? Action Theory offers a characterization of what it is to owe something to someone, though in the first instance what we owe to others are elements in or aspects of the world rather than duties. For this reason, Action Theory dispenses with the idea of a directed duty in the Hohfeldian sense but preserves the 'owing to' relation as an important part of a right. This relation is internal to the content of the duty rather than in the relationship between the rightholder and the duty.

3.3 Examples

I have argued that rights identify a particular practical question, namely: what must we make or leave available for others' potential actions? The answer to this question will identify the objects, if any, that are owed to others. This discussion has operated at a high level of abstraction. Although Action Theory is silent about what rights, if any, we have, and about what would justify any such rights, it will be helpful to work through some examples of how Action Theory characterizes rights that we generally countenance. Here I work through Action Theory's treatment of rights to (1) one's own body, (2) other objects, and (3) others' actions. This list is intended to be instructive rather than exhaustive.

3.3.1 The Right to One's Own Body

Let's begin with the right to one's own body. Action Theory construes familiar rights like the right not to be killed or the right against being tortured as correlative to duties to leave your

body to you. To kill you or to torture you is most fundamentally to treat you in a way that denies that your body is yours.

It is important to recall that Action Theory is concerned with the content of the duties that are correlative to rights rather than their justification. Thus, Action Theory is compatible with any of the following accounts (and more besides):

> (Interests) I have a duty to leave your body available to you for your potential actions because doing so is in your interests.
>
> (Personhood) I have a duty to leave your body available to you for your potential actions because doing so respects your dignity as person.
>
> (Happiness) I have a duty to leave your body available to you for your potential actions because doing so promotes the greatest overall happiness.

Thus, it is entirely compatible with Action Theory to hold that the reason I ought not torture you is because of the suffering I would thereby cause rather than the agency I would thereby thwart. Action Theory insists only that not torturing you be characterized as a way of leaving your body to you.

3.3.2. Rights to Other Objects

Next, let us consider rights to other objects. It may be helpful to highlight two aspects of these potential rights. First, to say that you have a right to an object is not necessarily to say that you have a property right to an object. The duties associated with property are generally thought to be waivable, transferable, and perhaps enforceable. None of these features is a necessary component of duties to make or leave objects available for others' potential actions. Focusing on a non-property example may help bring this out. I may have a duty to leave the library computer available for the use of the next patron who has signed up to use it. This person may lack the power to waive, transfer, or enforce this duty. The computer is not her property. Nonetheless,

there is a sense in which the computer is hers during her time slot, at least as between her and the other patrons.

Second, it worth recalling the capacious sense of 'object' at work in Action Theory. Since any potential enabling, instrumental, or constitutive element of action is a potential object of a right, rights need not be limited to medium-sized physical objects. You may have a right to breathable air, to safe working conditions, and to healthcare. These objects may involve complex arrangements of physical objects as well as the actions of others. I focus directly on the actions of others below. Here I simply want to highlight the extensive range of the potential objects of rights.

3.3.3 Rights to Others' Actions

Finally, then, let us turn to rights to others' actions. Although there are many ways one could come to have a right to another's action, it will be instructive to begin by focusing on how promising can give rise to such a right. If I promise to pick you up at the airport, I incur a duty to pick you up at the airport. Supposing this duty is correlative to a right, Action Theory takes this duty to be more fully describable as a duty to make the act of picking you up from the airport available for your potential actions. That is, my action should be available to you as something that can enable your own actions, or be used by you, or in part constitute what you are doing. In this way Action Theory identifies a sense in which my action is yours.

