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Source: *Ethics*, Vol. 123, No. 2, Symposium on Rights and the Direction of Duties (January 2013), pp. 202-229

Published by: [The University of Chicago Press](#)

Stable URL: <http://www.jstor.org/stable/10.1086/668707>

Accessed: 10/04/2013 08:58

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The Nature of Claim-Rights

Leif Wenar

This is a new analysis of rights, particularly of the paradigm: the claim-right. The new analysis makes better sense of rights than the leading alternatives do. The new analysis handles all of the well-known counterexamples to the Will and Interest theories; it seems not to generate counterexamples of its own; and it solves many long-standing puzzles in the theory of rights. Moreover, the central concepts of the new theory are as salient and forceful as are rights themselves.

This is a new analysis of rights, particularly of the paradigm: the claim-right. A good analysis will capture all the rights-assertions that we make—not only within morality and law, for example, but within sports and games and etiquette. A good analysis will also reveal why certain rights seem so vital, by locating their logic in our lives. In short, a good analysis will make sense of all the ways we speak of rights, and show why rights are so salient in our intellections and our self-conceptions. A good analysis will then be useful for normative theory: by showing what rights *are*, it will show how to prove what rights *there are* within the different domains (what moral rights there are, what legal rights there are, and so on).

The analysis of rights here betters the traditional theories by being more sensitive to the history of the concept's application. Attending to history allows us to understand rights' ubiquity and centrality, as well as a modern feature of human rights: their uncertainty.

I. THE TWO TRADITIONAL ANALYSES OF RIGHTS

There are two traditional analyses of rights. For Will theories, the function of rights is to give right-holders choices. According to the Will Theory, a promise creates a right because the promisee can then waive, or demand, the performance of the promissory duty. Interest theories hold that rights further the right-holders' interests. According to the Interest Theory, property is a right because ownership makes people's lives go better. The-

Ethics 123 (January 2013): 202–229

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orists on both sides take extensional fit with ordinary usage as a primary standard of success—that is, both aim to present theories that capture all and only rights-assertions that make sense to competent users of the language. This standard of success is accepted here.¹

Will and Interest theorists have struggled with counterexamples: cases where their theories cannot capture rights-assertions that everyone understands. For example, Hart's Will Theory says that rights give right-holders choices: to have a legal right is to have a legally respected choice. Yet we easily make sense of legal rights without choices. Neither toddlers nor the comatose are legally competent to make choices, but there seems no conceptual confusion in saying, for example, that young children have a legal right not to be abused. Or again, citizens have no choice about the enforcement of duties imposed by the criminal law, so according to the Will Theory, citizens have no rights under the criminal law. Most citizens would be surprised to hear, however, that they lack a legal right against being assaulted in the street.

The rights of players within sports and games are also instructively difficult for the Will Theory. Consider, for example, a rights-assertion from the official rules of soccer, *Laws of the Game*:²

Fouls and Misconduct—Law 12. All players have a right to their position on the field of play, being in the way of an opponent is not the same as moving into the way of an opponent.

What is challenging for the Will Theory about this rights-assertion is that soccer players lack authority. The rules of soccer do not allow players to waive their claims against other players. And although a player who is fouled might complain to the referee, players' complaints do not trigger penalties. No player has a choice with respect to waiver or enforcement.

1. See Leif Wenar, "The Analysis of Rights," in *The Legacy of H. L. A. Hart*, ed. Matthew Kramer et al. (Oxford: Oxford University Press, 2008), 251–73. Because this article focuses on the claim-right, its examples are all rights of conduct (e.g., moral, legal, and customary rights). Rights to believe, to feel, and to want are never claim-rights, but are rather Hohfeldian privileges. For comparisons of rights of conduct with epistemic, affective, and conative rights, see Leif Wenar, "Legal Rights and Epistemic Rights," *Analysis* 63 (2003): 142–46; and "Rights," *Stanford Encyclopedia of Philosophy* (2012), sec. 5.5, <http://plato.stanford.edu/entries/rights/>.

There are theories of rights beyond the two traditional theories, such as the Demand Theory developed by Feinberg, Darwall, and Skorupski (see Joel Feinberg, *Rights, Justice, and the Bounds of Liberty* [Princeton, NJ: Princeton University Press, 1980]; Stephen Darwall, *The Second-Person Standpoint* [Cambridge, MA: Harvard University Press, 2006]; John Skorupski, *The Domain of Reasons* [Oxford: Oxford University Press, 2010]). Henry Richardson sets out a different analysis of what it is for a right to be directed, in "Directing Rights: A Liability Theory" (unpublished paper, Georgetown University, 2012). These analyses merit separate treatment; the Demand Theory is known to face challenges similar to the Will Theory.

2. FIFA, *Laws of the Game 2012–13*, 118, available at http://www.fifa.com/mm/document/affederation/generic/81/42/36/laws_of_the_game_2012_e.pdf.

Yet the right asserted in the rules really is a right: a player forced out of position on the field of play is fouled (“game-wronged”). *Laws of the Game* distinguishes fouls from misconduct (like excessive celebration after a goal), where no player’s right is infringed.

The Interest Theory is subject to equally serious counterexamples. In Raz’s analysis, the entity *X* has a right iff some aspect of *X*’s interests is sufficient reason to hold another person to be under a duty.³ Yet the interests of a right-holder are not always sufficient to justify duties in others. Raz himself admits that a journalist’s interest in keeping his sources secret is not sufficient to justify his right to protect his sources. Rather, it is the interests of the general public in an independent media that justify such rights.⁴ Or again, parents may have the right to receive child benefit payments from the state, but here only the interests of the children, and not the interests of the parents, could be sufficient to hold the state to be under a duty. Even within the rules of soccer, the right of a goalie not to be obstructed when in possession of the ball strains Raz’s Interest Theory. Goalies have no more interest than any other player in nonobstruction when in possession of the ball, yet only goalies have such a right.

Consider next the rights of some promisees. Many Interest theorists explain the rights of promisees by the interests of promisees in the performance of the promised action. Yet there are many cases where a promisee was entirely mistaken about his own interests when he accepted a promise, and where he has a right to performance even though this will be in every way bad for him. A novice mechanic may have entered into a contract for the delivery of an engine he saw in a catalog, but his right that the engine be delivered cannot be explained by an interest in delivery since (as he does not yet realize) the engine will not fit into his or indeed any extant car. This mechanic does have a right that the engine be delivered, though the delivery will bring him nothing but grief.⁵

Faced with hard cases like these, Interest theorists have weakened their principles with qualifications that allow them to set counterexamples aside. So MacCormick says that rights are “*normally* an advantage” to their bearers while Kramer says that rights are “*generally* advantageous for their holders.”⁶ Such weakened generalizations can be useful, at least

3. Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1988), 166.

4. *Ibid.*, 179, 247–48. See Frances Kamm, “Rights,” in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. Jules Coleman and Scott Shapiro (Oxford: Oxford University Press, 2002), 485.

5. Raz explains the right of performance as deriving not from an interest in performance, but from an interest in entering into promissory relations: an interest in having voluntary special bonds with other people (Raz, *Morality of Freedom*, 175). Yet the same problem arises. Our mechanic had no interest in entering into a voluntary special bond with the swindlers at the auto parts outlet.

6. Neil MacCormick, “Rights in Legislation,” in *Law, Morality and Society*, ed. M. S. Hacker and Joseph Raz (Oxford: Clarendon, 1977), 202; Matthew Kramer, “Rights without Trim-

until principles that can explain the hard cases are found.⁷ However, a deeper difficulty for many Interest theories cannot be papered over with qualifications, because it concerns the nature of the interests at their foundations.