Notice that this account of promissory duties does not require that the promised action will in fact be an enabling, instrumental, or constitutive element of any of your actions. You might decide to take a cab instead of availing yourself of my ride from the airport. Moreover, this description of my promissory duty does not settle whether you have any interest at all in

having my action available to you. Suppose you promise me that you will quit smoking, but I could not possibly care less about whether you continue to smoke. Some theories of promissory duties will hold that a promisor cannot obligate themselves to perform an action about which the promisee is indifferent. Action Theory suggests that what is at issue here is whether we can have duties to make or leave objects available for others' potential actions if they do not care about acting in those ways. But adopting Action Theory's account of the form of promissory duties does not by itself settle this substantive matter one way or another.

Consider next duties to participate in cooperative endeavors. Contributing one's part to a cooperative endeavor is a way of making one's actions available as a constitutive element of others' potential actions and in this way may be thought of as correlative to a right to those contributions. Perhaps, for example, we have duties to stand in relationships of mutual respect. Such relationships can only be realized if we all do our part. In this case, doing one's duty requires contributing the actions and attitudes constitutive of relationships of mutual respect so that we may together realize the end of standing in such a relationship. In this way, one may have a right to others' respect.

One might worry that this way of construing a right to respect focuses on what I may do with your respect rather than simply on how your respect is called for in virtue of the kind of being that I am. One can certainly have a duty to respect another in virtue of the kind of being that she is. But as a duty to have the proper response to an object, this kind of duty to respect others has the same structure as a duty to venerate works of art. For this reason, a duty justified in this way does not thereby yet have in view the distinctive relationship that is possible between beings who are active in a shared world. This is the distinctive relationship Action Theory aims to capture. It is for this reason that I take talk of a *right* to respect to focus on how respect shapes

the actions available to us rather than on how respect responds to the kind of beings we are, though it may yet be that the reason why these actions must be available to us is because of the kinds of beings we are. Once again: 'How must I respond to the nature of what I encounter?' is an important practical question. But that is the question raised by the concept of value rather than the concept of rights.

Now that we have a general sense of how Action Theory construes familiar claim rights, I turn in the next section to considering how this account of claim rights can be combined with accounts of liberties, powers, and immunities.

4. Liberties, Powers and Immunities

Recall that Hohfeld distinguishes between claims, liberties, powers, and immunities. He also argues that, at least in the legal context, these terms may be understood as bearing logical relationships to one another:[26]

Claim Right	Liberty	Power	Immunity
No-Right	Duty	Disability	Liability

Each of the columns in the table consists of a pair of 'jural opposites', i.e., "two legal positions that negate each other."[27] For example, to have a claim right is to lack the otherwise unnamed legal position that Hohfeld dubs a 'no-right'. The diagonal pairs in the first two columns (Claim Right/Duty and No-Right/Liberty) and the last two columns (Power/Liability and

[26] This is the first of two tables Hohfeld gives (Hohfeld 1913, 30) with one minor change. Here and throughout I use the term 'liberty' rather than the term 'privilege' although Hohfeld preferred the latter.
[27] Kramer (1998) 8

Disability/Immunity) consist of 'jural correlatives', i.e., "two legal positions that entail each other."[28] We have already seen what Hohfeld takes this involves in the case of a claim right: *A* has a claim right that *B* φ iff *B* has a duty to *A* to φ.

Rather than characterizing liberties via their correlative 'no-rights', it has been more common to characterize liberties via their opposites, namely, duties. Thus, it is common to gloss Hohfeldian liberties as follows:

Hohfeldian Liberty: *A* has a liberty to φ iff *A* has no duty not to φ.[29]

But notice an unclarity that creeps into the system via the abstract reference to a duty in this formulation. Is a liberty correlative to the absence of any duty to φ or only to the absence of a duty to φ that is correlative to a claim right? Since liberty is supposed to be correlative to a no-right, this suggests the latter interpretation. Thus, the following may be a more illuminating characterization of a liberty in the Hohfeldian schema:

> **Refined Hohfeldian Liberty:** *A* has a liberty to φ iff others have no claim right against *A*'s φ-ing.