Kramer is explicit about whose interests ground his analysis: “Any legal right, if actual, protects some aspect of the right-holder’s situation that is normally to the benefit of a *human being*”⁸ This analysis requires that all legal rights map the true interests of human beings; yet on reflection it cannot be so. We get warnings of trouble in cases like the right of the bomb squaddier to disarm bombs, the right of the kamikaze to his allocation of fuel, and so on. Such cases point to a systemic fault in this analysis, which is on full display with legal rights like marriage. In some societies, parents have a legal right to arrange marriages. That statement is clearly true, and remains true, even if it is also true that the human beings who are parents will normally be better off when parents have no legal right to arrange marriages (perhaps this is stressful or fuels resentment). And similarly in the other direction: in some societies, adults have a legal right to choose their own marriage partners. Yet it could be that adults would normally be better off were marriages arranged by parents (perhaps parents choose better partners). What legal rights there are does not depend on what makes a human life go well, so we cannot make the analysis of the former turn on the truth about the latter.⁹

Raz in passing mentions a way around the problem of the novice mechanic promisee, which leads to a better approach. Raz says that when searching for the interests sufficient to explain some right, we should consider not the interests of individual humans, but rather the interests of

ings,” in *A Debate over Rights*, by Matthew Kramer, N. E. Simmonds, and Hillel Steiner (Oxford: Oxford University Press, 1998), 96 (emphases added).

7. See Wenar, “The Analysis of Rights,” 255–57.

8. Matthew Kramer and Hillel Steiner, “Theories of Rights: Is There a Third Way?” *Oxford Journal of Legal Studies* 27 (2007): 281–310, 289 (emphasis added). The full sentence ends, “. . . of a human being or a collectivity or a non-human creature.” We will return to nonhuman creatures in the conclusion; collectivities merit separate treatment.

9. Or consider the legal rights of property owners. Both Rousseau and Marx insist that it is bad for humans to own private property, because of the antagonistic relations and anti-social attitudes this brings. Jesus adds the thesis that it is worse to be rich than poor. These claims may be true or false, but no analysis of rights should make the existence of property rights within, say, the Swiss legal system turn on the truth or falsity of humanist critiques of capitalism, or on the truth or falsity of the thesis that the rich man shall hardly enter into the kingdom of heaven. Even among the wreckage of such critiques, Kramer might try to find some tightly specified beneficial aspect of an owner’s situation that is protected by property rights (privacy, security, etc.). But that strategy would explode the extension of his Interest Theory, since nearly every state of affairs, however awful, is normally beneficial to humans in some tightly specified way or other. We do not want to be forced to conclude that prisoners of war have a right to be waterboarded, for example, by the fact that it is normally to the benefit of a human being to lie down sometimes.

persons in their roles.¹⁰ We should consider the interests not of Michael, the human being who has accepted a promise of a useless engine. We should consider the interests of Michael qua promisee. Rights attach not to individuals, Raz suggests, but to roles. That is the crucial insight, and it opens a new path for the analysis of rights.

Raz's suggestion cannot save his Interest Theory. As mentioned above, Raz does not believe that the interests of journalists (even qua journalists) in protecting their sources can be sufficient to ground the corresponding duties. Presumably, he would not hold that the interests of parents (even qua parents) can be sufficient to explain their right to arrange marriages where they have such rights. Yet Raz's mention of roles is fruitful. Many problems in the analysis of rights can be solved when we start with the idea that rights attach not to individuals, but to roles.

II. ROLES AND HISTORY

A word about roles. Asked who we are, we will mostly respond with our roles: we are a professor or doctor or lawyer, a child or sibling or parent, a citizen of some country, a friend, a fan, and so on. Role identification has long been taken as a primary factor for explaining human action.¹¹ Most moderns spend a great deal of their free time (as children, then outside school or work) taking in, and taking part in, role-based dramatizations and play—stories, sports, and games. Reflecting on our own moral experience, we find role-based norms in most of the evaluations of persons and actions that we make and hear. The everyday stuff of condemnation is that someone has failed to live up to their role: that the person is lazy or corrupt or unfaithful or criminal. Moreover, the dilemmas characteristic of modern life arise when one's many roles—father and teacher, wife and friend—generate conflicting demands. (The example that resonated most outside of philosophy in the twentieth century was not the trolley problem, but Sartre's young man torn between being a good son and joining the resistance.) Both roles and rights are integral to our lives; it will be natural to find affinities between them.

The ties between roles and rights are a relic of the history of the latter concept. The historical unity of rights (I just assert here) is that rights enabled role-bearers to do their jobs. Divide any office into, first, the duties of that office and, second, the normative features of the office that enable the office-holder to do those duties. Historically, rights formed that second category. Historically, all rights were what Rawls calls *enabling* rights: "rights we have so that we can fulfill certain duties that are

10. Raz, *Morality of Freedom*, 180.

11. In sociology, for example, leading twentieth-century theorists of roles included George Herbert Mead, Robert K. Merton, and Irving Goffman.

prior in the order of grounds.”¹² A policeman has a duty to maintain public order, for example, and to do so he may need rights to stop, to detain, and to search persons and property. Historically, all rights were enabling rights like these.

Today we occasionally hear echoes of this conceptual connection between rights and duties, when it is said (usually in conservative exhortations) that every right implies a duty.¹³ Yet this particular connection is now cut. As we will see, because of this break, the class of potential right-holders has expanded to include duty-less entities like animals, while once-secure rights (like the natural rights of humans) have become less certain.

III. THE CHALLENGE OF THE CLAIM-RIGHT

We can now take up the main challenge that the concept of a role will help us to meet. The challenge is to analyze the paradigm right of conduct: the Hohfeldian claim-right.¹⁴ A person holding a claim-right is owed a duty by some other person(s). Yet what it means for one person to owe a duty to another is opaque. It is uncertain how we identify which people have duties owed to them, and so how we identify who has a claim-right. There are, after all, many rules that assign strict duties: duties to perform or omit a specific action.¹⁵ But only some of these strict duties are owed to others, while others are not.

For example, a promisor has a duty to do what she promised, and she owes this duty to her promisee. By contrast, a student has a duty to study, which corresponds to a right in no one. Or again: a parent has a duty not to abuse her child, and this duty corresponds to the child’s right not to be abused by the parent. Yet the members of the firing squad have a duty to shoot a convict at sunrise, and the convict has no right to be shot. The

12. John Rawls, *Lectures on the History of Political Philosophy*, ed. Samuel Freeman (Cambridge, MA: Harvard University Press, 2008), 144. On the history of rights, see Richard Tuck, *Natural Rights Theories* (Cambridge: Cambridge University Press, 1976); Brian Tierney, *The Idea of Natural Rights* (Atlanta: Scholars Press, 1997); Annabel Brett, *Liberty, Right, and Nature* (Cambridge: Cambridge University Press, 1997).

13. The American philanthropist John D. Rockefeller Jr. pronounced that, “Every right implies a responsibility, every opportunity an obligation, every possession a duty.” John D. Rockefeller, “I Believe,” in *Personal Papers 1878–1961* (Sleepy Hollow, NY: Rockefeller Family Archives, 1974).

14. In the Hohfeldian classification of rights, the four categories are the claim, the privilege, the power, and the immunity. An analysis of all four incidents is in Leif Wenar, “The Nature of Rights,” *Philosophy and Public Affairs* 33 (2005): 223–53. This article deepens that analysis for the claim-right.

15. A strict duty requires one to perform a specific action, while a broad or wide duty requires one to have a certain end (such as helping others) that may be achieved through various actions. All references to duties in the text will be to strict duties. See Christine Korsgaard, “Natural Motives and the Motive of Duty: Hume and Kant on Our Duties to Others,” *Contemporary Readings in Law and Social Justice* 1 (2009): 9–36, 13.

mystery is how we know which of these duties is a duty whose performance is owed to some other party—which duties are directed at some other party—and so which is a duty that corresponds to a claim-right in some other party.

The challenge of identifying claim-right holders can be put in this way: given that we know what strict duties there are, locate the claim-rights. That is, given that we know what duties there are, find the duties whose performance is owed to some other party. The challenge can also be framed in terms of wrongs and wrongings. Someone who fails to perform a duty does wrong, but someone who fails to perform a duty owed to another *wrongs* that other. How do we know which failures of duty are not merely wrongs, but wrongings?¹⁶

This is one mystery that Will and Interest theorists have tried but failed to solve. Will theorists say that duties are owed to those who have choices to waive or enforce the duty. Interest theorists say that duties are owed to those with an interest in the duty's creation or performance. But counterexamples (e.g., children and the comatose for the Will Theory, promisees and parents for the Interest Theory) show that neither of these theories is an adequate analysis of the claim-right.

To begin to meet this challenge of analyzing the claim-right, I will first set out a subtheory ("role theory") that is adequate to explain claim-rights of the classic sort: the rights of office-holders and other occupiers of established social roles. This subtheory is not adequate for capturing all claim-rights, since today not all right-holders are role-bearers. Yet the theory will become adequate when we substitute a more capacious noun in place of "role," which will occupy us at the second stage.

IV. THE ROLE THEORY OF CLAIM-RIGHTS

This is the role theory of claim-rights:

ROLE THEORY: Some system of norms (such as a legal system or a game) refers to entities under descriptions that are roles, such as "parent," "journalist," "convict," "goalie," and so on. Within such a

16. These statements about wrong and wrongdoing hold only for the duties considered in isolation; the all-things-considered situation may be different. Also, it emerges below that only enforceable directed duties correspond to claim-rights. On directed duties, see Michael Thompson, "What Is It to Wrong Someone? A Puzzle about Justice," in *Reason and Value: Themes from the Moral Philosophy of Joseph Raz*, ed. R. Jay Wallace, Philip Pettit, Samuel Scheffler, and Michael Smith (Oxford: Oxford University Press, 2004), 333–84; Margaret Gilbert, "Scanlon on Promissory Obligation: The Problem of Promisees' Rights," *Journal of Philosophy* 101 (2004): 83–109; Rowan Cruft, "Why Aren't Duties Rights?" *Philosophical Quarterly* 56 (2006): 175–92; Gopal Sreenivasan, "Duties and Their Direction," *Ethics* 120 (2010): 465–94; Leif Wenar, "Rights and What We Owe to Each Other," *Journal of Moral Philosophy*, special issue on Scanlon (forthcoming).

system, claim-rights correlate to those enforceable strict duties that the relevant role-bearers want to be fulfilled.

FORMALIZATION: Consider a system of norms S that refers to entities under descriptions that are roles, D and R . If and only if, in circumstances C , a norm of S supports statements of the form:

1. Some D (qua D) has a duty to *phi* some R (qua R); where “*phi*” is a verb phrase specifying an action, such as “pay benefits to,” “abstain from searching through the notes of,” “shoot,” and so on;
2. R s (qua R s) want such duties to be fulfilled; and
3. Enforcement of this duty is appropriate, *ceteris paribus*;

then: the R has a claim-right in S that the D fulfill this duty in circumstances C .

The first condition wants only one note: that the verb phrase “*phi*” cannot refer to what D s owe to R s, since this is part of the explicandum. The second condition will occupy us most. The second condition is not sensitive, as it might appear, to psychological states. It is rather equivalent, as we will see, to: “Anyone bearing role R has a role-based reason to want such duties to be fulfilled.”

V. THE MINIMAL COMMITMENTS OF THE ANALYSIS

Role-theoretic analysis holds for systems of norms insofar as their domains of discourse include roles. The analysis captures legal claim-rights in systems of legal rules, moral claim-rights in systems of moral rules, the rights of players within sports, and so on.¹⁷

The analysis needs to traverse many normative realms, so it must travel light. The analysis carries no commitments regarding the justification of rights, or regarding the conceptual priority of duties or rights. The analysis says nothing about the force of rights: whether moral rights are “side-constraints” or whether legal rights are “trumps” are questions

17. Interesting as they are, nonsporting games such as chess will not be discussed here. This is because within the primary rules of most nonsporting games there are no claim-rights. That is to say, the rules of most games will define valid moves only in nonclaim terms (mostly, the rules will be defined by Hohfeldian privileges). A chess player, for example, may move a bishop along any unobstructed diagonal of its color. Yet it is not possible to commit a foul with a bishop, or to charge a player with a rights violation because of the square to which she moved her bishop. Games may of course have secondary rules specifying claim-rights regarding not *the moves of the pieces* but *the conduct of the players* (players can have claims against each other not to cause distractions during the game). Regarding the conduct of the players, games have the normative structure of sports.

for moral and legal theory.¹⁸ Nor, most importantly, does the analysis say what duties or rights really exist. Role theory is an analysis of what rights *are*, not of what rights *there are*. The analysis merely says that if there is a system of norms, and if these norms refer to certain roles, and if one norm relates role-bearers in a particular way, then there is a claim-right within that system of norms. The analysis does not endorse or condemn any system of norms. It does not endorse or condemn any roles or duties within any system of norms.

That is to say: given any system of norms with roles, this analysis will show where the rights are. Describe any role-laden practice you like—real or imagined, moral or sporting, sacred or wicked—and this analysis will find the claim-rights within it.

VI. THE RIGHTS OF ROLE-BEARERS

Let us see how this analysis of the claim-right works by sifting some of the hard cases for the Will and Interest theories. Initially, we attend conditions 1 and 2, assuming that all of the duties in these cases are enforceable.

First, within the system of norms that is soccer, a goalie has a right not to be obstructed when in possession of the ball, because opposing players have a duty not to obstruct the goalie (condition 1), and because goalies want not to be obstructed (condition 2). Being free from obstruction helps goalies to do their job, which is to keep the ball from crossing the goal line and to assist their own team in scoring. Notice that all soccer players want (for the same reasons) not to be obstructed while they control the ball. Yet the rules of soccer support condition 1 of the analysis only for goalies, so only goalies have a right against obstruction when in possession.

A second hard case is the duty owed to journalists. Say a law creates a duty in everyone not to search through journalists' notes (condition 1). Then the law simultaneously ascribes a claim-right to journalists, because journalists have journalistic reasons to want this duty to be fulfilled (condition 2). Journalists want others not to search through their notes, because keeping their notes private helps them to do their job—and journalists qua journalists want to do their job as journalists.

Third is a parent's right to receive child support. A law ascribes to government officials a duty to pay benefits to parents with dependent children. The formalization shows that this law also ascribes a claim-right to these parents. Parents have reason to want to be paid child benefits, because the money will help them to do their job as parents. So the law that ascribes a duty to government officials also ascribes a claim-right to parents, because parents qua parents want the officials to pay them the child benefits.

18. See Sreenivasan, "Duties and Their Direction"; Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978), xi.

Fourth, the role theory will find rights within the criminal law, since criminal law duties (like the duty not to assault people in the street) are duties that potential victims have reason to want to be fulfilled.

VII. DUTIES WITHOUT RIGHTS

Let us continue to explore the theory, next with examples where the analysis correctly identifies a strict duty to which no claim-right corresponds.

The Prison Warden

A prisoner qua prisoner has a duty to stay in prison, and a warden qua warden wants the prisoner to stay in his prison. Yet we do not say that a warden has a right that a prisoner stay in his prison. Why not? According to the analysis, this is because legal norms do not support statements that bring the warden into the specification of a prisoner's duty, as required by the first condition. Applying legal norms, we accept the statement "Prisoners (qua prisoners) have a duty to stay in prison," but we do not accept "Prisoners (qua prisoners) have a duty to stay in the prisons of wardens (qua wardens)." Indeed there is no *phi* that relates the prisoner and the warden together with respect to the prisoner's duty to stay in prison. A prisoner's duty is to stay in prison, and the warden has no corresponding right.

The Capital Criminal

In Oklahoma, members of the firing squad have a duty to shoot capital criminals when such executions are scheduled. But Oklahomans would not of course say that capital criminals have a right to be shot. This is because the second condition is not met: the role of capital criminal does not contain the relevant desire. Oklahomans do not infer that a prisoner wants to be killed from the fact that he is on death row. So the capital criminal facing a firing squad in Oklahoma is ascribed no claim-right to be shot. (Interestingly, Hegel held that the criminal wills the punishment that is inflicted upon him. It is this attribution that supports Hegel's pronouncement that the criminal has a right to be punished.¹⁹)

VIII. THE CLASSIC PRIVATE LAW RIGHT-HOLDERS

Promisee

Contract law contains the distinct roles of promisor and promisee. For the first condition: a promisor has a duty to do what he promised to a promisee (i.e., a promisor has a duty to do what he offered and what the

19. G. W. F. Hegel, *Elements of the Philosophy of Right*, ed. Allen Wood (Cambridge: Cambridge University Press, 1991), 126–27. Oklahoma's law says that executions are to be carried out by firing squad if lethal injection and electrocution are prohibited.

promisee agreed that he do), in the circumstances where the promisee has not waived that duty.²⁰ For the second condition: in the circumstances where the promisee has not waived the promissory duty, the legal norm supports the statement that the promisee wants this duty to be fulfilled. After all, as the law notices, the promisee agreed that the duty be created, and she has not waived the duty since the duty came into force.