Although the practical question "What may I do consistently with my duties?" is undoubtedly an important question, the concept of permissibility identifies this question. We may take liberty instead to name the question, "What may I do consistently with others' rights?" The refined Hohfeldian gloss on liberty identifies this question.

Action Theory can take on board the refined Hohfeldian characterization of a liberty, filling in the reference to claim rights with Action Theory's distinctive characterization of that concept. Of course, asking "What may I do without violating someone's rights?" is for Action Theory equivalent to asking "With what may I act without violating someone's rights?" But

[28] Kramer (1998) 8
[29] For this characterization of liberties see, for example, Kramer (1998) 10 and Wenar (2020).

there are ways in which leaning of the former characterization can sometimes be illuminating. Action generally involves more than one object. For example, when I swim in a lake, at the very least my action involves both my body and the lake. For this reason, a concept that orients us toward what we may do and not just what we may act with can play an important role in structuring our deliberations. Taking the concept of liberty to identify a question about what we may do without violating anyone's rights allows it to play this role.

Two features of the relationship between liberties and claim rights on this proposal are worth highlighting. First, since the characterization of liberty refers to claim rights, Action Theory treats the idea of a claim right as conceptually prior to that of a liberty. But second, this does not mean that the justification of liberties is simply an implication of the justification of claim rights. Rather, considerations about what people ought to be able to do without violating anyone's rights and what ought to be made or left available for their potential actions may together inform the scheme of claim rights and liberties. Consider an example. Perhaps it is important for democratic self-governance that people have a liberty to speak their minds. The question of where, when and with what one may speak is settled by the claim rights of all involved. But the reasons we have for wanting people to be able to speak their minds may constrain what claim rights it is appropriate to attribute to people. Perhaps, for example, we ought not allow monopolies on the means of communication. Thus, although claim rights are conceptually prior to liberties, claim rights need not be prior to liberties in the order of justification, at least as far as Action Theory is concerned.

Let us turn, finally, to powers and immunities. Much like with liberties, Action Theory can incorporate Hohfeldian accounts of powers and immunities. So, I will treat those concepts briefly. A power may be understood as the ability to change one's own or another's rights

(broadly understood). One has an immunity to another's changing one's own rights if the other lacks to power to do so. Powers and immunities together answer the question 'How may I control others' duties to make or leave objects available for others' potential actions?' This question should look familiar as it bears a striking resemblance to the question Will Theory identifies with rights. This confirms the suspicion that Will Theory is occupied with a curiously limited category of rights. Will Theory is in effect identifying the question associated with higher-order rights. But doing this without first identifying the questions identified by claim rights and liberties is to put the cart before the horse.

5. Counterexamples Revisited

Although I have urged moving away from exclusive focus on counterexamples to evaluate competing characterizations of rights, one might naturally wonder how Action Theory handles the traditional counterexamples to Will Theory and Interest Theory. In this section, I consider those cases. While I take Action Theory to provide well-motivated accounts of the relevant cases, in keeping with my discussion in Section 1, I take consideration of these cases to be of limited import for comparing accounts of rights. The notions of control, interests, and action are all malleable enough to deliver the desired verdicts about cases. More important for my purposes is to show how the practical question Action Theory associates with rights arises in these cases.

5.1 Revisiting Counterexamples to Will Theory

Recall that Will Theory faced potential counterexamples regarding inalienable rights and the rights of incompetent individuals. I will consider each of these examples in turn. First, Action

Theory has no trouble accommodating the possibility of inalienable rights. According to Action Theory, one has an inalienable claim right if and only if one lacks the power to waive another's duty to make or leave some object available for one's potential actions. If, for example, your state has a duty to make healthcare available to you, you have a right to healthcare regardless of whether you can waive that duty.