All that matters for this analysis of promissory rights is how the parties register within the relevant normative system, here the law. To the law, many facts about the human beings who fill the legal roles are mute. For example: some individual might accept a promise only to show off, and then not waive it to show off more, never having a reason (in her personal life) to want performance. Another promisee, such as our hapless novice mechanic, may become much worse off as a result of a promise being performed. These will be high-decibel facts within these individuals' lives, yet the law of contracts does not hear them. Confronted with the distraught mechanic, for instance, the delivery driver will apply the contractual norm perfectly by saying, "If you didn't want the engine, you shouldn't have ordered it, or you should have cancelled." While a legal duty exists, a promisor rightly acts on the basis that the promisee wants performance. So follows the general conclusion within the law: the promisee has a claim-right that the promisor fulfills his contractual duty.

Owner

A similar analysis holds for the other classic right-holder in private law: the property owner.²¹ When nonowners have a legal duty not to enter Greenacre (the owner has not invited them in, there is no emergency,

20. The explication of "do what he promised" above shows that this *phi* can be specified in a way that does not beg the question of whether promisees have claims. While it is true that the explication refers to "what the promisee agreed," this mention of the promisee does not smuggle in a right. Many duties (like those secured by a corporate merger) require the agreement of a non-duty-bearer (such as a regulatory authority) for their creation. So not all entities whose agreement is required to create a duty hold a corresponding claim-right. On another point, note that a contractual duty can fail to exist for reasons besides waiver, such as impossibility of performance; the argument above expands to include these factors as well.

21. All analyses of property (and bodily) claim-rights face the challenge of setting up the problem: of describing the relevant duties without smuggling in the claim. We must not, for example, frame the first condition of an analysis of a property right as: "Some person has a duty to refrain from touching *the property of a property-owner*." Owning a piece of property implies having a claim-right over it, so this description of the duty looks rigged. The challenge is met by finding a nonrigged way to connect the owned object to the owner; e.g., by finding land boundaries matched to a name on a deed that has a valid legal pedigree. This will not always be simple for property (the parallel challenge for bodily rights is easier to meet).

etc.), these nonowners should act on the understanding that the owner wants them not to intrude.²²

Third Party to a Promise

Say that *A* promises *B* to *psi C*. Then, as above, *B* has a right to *A*'s performance. Does *C* have a right to *A*'s performance? In these circumstances, *A* does have a duty to do something to *C*. Yet we cannot assume that this third party wants this duty to be performed, because we do not know what that something is. *A* might after all have promised either to kiss *C* or to kick *C*. Since we cannot assume that the third party wants *A*'s performance, we do not attribute to the third party a right to *A*'s performance, which is the correct result.

Third-Party Beneficiary

Legal systems inheriting the Roman concept of *jus tertii* define a distinct role of "third-party beneficiary": a party (*C*) whom the promisee (*B*) intends that promisor (*A*) benefit through performance.²³ When the relevant legal norm fulfills the first condition of the analysis by affirming a duty relating the promisor and such a third-party beneficiary, then the third-party beneficiary has a right to the promisor's performance (as these legal systems say). Beneficiaries, these legal systems hold, want benefits. This is a simple solution to a problem that has bedeviled the Interest Theory especially.

IX. THE RIGHTS OF DUTY-IMPOSERS: METER ATTENDANT VERSUS ARMY CAPTAIN

One more set of examples illustrates a different type of case, in which one role-bearer imposes a duty on another. A meter attendant issues a parking ticket requiring the owner of a car to pay a fine. An army captain orders a corporal to peel potatoes. We are ordinarily inclined to

22. The complexities of market relations might seem to generate counterexamples to a desire-based analysis. For example, a commodities trader may purchase and then quickly sell a futures contract for delivery of fifty tons of copper next August, never wanting delivery of the copper himself. The analysis stands when it matches the complexities of the example: "Persons in the short position have a duty to deliver to the persons in the long position on the settlement date" and "Persons in the long position want persons in the short position to fulfill this duty on the settlement date." While holding the future, the trader mentioned above does want the copper to be delivered next August to the person in the long position: this is the basis of the future's value. He just does not expect to be the person in the long position, as he knows he will sell the future soon. Thanks to Charles Beitz, Corey Brettschneider, Steve Darwall, Shelly Kagan, and David Lyons for discussion of such cases; thanks to Henry Richardson for years of illuminating conversations about rights; and special thanks to Rowan Cruft for careful and constructive criticism on drafts of this article.

23. See, e.g., the UK *Contracts (Rights of Third Parties) Act 1999* (c. 31).

say that a meter attendant does not have a right that the car owner pays his ticket, while the captain does have a right that the corporal do what she ordered. The formalization correctly sorts these structurally similar situations, where in one case we ascribe rights and in the other we do not.

According to the formalization, the test for whether there is a right in such cases turns on whether we understand the role with the power to impose the duty as including a desire that the duty be performed. The job of the meter attendant is just to put tickets on cars illegally parked. Meter attendants as such do not care whether drivers pay their fines—as meter attendants, they are indifferent if someone they ticket dies the same day. However, army captains do care that their orders are carried out. The captain gives orders to get results, and she would have reason to care if the corporal had a seizure upon hearing her order. So the theory explains why captains have a right that the duties they impose are fulfilled, while meter attendants do not, by noticing what these role-bearers as such want.

X. ENFORCEABILITY

Condition 3 requires that claim-rights correlate with enforceable duties: duties that (absent countervailing considerations) are appropriately enforced, either by coercing performance or by penalizing nonperformance. Here the analysis is detecting a feature of rights persisting from their origins in the law. Conditions 1 and 2 alone may be fulfilled within affective relationships. For instance, a friend may have a duty to try to repair the damage from the terrible gaffe he made, and his buddy may have reason to want him to try. But enforcement of duties is rarely appropriate within such relations, so we are wary of speaking of rights here.²⁴

XI. ATTRIBUTION OF ROLE-BASED DESIRES

Two features of a system of norms are doing the work in explaining claim-rights on this analysis. The first is that those within the system accept statements linking two types of role-bearers with an enforceable duty. Yet that is not sufficient: many such statements connect role-bearers where no claim could be at stake (recall the firing squad and the capital criminal). The second feature is the attribution of a role-based desire. On this

24. A plausible hypothesis, which I will not pursue, is that enforceability turns directed duties into rights. The gaffe-making friend owes a duty to his buddy, but the buddy has no right against him because that duty is not appropriately enforced. Conditions 1 and 2 mark a directed duty; condition 3 makes a directed duty into a right.

analysis of the claim-right, the direction of one role-bearer's duty points to the attractive force of another role-bearer's desirous state. Let us take a first look at how we attribute role-based desires, since this attribution is pivotal in the theory.

The attribution of attitudes to role-bearers is routine in daily life; we do this all the time. The traffic cop wants to keep traffic moving, the candidate is trying to win votes. When traveling through King's Cross station in London, you may hear a recorded announcement saying that members of the station's staff will be happy to help passengers. Even if every individual who works at King's Cross is entirely misanthropic, we still say that all staff members, qua staff members, are happy to help passengers. As passengers, we act on the basis that the staff member in front of us would like to help us, even if we suspect that in another capacity this person would prefer us squashed by a carriage. A good deal of everyday social life presumes the attribution of attitudes to role-bearers in this way; we understand the world in front of us and maneuver through it using role-based attributions.

This attribution of attitudes to role-bearers is not based on perceived regularities, nor on insights into individuals' psychological states. Rather, it follows from our understanding of the roles themselves. Consider the goalie. Part of what it is to be a goalie is to try to keep the ball out of one's team's goal. We do not learn this through surveys showing that 99 or even 100 percent of goalies have this common aim. Rather, an individual who does not try to keep the ball out of his team's goal is not playing goalie. To play goalie is to try to stop the other team from scoring, so we attribute to goalies the corresponding desire. We can say either that "someone playing goalie has reason to want to stop the other team scoring," or that "a goalie wants to stop the other team scoring," or that "goalies qua goalies want to stop the other team scoring." The three are equivalent: the reason comes with the role, and the role comes with the desire.

In goalie-type cases, our attribution of a role-based desire derives from our grasp of the role-bearer's responsibilities. These are position-derived, or job-derived, or what I will call *duty-derived* attributions of desires to potential right-holders.²⁵ Those within a system of norms understand its positions, and so understand what those who occupy its positions have a duty to do. Above we saw some duty-derived attributions of desires based on the principle that a role-bearer wants to do her job, to fulfill her responsibilities. A journalist wants to break the story, a parent wants to do what's best for her child—so a journalist wants his notes to be private, and a parent wants to receive child support. In such analyses, the *R*'s desire for the *D*'s duty fulfillment flows from a more basic desire: that she be able successfully to carry out her own duties. Here the

25. Note that these are attributions derived from the duties of the potential *right-holder*, *R*.

analysis is detecting another remnant of history; this time, that rights enabled role-bearers to do their jobs.

Since duty-derived attributions of a desire are fixed by the responsibilities of a role, they can ground judgments about the goodness or defectiveness of bearers of that role. As Bernard Williams says of the role that is a bank clerk, “to know what a bank clerk is involves knowing a good deal about the social fabric in terms of which the role of a bank clerk is defined—but when I understand that role in those terms, I also understand in outline the sorts of things a man would have to do in order to be called a good bank clerk.”²⁶ The exemplar of a role wants to fulfill his role responsibilities. That exemplar challenges, and is not challenged by, individuals who bear that role. We say, “A parent wants to do what’s best for his child.” When we meet an uncaring father, who has no such desire, we have not found a counterexample; we have just found a bad parent.

The attribution of a desire to the promisee is different; it is not duty-derived. Having accepted a promise, there is nothing more a promisee need do. The promisee has no further end to pursue, or responsibility to discharge. Rather, the law sees the promisee as desiring performance because the promisee accepted the creation of the promissory duty, and has not waived that duty. Again the role comes with a desire, yet this desire is not duty-derived; it is simply a role-norm. Those who understand the role will make this attribution directly.

Consider next an employee’s legal right to the minimum wage, which within the analysis turns on the idea that employees want more pay. The thought that employees want more pay seems utterly unremarkable, and outside of a seminar room we will accept it without question. As with the promisee, we attribute this desire to employees independently of any end-guided activity that employees perform. Employees as such want to do their jobs, certainly, but getting more pay does not necessarily enable them to do their jobs.²⁷ The attribution of a desire for more pay is also role-normative; we say, “an employee wants more pay.” (As we will see below, this is much like saying: “a lion wants to roam free.”)

The formalization shows that the desire-attributions relevant to rights are context-sensitive. Such attributions need only hold within the norms of the system that we are applying at the moment. Consider a legal system that contains rights of private property. As above, this legal right must be grounded in the idea that owners want others not to intrude on their property. A philosopher swayed by the young Marx might believe that, qua

26. Bernard Williams, *Morality: An Introduction to Ethics* (Cambridge: Cambridge University Press, 1993), 48.

27. One might recharacterize the minimum wage as a “living wage,” and say that receiving such a wage is necessary for employees to do their jobs. Yet a law that set the minimum wage well above the level of a living wage will still generate rights in employees to that wage.

species being, man has no such alienated desire. However, this philosopher's judgment is not an application of the norms of the legal system in question. The judgment that owners want to be free from intrusions is made by taking what Hart would call a perspective internal to the system of law.²⁸ Those applying the norms of this legal system will ascribe the desire to owners, and this is part of the explanation of why that legal system contains property rights. Whether that legal system should be changed to reflect beliefs like the philosopher's is an issue beyond the conceptual analysis of the rights of ownership.

Our attributions of desires to role-bearers can be quite confident, yet we will also find areas of ambivalence and disagreement. A fan wants his team to win, but does a fan cheer the traditional rival against a third team, when the rival's victory will qualify his team for the playoffs? Our desire-attributions are only as determinate as the normative systems in which roles are embedded, and these normative systems are only as determinate as they need to be. Uncertainty in desire-attributions can be significant, and will be of first importance for the analysis in what follows.

XII. UNWAIVABLE AND INALIENABLE CLAIMS

Some of our roles ("citizen of Michigan") we are born with but can abandon. Most of our significant roles ("husband," "employee," "owner") can be entered and exited at will. The rights of many roles ("criminal defendant") may be waived. For most roles, the bearer can nullify its rights, or the role itself can be quit.

One purpose of ascribing a power to nullify role-based rights is to enable an agent to adapt others' duties to her situation as she sees fit (the employee waives her right to a pay raise to help her struggling firm; the cricket captain declares an innings closed at the point of maximum advantage). Another purpose of ascribing a power to nullify is to enable the agent to adjust her roles to each other (the patient waives his right to treatment so as not to become a burden to his family; the boss takes a leave to help her child apply for college). Given the complexity of our circumstances and our many role memberships, ascribing such powers to agents is useful for enabling individuals to further their particular goals, and for the smooth running of the larger social system of which these subsystems are parts.

Some roles come with rights more firmly fixed: such rights are inalienable, or unwaivable, or unforfeitable. Fixing rights is one way for a system of norms to give priority to certain rules. Fixed rights gain priority over other considerations that may arise within a particular role, and over considerations that arise from the right-holder's other roles. An

28. H. L. A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Oxford University Press, 1997).

employee may not waive her right to the minimum wage to help her struggling firm; a citizen may not sell his vote even to pay school fees.

Human rights are more permanent rights: they are very difficult, at least, to alienate, waive, or forfeit. Moreover, our societies impose on us, and do not allow us to escape, the description “human.” We assign humanity, and human rights, the highest normative priority. Yet we do not regard “human” as a role. We see “human” simply as the kinds of things we are. Explaining the modern understanding of human rights requires an expansion of the role-based analysis.

XIII. EXPANSION OF THE ROLE THEORY

While it is tempting to construe all claim-rights as the rights of role-bearers, this can no longer be done. History has moved on. As Applbaum says, “There persists a whiff of the premodern in talk about roles, making such talk suspect to liberals who have no nostalgia for societies divided into castes, estates, or classes, and who fear retreat from the idea of universal humanity.”²⁹ Moderns think that humans have rights, and moreover that children and animals do as well. However these rights are explained, the explanation cannot rest on these entities’ jobs, offices, or functional roles within a social system.

The expansion of the role theory enlarges its load-bearing noun. “Role” is no longer a sufficiently capacious term for the analysis. We need a term for sets of entities within systems of norms that is more relaxed than *role*, yet continues to support the “qua” locution that indicates what is definitive of a class. We might consider the noun *class* itself, or (with increasingly essentialist overtones) the nouns *sort* or *type*.

The best noun for the expanded analysis is *kind*, corresponding to the Latin *genus*. A kind is a set of entities that share defining characteristics. There are natural kinds: gold and planet and panther. And there are social kinds as well, of which roles form one very large subgroup. To be a baby, and to be a goalie, is to be a member of a kind—natural and social, respectively.³⁰

This is the expansion of the role theory, the kind-desire theory:

KIND-DESIRE THEORY: Some system of norms refers to entities under descriptions that are kinds (“parent,” “journalist,” “human,” etc.). Within such a system, claim-rights correspond to those enforceable

29. Arthur Applbaum, *Ethics for Adversaries* (Princeton, NJ: Princeton University Press, 2000), 47.

30. In some contexts, a term that might appear to refer to a natural kind refers instead to a social role: consider what it meant to “be a man” (or “a real woman”) in a classic Western, or gangster, or detective film. As with the role of “citizen” that we will soon consider, these older understandings of social roles have since decayed.

strict duties that the members of the relevant kind want to be fulfilled.