Consider next the possibility of incompetent rightholders. Action Theory involves no commitment to rejecting the possibility of claim rightholders who lack the competence to exercise powers over others' duties. But it is worth considering how Action Theory's focus on duties to make or leave objects available for another's potential actions constrains the class of possible rightholders. I suspect purported duties to leave objects available for the potential actions of entities incapable of *ever* acting with those objects would be conceptually confused in some way. But in any case, as a substantive matter, such duties would surely be absurd. Apart from this constraint, Action Theory suggests a capacious view of potential rightholders. In what follows, I discuss the case of animals, children, incompetent adults, and beings capable only of reflexive behavior.

5.1.1 Animals

Action Theory might be developed in a number of ways relative to different understandings of what constitutes an action. But I take the practical question on which it focuses to suggest a capacious understanding of that notion. Put more informally, the question Action Theory takes rights to address is how we are to share a world with other beings who are also using it. The kind of purposive activity engaged in by non-human animals seems entirely apt for

raising this question. Animals act in and through engagement with the world that we share with them. We may thus ask what, if anything, we must make or leave available for them.

Although this is an apt question to raise with respect to animals, one might doubt that this is the most salient question that arises in circumstances in which one might attribute rights to animals. For example, wouldn't a right against being tortured be better taken to reflect the normative pressure animals' interests exert on us? In answering this question, it is important to recall that Action Theory is silent about what justifies duties to make or leave objects available for others' potential actions. It may well be that some such duties are justified by the interests of the rightholders. Action Theory insists only that our relationship to the interests of those who have rights against us is not like our relationship to beautiful works of art. Beings who have rights are not merely objects whose nature calls out for certain responses. They are beings who share the world in which we are all active. This is a way of insisting that they are not mere means to our ends, even when those ends include responding to their value.

5.1.2 Children

Although what I have just said about non-human animals will apply to children as well, this is not all Action Theory suggests about them. There is no conceptual confusion in the possibility of duties to make or leave objects available for entities that are presently incapable of acting with them but may one day be able to do so. In this way, Action Theory has even more expansive resources for conceptualizing the rights of children. Some rights of children may reflect the purposive activity of which they are currently capable. But other rights may look forward to the possibility of future action.

5.1.3 Incompetent Adults

Adult human beings with limited cognitive abilities may still be able to act just as children and animals do. So, there is once again no conceptual barrier to taking these individuals to be rightholders. And here it may be worth observing that we may act with objects unknowingly. You may drive a car without knowing that you are using fossil fuels. I regularly use the internet while having only the most rudimentary understanding of what that involves. So, we should be cautious not to overintellectualize what is involved in being able to act with something and hence involved in potentially having a right against others that they make or leave it available for one's potential actions. Moreover, cases of temporary impairment, including even temporary unconsciousness do not rule out the possibility of future actions. Hence, individuals who are temporarily impaired may still have rights to what they may one day be able to act with.

What about adult human beings who permanently lose the capacity to engage in purposive activity? For example, consider someone who is comatose and will never regain consciousness. Can such a person still be acting with anything? To answer this question, let us begin by observing that actions need not require continual conscious direction to come to completion. A terrorist may plant a bomb with a timer and thus kill her victims when she is miles away and thinking about something entirely different. If someone diffuses her bomb, that person will have prevented her from acting with the bomb as she intended. In this way, one can be acting with something and have that action disrupted without active reflection on one's action or its disruption.

Our bomber is still conscious, however. She could reflect on her action in progress if she chose to. Is that an important component of what enables us to understand her as using the bomb to kill her victims even while she is, say, busy thinking about the game of poker in which she is

presently engaged? It seems not. While I sleep, I can be using my phone charger to charge my phone. Here I use something while reflection on that very activity is foreclosed by my condition. Setting bombs and charging phones are not unique in this respect. Many actions involve setting in motion a causal chain from which one's conscious participation is at some remove. When a basketball player shoots a free throw, she is still using the basketball as it sails toward the net even though the contributions of her body and even her thoughts to her action have already concluded. If she is struck dead by lightening moments before the ball swishes through the hoop, it will still be true that she scored. Precisely because actions can be extended in this way, one need not be consciously engaged throughout with the elements of one's action.