FORMALIZATION: Consider a system of norms S that refers to entities under descriptions that are kinds, D and R . If and only if, in circumstances C , a norm of S supports statements of the form:

1. Some D (qua D) has a duty to *phi* some R (qua R); where “*phi*” is an verb phrase specifying an action, such as “pay benefits to,” “refrain from touching” “shoot,” and so on.
2. R s (qua R s) want such duties to be fulfilled; and
3. Enforcement of this duty is appropriate, *ceteris paribus*;

then: the R has a claim-right in S that the D fulfill this duty in circumstances C .

This analysis holds for all systems of norms of conduct. The analysis captures legal, moral, and customary claim-rights, claim-rights within sports, and all other cases.

The analysis turns on the attribution of desires to kinds, and we will take a long look at this in what follows. First let us sort some examples, for now taking “ R s (qua R s) want . . .” in the second condition to mean simply “ R s have reason to want . . .”

Role Examples

Since roles are social kinds, the kind-desire analysis absorbs all of the examples from role theory above: the goalie, the journalist, the parent, the promisee, and so on.

Children and the Comatose

Next are the examples of incompetents like young children and the comatose. Our duties to young children not to abuse them correlate with rights in those young children not to be abused, because young children (like everyone, or perhaps even more than others) have reason to want not to be abused. And the same, *mutatis mutandis*, for the comatose.

Livestock

An example of a duty whose correlativity to a claim can vary shows how kind-desire analysis solves a problem that has vexed rights theory for ages. Imagine a cattle ranch where a sign above the door says, “Cowhands must not abuse the animals.” Does this sign ascribe a right to the animals not to be abused?

On a kind-desire analysis, whether the rules of the ranch ascribe the animals a right will depend on how those applying the norm regard them. If the cowhands have a duty not to abuse the animals as livestock—as crea-

tures raised for profit—then the rule does not ascribe a right to the animals. Livestock are not seen as having reasons at all; they are just commodities with hoofs. However, if the cowhands have a duty not to abuse the animals as animals—that is, as sensate beings who have reason to want not to be abused—then the rule does ascribe a right to the animals. The contents of the cowhands' duty may be identical under the two descriptions of "animals." Whether the animals have a right corresponding to this duty depends entirely on what kind of thing they are seen, on the ranch, as being.³¹

This example shows why political disputes over rights often take the form of attempts to influence public perceptions concerning which entities are members of some rights-bearing kind. In 1968, sanitation workers in Memphis, marching for their civil rights, emphasized that they were members of the relevant category in the US Constitution's credo—"All men are created equal"—by holding up signs saying: "I *Am* a Man." The most famous antislavery logo of all time, designed by Wedgwood in 1788 and reproduced endlessly thereafter, matched an image of a slave with the suggestion that this entity should be seen as a member of not one but two kinds: "Am I Not a Man and a Brother?"³² One slogan of the movement urging that fetuses be ascribed legal rights is, "It's a Child, not a Choice."³³ One can play through for oneself how contestation over kind-membership may lead to "identity politics" and "the politics of recognition." Here we only note that the language of such politics is identity *as*, and recognition *as*.

XIV. DESIRE-ATTRIBUTION AFTER DUTY LOSS

Desire-attribution to role-bearers is simpler than desire-attribution to the members of natural kinds. Law, armies, soccer, and other role-based institutions are our "games," after all, and we can define the "players" in the ways we like. Natural kind-members seem different. Human beings are what they are, for instance—they seem unavailable for shaping with duty-derived or role-normative desires. How then do we support the desire-attributions needed in the analysis of human rights: that "Humans (*qua* humans) want . . .?"

We approach desire-attribution to natural kinds by looking once more at desire-attribution to roles, this time at cases where an earlier un-

31. The proper status of animals within morality is of course a separate question, to be answered within that normative system.

32. Ben Franklin judged that the impact of Wedgwood's logo was "Equal to that of the best-written Pamphlet." Adam Hochschild, *Bury the Chains* (New York: Houghton Mifflin, 2005), 128–29.

33. One might also think that a significant division between the two sides in the abortion debate concerns how they code the pregnant woman: as an autonomous adult (who wants to make free choices) or as a mother (who wants what is best for her child).

derstanding of a role has decayed. A desire, once confidently attached to a role, now seems uncertain. The game has changed. Nonetheless, we still want to attach familiar rights to the role, and so we have sought a new basis on which to assert the role-based desire.

Consider for example a citizen's rights to speak freely on political issues, which in earlier times rested on an attribution to citizens of a desire to speak on political issues. In history, this attribution came easily, as there was a much stronger sense that citizenship is an office that carries with it public duties. When speaking out was seen as a citizen's duty, the attribution of a role-based desire to speak out was duty-derived: it was part of a citizen's job to speak out, and citizens (like goalies and journalists) wanted to do their jobs.

This picture of the citizen as the bearer of public duties has faded in common sensibility. Already in 1861 Mill lamented that segment of his society in which "scarcely any sense is entertained that private persons, in no eminent position, owe any duties to society except to obey the laws and submit to government."³⁴ Some theorists and statesmen still try to shore up the old tradition of the dutiful citizen; Pettit's neo-republican theory, for example, lauds "the invigilation of an active, contestatory, even mistrustful citizenry."³⁵ However outside of the republican tradition, the duty to speak publicly has come loose from the role of the citizen.

One way to attribute role-based desires after duty loss is simply to stipulate them. This is what Rawls does in "The Basic Liberties and Their Priority."³⁶ Here Rawls specifies an elaborate conception of the citizen, centered on fundamental desires to pursue a conception of the good and to participate in a fair system of social cooperation. Rawls builds these two fundamental desires into his citizens—by definition, as it were. Rawls then explains in detail why citizens conceived as having these fundamental desires must be ascribed basic rights protecting, for example, speech and conscience. Because Rawls defines his conception of the citizen with certain desires, "Citizens (qua citizens) want . . ." becomes necessarily true of all instances, and these stipulative desire-attributions then support the ascription of rights like free expression.

There is also a second route to attributing desires to role members once a grounding duty fades, which is by reference to a role norm (recall the desire of the promisee for performance, and the desire of employees

34. John Stuart Mill, *Considerations on Representative Government* (Charleston, SC: BiblioBazaar, 2007), 56.

35. Philip Pettit, "From Republicanism to Democracy: A Comment on Henry Richardson," *Philosophy and Phenomenological Research* 71 (2005): 196–203, 199.

36. John Rawls, *Political Liberalism*, expanded ed. (New York: Columbia University Press, 2005), 289–371 (reading principle- and conception-dependent desires as the core of the two moral powers).

for more pay). A role norm is a social kind-norm, expressed by statements of the form “The X does Y.” For example, this is a kind-norm statement about citizens: “The citizen speaks out with his heart, but votes with his pocket-book.”³⁷ The distinctive logic of kind-norm statements models what Michael Thompson calls natural-historical judgments, such as “the lion wants to roam free.” Such statements are based on an exemplar, and so can remain true even though they are not universal generalizations. “The lion hunts in packs” can be true even though Elsa, in captivity, never hunts.³⁸ Similarly, “The citizen speaks out on matters of public moment” can be true even when many, even most, citizens speak out not at all. The attribution of the underlying desire (“The citizen wants to speak out . . .”) can be correct even when most individuals who are citizens evidence no such desire.

Both the stipulative and the kind-normative routes to desire-attribution have risks. If we define a role with desires built in, as Rawls does with the role of citizen, then we can ensure that our theory will contain exactly the rights we want. However, we may still end up uncertain about our rights, because it may not be clear to us that we see ourselves as the kinds of creatures portrayed. Rawlsian citizens may have definite rights, but we may not be sure that we see ourselves as Rawlsian citizens. If we attribute desires to role members with a kind-norm (“The citizen speaks out on matters of public moment”), we may find that others in our society do not share our views that this kind-norm is correct or important. So these others may disagree with us about whether the corresponding rights exist or have weight.

Frustration is natural when analysis detects ambivalence and disagreement about rights, instead of what we want to know, which is what rights there are. Yet, on reflection, tracking uncertainty is not a failure in a conceptual analysis so much as an advertisement for it.³⁹ A good conceptual analysis displays what rights are by stating the conditions under which rights-ascriptions are valid. When we find ourselves ambivalent or divided about whether these conditions obtain, we should expect to be ambivalent or divided about what rights there are. This is what we are finding here. Moderns want to continue to ascribe to citizens rights to speak freely on political issues, yet the old understanding of the citizen has faded, and we are now less certain what understanding of the citizen could support such ascriptions. So, as the analysis predicts, we are less

37. Kristian S. Palda, “The Effect of Expenditure on Political Success,” *Journal of Law and Economics* 18 (1975): 745–71, 771.

38. Michael Thompson, *Life and Action* (Cambridge, MA: Harvard University Press, 2008). A natural-historical judgment can remain true even when it has *no* true instances (e.g., “the lion hunts in packs” can be true even when all lions are in separate cages).

39. As the Frequently Asked Questions for some apps say, “This isn’t a bug—it’s a feature.”

certain about exactly which speech rights citizens have, and less certain about how to construct convincing arguments for speech rights that are controversial. Kind-desire theory mirrors uncertainty on one side of the biconditional with uncertainty on the other, as a good conceptual analysis should. This tracking of uncertainty is even more noteworthy in our final analysis, the rights of human beings.

XV. HUMAN RIGHTS AND UNCERTAINTY

Consider now what constitutes the kind “human being.” The formalization says that our judgment of what rights humans have must be supported by a judgment of what humans as such want.⁴⁰

Historically, judgments about what humans want were easier to make, and more like ascriptions of role-based desires, because of the theoretical availability of God. In the *Two Treatises*, Locke portrayed humans as “all the servants of one Sovereign Master” who is God. God assigns each human servant the duty “to subdue the earth, i.e., improve it for the benefit of life.”⁴¹ With this characterization of humans as servants of God who have a duty to improve the Earth, Locke’s explanation of the right of humans to hold private property is as easy as our explanation of the goalie’s right not to be obstructed. In each case, the judgment that there is a right in the role-bearer is supported by the precept that a role-bearer wants to do his job.

Even more strikingly, Locke also says that “the first and strongest desire that God Planted in Men and wrought into the very Principles of their Nature” was a desire for self-preservation. This desire for self-preservation then becomes in Locke the basis of man’s right to make use of lesser creatures.⁴² On Locke’s view, the statement “Humans (qua humans) want . . .” is necessarily true for all humans—not, as with Rawls, by stipulation; but simply, we might say, by creation.

Such understandings of the kind “human” have now decayed beyond public use. In modern times, since political culture has become secular, we no longer presume for public purposes that humans have duties that God requires them to perform, nor desires that God wrought into their nature. This means that agreeing on a characterization of humans that can ground the rights of humans has become much more difficult. It is not at all clear that humans as such want private property, for example,

40. A reviewer rightly suggests that we may have human rights not because we are *Homo sapiens* but because we are persons, and in that case such rights could be held by members of different species. This suggestion deserves to be pursued; it leads to the intriguing question of whether persons are natural kinds.

41. John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), II.6, II.5.

42. *Ibid.*, I.88.

much less that they want democratic governance. Still, many have wanted to maintain the commitment to the idea of the rights of man.⁴³

Studying the history of the Universal Declaration of Human Rights, one finds the drafters rather desperately searching for a conception of man to replace that of God's creation. In the document, the authors finally venture that all humans are members of a human family, and that humans should act toward each other as brothers.⁴⁴ This characterization of all humans as siblings has not gained traction, and we are still struggling with the now-untethered question of what humans as such want.

Recent philosophical explorations of human rights have tried two strategies to support the attribution "Humans (qua humans) want. . . ." The first strategy is philosophical anthropology. Nussbaum's "internalist-essentialist" Aristotelean theory of human rights invokes a kind-norm. As part of her "story about what seems to be part of any life that we will count as a human life," Nussbaum asserts that "All human beings have an aversion to death," "Human beings like moving about and dislike being deprived of mobility," and "All human beings participate (or try to) in the planning and managing of their own lives. . . . Moreover, they wish to enact thought in their lives—to be able to choose and evaluate and to function accordingly." With these desire-attributions Nussbaum defines a kind-norm that will be untroubled, as above, by any desire-deficient creatures in human form (cf. "Lions want to roam free.").⁴⁵

The second philosophical strategy locates normativity not in the subject of "Humans (qua humans) want. . . ." but in its objects. These are accounts of what all humans *have reason to want*. What humans have reason to want is said variously to be the satisfaction of basic human needs; or the requirements of human dignity; or the requirements of personhood; or the necessary conditions of action; or a list of capabilities "such that it is always rational to want them, whatever else one wants."⁴⁶

43. The public loss of a religious conception of man is not here taken as cause for MacIntyrean gnashing of teeth—this is just a report on the state of affairs.

44. *Universal Declaration of Human Rights*, preamble, art. 1.

45. Martha Nussbaum, "Human Functioning and Social Justice: In Defense of Aristotelean Essentialism," *Political Theory* (1992): 202–46, 214–20, and *Frontiers of Justice* (Cambridge, MA: Harvard University Press, 2007), 285. Cranston makes similar kind-normative desire attributions: "Natural rights can be seen in their origins as claims that everyone naturally makes. No one wants to die a violent death or be injured. No one wants to be hindered in his natural movements and in the utterance of his natural sentiments." Maurice Cranston, "Are There Any Human Rights?" *Daedalus* 112 (1983): 1–17, 15.

46. David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), 183–85; Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca, NY: Cornell University Press, 2003), 94; James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), 31–33; Alan Gewirth, *Reason and Morality* (Chicago: University of Chicago Press, 1980), 103; the (later) Nussbaum echoing the (earlier) Rawls in Martha Nussbaum, *Women and Human Development* (Cambridge: Cambridge University Press, 2001), 88.

Here the emphasis is on the objective value of what is wanted, and humans are idealized only as far as they desire what is desirable for them.

It is fair to say that the philosophical debate over human rights remains incipient, with theories forming around quite different trajectories of thought (including a perennial skepticism). In part the controversy concerns what normative system is being theorized: the international practice of human rights, or something morally more basic.⁴⁷ In part the controversy is over condition 1 in the kind-desire analysis, that is, over which human-related duty statements are valid. And in part the disagreement reflects a profounder uncertainty about the second condition of the analysis: about what approach to take when attributing attitudes to humans as such. Kind-desire analysis predicts that our confidence in our ascriptions of human rights will track our confidence in these desire-attributions. Where we are more confident about what humans as such want, we should be more confident about their rights; and where we are less confident, the rights should appear less certain. The analysis shows why a settled understanding of human rights is as yet beyond our collective grasp.

XVI. COMPARISON WITH THE WILL AND INTEREST THEORIES

Kind-desire theory handles all of the well-known counterexamples to the Will and Interest theories, and it seems not to generate counterexamples of its own. It is extensionally superior to the traditional theories, which is the primary standard for a successful analysis.⁴⁸ Moreover, in pursuing extensional fit, we have found a theory that solves long-standing puzzles about rights, and a theory whose central concepts (roles, kinds, desires) are as salient and as forceful as are rights themselves.

The main contrast with the two traditional theories of rights is that the new analysis turns on kind-based desires. Because “desire” is in the same conceptual space as “will” and “interest,” kind-desire theory overlaps with the Will and Interest theories at many points. But kind-desire theory is not a blending of the other two.⁴⁹ Rather, the concept of “desire” is the center of gravity of the claim-right, around which “will” and “interest” circle.

47. Compare Charles Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009) with Griffin, *On Human Rights* and John Tasioulas, *Human Rights* (Oxford: Oxford University Press, in press). Within international or “political” human rights theorizing, it might be thought that the right-holders are not humans as such, but the denizens of a state’s territory.

48. Simplicity might be taken to be another criterion for preferring a theory; kind-desire theory is at least as simple as the traditional analyses of rights.

49. Compare Gopal Sreenivasan, “A Hybrid Theory of Claim-Rights,” *Oxford Journal of Legal Studies* 25 (2005): 257–74.

Will Theory

Both will and desire are voluntative concepts, yet, to use Kant's terms, claim-rights concern the holder's wishes not her choices. The powers of promisees and owners do make brief cameos within the kind-desire analyses of their respective rights.⁵⁰ Yet the formalization shows that powers need not be the partners of all claims. This makes kind-desire theory immune to the standard counterexamples to the Will Theory, such as unwaivable rights, incompetent right-holders, and citizens under the criminal law.