As the untimely death of our basketball player suggests, I do not think there is any conceptual difficulty in taking the permanently comatose and even the dead to still be acting. Of course, they cannot undertake anything new. But it is an open and substantive question whether we have a duty to allow them to complete actions they have begun – to, in this case, allow the player to finish using the ball. Action Theory affirms the open and substantive nature of this question.

5.1.4 Reflexive Behavior

Finally, consider human beings who are unable to ever have conscious experience. Infants with anencephaly may be such a case. Such infants may still engage in reflexive activity, like respiration. Does this kind of activity suffice to count as using, say, the air that they breath? We can ask much the same question about plants that turn toward sunlight. In these cases, I think we reach the end of what the concept of a right can do by itself. The concepts invoked in any practical question associated with rights will themselves be opaque in some ways. For this

reason, we should not be surprised that cases at the outer bounds of the application of those concepts are puzzling. Notice, though that we can ask whether we have duties to make or leave anything available for these kinds of beings for this kind of activity without settling whether this is the same question we are asking in the cases with which Action Theory is more centrally concerned or rather simply a closely related one. Thus, although these cases are at the margins of what the concept of a right encompasses, this need not be an impediment to practice.

Moreover, recall that Action Theory is not committed to holding that all duties are correlative to rights. We may well have duties to treat human beings who will never have conscious experiences in certain ways because doing so is the appropriate way to respond to their nature. I have suggested that in doing so we would be answering a question posed by the concept of value rather than by the concept of right. But that does not make the answer to that question any less important.

5.2 Revisiting Counterexamples to Interest Theory

Recall that Interest Theory faced potential counterexamples regarding the rights of officeholders and third-party beneficiaries. We can quickly dispense with the former case. Since Action Theory makes no claims about the interests of rightholders, any apparent absence of interests is no bar to taking officeholders to be rightholders.

Let us turn, then, to the case of third-party beneficiaries. Consider how Action Theory handles cases with this structure. When you promise your brother that you will give your sister £100, you thereby incur a duty to make the act of giving your sister £100 available for your brother to act with. He may, for example, rely on this action in his planning. Thus, supposing he does not use his power to release you from your promise, the duty to make this act available for

his potential actions entails a duty to perform the act. By promising, you incur a duty to give your sister £100. So far, this is just what one would have expected.

But now notice that a duty to give your sister £100 just is a duty to make £100 available for her potential actions. Thus, Action Theory holds that your promise to your brother endows your sister with a right to £100. But notice that Action Theory still draws an important distinction between what you owe your sister and what you owe your brother. You owe your brother the act of giving your sister £100 while you owe your sister £100. Thus, Action Theory can explain why this kind of case might be a source of conflicting intuitions – you stand in importantly different relationships to your brother and your sister, though you would violate the rights of both if you broke your promise. In contrast, you have no duty to make £100 available to your sister's daughter. You may, for example, interfere with your sister's ability to spend £100 on her daughter by mentioning to someone to whom your sister owes money that she is about to come into £100. Hence your promise does not endow your sister's daughter with a right against you. Action Theory is thus able to provide a nuanced and attractive account of the status of third parties.

6. Conclusion

The impasse between Will Theory and Interest Theory has dominated discussion of rights. I have offered a diagnosis of the source of this impasse. Both Will Theory and Interest Theory characterize rights in terms of concepts that are malleable enough to accommodate purported counterexamples. I have therefore suggested shifting the focus of debate from the search for counterexamples to the practical questions competing theories associate with rights. I used practical inquiry to bring out the ways in which Will Theory and Interest Theory involve

fundamentally different orientations to the relationship between rightholders and duty bearers. And I used this discussion to open up space for a new theory of rights. Action Theory orients us to thinking of ourselves as one among many agents all acting in a shared world. This is an orientation that effectively captures the role of rights in our practical deliberations.

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