The Will theorist's insistence on the enforceability of rights turns out to be well motivated, but mislocated. All claim-rights are enforceable—just not necessarily by the right-holder. (Recall the rights of soccer players against being fouled, where the right-holders lack any authority to waive or demand.)

Interest Theory

Above we found several routes by which a normative system can support the attribution of a kind-based desire: "*Rs* (qua *Rs*) want . . ." For the kinds that are roles, we found duty-derived desires (a parent wants to receive child support); and role-normative attributions (an employee wants more pay; the citizen speaks out from his heart); and desires built in by theoretical construct (the Rawlsian citizen wants to pursue his conception of the good). For natural kinds such as humans, we found that desire-attributions in an earlier age included both duty-derived desires (Locke's man has the duty to subdue the earth) and desires created by fiat (Locke's man is wrought with a desire for self-preservation). In our times, we found kind-based desires defining kind-norms (Nussbaum's human being) and defined by what kind-members are said to have reason to want (the satisfaction of basic needs, the conditions of human dignity, and so on).

We have excluded the vague concept of an "interest" for some pages. We can now welcome its return, though we must watch it very closely. There is a way in which it is perfectly natural to speak of interests when carrying through a kind-desire analysis of rights. But this is not the way of the Interest Theory.

When asked to define "interest," theorists (including Interest theorists) will associate it with well-being, welfare, or quality of life: in Parfit's words, "What would be best for someone, or would be most in this person's interests, or would make this person's life go, for him, as well as possible."⁵¹ Hedonism is one leading theory of well-being: life goes bet-

50. In explaining the assumption that promisees continue to want performance (they have not waived the promissory duty), and that owners want others not to intrude (they have not invited the others in).

51. Derek Parfit, *Reasons and Persons* (Oxford: Oxford University Press, 1986), 493.

ter the more pleasures, and the fewer pains, it contains. “Objective list” accounts of well-being hold that pleasure is not the only thing that makes a life go better, and add to the list values such as knowledge, the awareness of beauty, and the experience of mutual love.⁵²

Kind-desire analysis accepts that “interest” in this objective sense grounds desire-attribution in certain cases, and so anchors the analysis of claim-rights in these cases. These cases are within the class of *nouveau* right-holders that includes detheologized human beings, children, and animals. We have no hesitation saying that humans, children, animals have *reason to want* aspects of their own well-being—to be free from pain, for instance. Here well-being is an independently defined value, and the rational desires of humans, children, and animals track it. Well-being is the primary concept, and kind-based desires are derived from it. Yet this is the direction of fit only for this new class of right-holders, not for most cases.

What seems to have happened, historically, is that we have hoped to continue to ascribe rights to humans even as we (at least many of us) have lost faith in earlier forms of desire-attribution, such as divinely assigned tasks, divinely implanted desires, or species norms. One remaining ground for desire-attribution to humans was “what humans have reason to want,” and well-being was one respectable concept for “have reason to want” to latch on to. Who could deny that well-being is valuable, and so something that rational humans want? Having made this welfare-based move for the rights of humans, the same move then became available with respect to young children and animals. Thus it became natural, even inevitable, for moderns to accept what premoderns resisted: that young children and animals can have rights.⁵³ Further along, as “has reason to want its own well-being” became established as a predicate that can turn an entity into a right-holder, the class of potential right-holders expanded further, to include, for example, trees, or even the Earth itself.⁵⁴

The mistake of the Interest Theory is to take the analysis of these latecomers (detheologized humans, children, animals, etc.) as its paradigm, and to attempt to explain rights-ascriptions beyond these cases with the independent value of well-being. This is like Puerto Rico invading the United States for the purpose of colonization. The homeland of rights, which is roles, resists the attempt.

We have already found familiar examples in which the Interest Theory has trouble explaining the rights of role-bearers when it uses an

52. *Ibid.*, 493–502.

53. Recall that as late as 1973 Hart was saying that it was a “substantial merit” of his Will Theory that it accorded with the fact that animals “are not spoken or thought of as having rights.” H. L. A. Hart, *Essays on Bentham* (Oxford: Oxford University Press, 1982), 185.

54. See <http://treeshaverightstoo.com> and <http://motherearthrights.org>.

objective sense of “interests.” The interests (say, the pleasures) of parents cannot explain their legal rights to receive child support, or to arrange marriages; nor do the pleasures of soccer goalies explain their right not to be obstructed. Similarly, the rights of members of the bomb squad will not likely turn on their pleasures, awareness of beauty, or experience of mutual love. The only way to make a necessary connection between “interests” and claim-rights in these cases is to interpret “interest” as the satisfaction of a role-based desire. That is, any reference to “interests” when analyzing role-based rights must be filled out not with a hedonist or an objective list theory, but with a “desire-satisfaction” or “success” theory that defines “interests” in terms of the satisfaction of desires.⁵⁵

Thus we might find ourselves saying that it is in the “interest” of a goalie not to be obstructed, or even that it is in the “interest” of a member of the bomb squad to disarm bombs. Yet here one must keep a sharp eye on one’s tongue. “Interest” here refers only to the satisfaction of a role-based desire. In these assertions, it is the role-based desire that is the primary concept, and “interest” means nothing more than the fulfillment of such a desire. Such role-based desires are understood from a perspective internal to the relevant normative system (the law, the game of soccer), without appeals to pleasure, pain, or any other independent dimension of well-being. Desires are conceptually prior in such contexts; “interest” derives its meaning from desires. And, as we have seen, role-based desires themselves often derive from role-based duties. Parents want to receive child support because this helps them do their duty as parents; goalies want not to be obstructed because this helps them support their team.

The meaning of “interest,” like butter, is semisolid. When Interest theorists are rigorous, and freeze the concept into hedonist or objective-list meaning, the concept then becomes unsuitable for analyzing rights outside those of a limited (if growing) set of natural-kind right-holders like humans, children, and animals. But “interest” can also be smeared across roles by deriving its meaning from role-based desires. When this is done, it is natural and correct to say that claim-rights are conceptually tied to the right-holder’s “interests.” However, in this usage, the term “interest” gets its sense from the prior concept of desire. “Interests” as an independent concept grounds only a minority of claim-rights. Conceptual analysis centered on desires captures all rights-assertions.

Concluding the kind-desire analysis: claim-rights are entitlements that correspond to certain enforceable strict duties, duties that the relevant kind of entities want to be performed. Where the claim-rights are within any normative system will depend on what is due from, and what

55. Parfit, *Reasons and Persons*, 493–502.

is desired by, the kinds of things that populate that system's ontology. To prove that a certain normative system contains some claim-right, one must show that the performance of a strict duty by the members of one kind is desired by the members of another as such.

XVII. CONCLUSION

Recalling our own moral education, we might remember how much of it involved learning which kinds contain which entities (especially oneself); and learning what is expected of the bearers of roles (especially one's own). Reflecting on our adult moral experience, we see how much of it involves exerting and responding to social pressure to fulfill these expectations. The drama in most dramas, and the humor in much humor, turns on a failure to live up to the expectations of some compelling system of kind- or role-norms: gender-based, familial, occupational, legal.

A familiar warning, burnt into modern consciousness by the horrors of the two world wars, is that "much of the time, fidelity to role or function isolates the person from moral sense."⁵⁶ That warning is important; and yet, moment to moment, much of our sense of what should be done is nothing but "fidelity to role or function." When you explain what you are doing now, and what you will do next and after that, you will likely refer to your roles. We learn to play our roles in life, to switch from one to another as required, to hold each other to account, and to manage as best we can any conflicts among the parts we are meant to play.

"The judge's wig," wrote Huizinga, "is more than a mere relic of antiquated professional dress. Functionally it has close connections with the dancing masks of savages. It transforms the wearer into another 'being'."⁵⁷ Rights have their home in normative systems with constructed personae. We are just beginning to understand how to make sense of rights outside of such contexts.

56. George Kateb, *Human Dignity* (Cambridge, MA: Harvard University Press, 2011), 83.

57. Johan Huizinga, *Homo Ludens* (London: Routledge, 2008), 77.