Searching for the Rights in Human Rights:


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Abstract

The contemporary debate over human rights has developed a wealth of literature defending different theories of human rights. In this thesis I do not seek to defend or attack any specific theory of human rights, instead focusing on the rights in human rights. I do this by bringing Wesley Newcomb Hohfeld’s anatomy of rights as directed-duties into conversation with the literature on human rights.

While Hohfeld’s anatomy of rights as directed-duties has been broadly accepted in the literature, what makes something a right (or directed-duty) is much more controversial. Currently the literature has been dominated by two viewpoints, the Interest Theory and the Will Theory. The Interest Theorist believes that it is something about a duty being in a patient’s interest that makes it directed, and, hence, the subject of a right. While the Will Theorist believes that it is something about a patient’s having control over a duty that makes the duty directional, and, hence, the subject of a right.

While I do not attempt to resolve the wider debate between these two camps in this thesis, I argue that the Will Theory is unable to capture inalienable rights, and that because a commitment to the existence of human rights implies at least some inalienable rights, the Will Theory is an inappropriate theory of rights for the analysis of human rights. Hence, the human rights theorist ought to reject the Will Theorist’s interpretation of rights and instead favour the Interest Theory.
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Introduction

Currently, the debate concerning how to ground human rights claims appears to be at an intractable impasse between two major viewpoints: On one hand, the foundationalists argue that human rights are grounded in principles about our humanity, and it is from this that we can derive a list of human rights. On the other hand, the functionalists argue that the foundationalists are wrong to look for a grounding in principles. Rather, it is human rights practice that grounds the existence of human rights. In this sense, the functionalist argues that human rights are without foundations. I present these viewpoints in Chapter 1 of this thesis.

While both of these views appear to enjoy some prima facie plausibility, there remains extensive controversy over which is the correct view. However, it doesn’t appear that this controversy will be resolved anytime soon. Hence, while I seek in this thesis to treat both theories seriously, I move the investigation elsewhere. Instead of investigating what grounds human rights, my investigation targets the rights in human rights, and in particular, the relationship between rights and duties. I do this in Chapter 2 by bringing into conversation the dominant theory of the anatomy of rights, as first expressed by Wesley Newcomb Hohfeld¹, along with clarifying the logic of this anatomy.

While Hohfeld’s anatomy of rights presents a clear way to understand how rights are related to duties, Hohfeld’s anatomy does not tell us what makes something a right. Instead,

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for some insight into what makes a duty the object of a right we must turn to the dominant theories of rights—the Will Theory and the Interest Theory. Will Theorists argue that a duty is made the object of a right in so far as some agent, the right-holder, has control over the duty. Interest Theorists argue that if a duty is in the interests of some agent, then the duty is the object of that agent’s right. Hence, in Chapters 3 and 4 I turn to a discussion of these theories in relation to human rights.

In Chapter 3 I explore the compatibility of these theories of rights with human rights generally. I argue that because a commitment to the existence of human rights implies a commitment to the existence of at least some inalienable rights, an adequate theory for the analysis of rights in the human rights discourse must be compatible with the existence of inalienable rights. However, because of the Will Theory’s commitment to the right-holder’s control over the duty, it appears that the Will Theory is incompatible with the existence of inalienable rights. Hence, in Chapter 3 I explore and defend the claim that the Will Theory is incompatible with inalienable rights. Given that this charge holds, I conclude that the Will Theory is not an adequate theory for the analysis of human rights.

On the basis of this conclusion I turn back to the Interest Theory in Chapter 4. Since the Interest Theory is not incompatible with the existence of inalienable rights it at least appears more plausible than the Will Theory. However, some recent ‘third-way’ theories of rights have been offered in the literature.² I argue that these do not offer sufficient

alternatives to the Will/Interest dichotomy and, given the Will Theory’s incompatibility with inalienable rights, this provides a good reason for utilising the Interest Theory in the analysis of human rights.

Finally, I finish this dissertation by exploring one possible consequence of analysing rights in human rights through the Interest Theory. I offer a distinction between fundamental and derivative human rights that draws heavily on the Interest Theory of Joseph Raz. Broadly stated, a human right is fundamental in so far as it can justify the existence of other human rights claims but does not require an appeal to some other human right to justify it.

A consequence of this distinction for the human rights debate is that some things we claim are human rights may just be derivative human rights. In this regard, they may not require the same characteristics as those of fundamental human rights. For example, a human right to food may be derived from some more fundamental right, like the right to liberty, and that due to its being a derivative right, it may not be a human right for all persons at all times—only those under certain conditions that require a human rights claim to food for the securing of the more fundamental human right to liberty. While I do not give a thorough or complete picture of this view in this dissertation, I offer it as an example of where the Interest Theory could be utilised in the contemporary debate about human rights, and, in particular, where it may have some potential to clear up some issues in that debate.
Chapter 1:

The Landscape of Human Rights (the Contemporary Debate)

In chapters 1 and 2 of this thesis I lay out the groundwork for my discussion of rights within the human rights discourse. This first chapter provides some preliminary remarks about what human rights at least intuitively appear to be. This will provide some framing conditions from which I cultivate a conceptual analysis of human rights. To do this, I compare the intuitive theory derived from these framing conditions with some of the predominant views in the literature. Following the likes of John Tasioulas¹, I split these into the foundationalist accounts of human rights and functionalist accounts of human rights. Loosely, they are divided along the lines of whether the theory posits some foundational thing, be that a principle or otherwise, about humans that provides the grounds for a theory of human rights. Theories that commit to something akin to this are classified as foundationalist, while those that do not generally fit this criterion make up the functionalist classification. Instead, Functionalist theories focus directly on the functions that human rights are intended to, and actually do, perform. Hence, by the end of this chapter a broad picture of the current human rights debate should be clear.

1.1. Towards an Intuitive Theory of Human Rights

“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”

– Preamble to the UDHR

To begin this discussion of human rights, it seems prudent to lay down some preliminary remarks about what exactly we are talking about when we talk about human rights. The natural place to begin might seem to be the Universal Declaration of Human Rights [UDHR]—the primary international declaration of recognised human rights within international law. Unfortunately, the UDHR does not offer much in the way of philosophical justifications for the holding of these rights, *qua* human rights. Nonetheless, it does give us a starting place for a brief outline of some plausible conditions for some right being a human right.

However, before we can discuss the set of human rights laid out by the UDHR as a category of rights, it appears necessary to express some brief remarks about what a *right* itself is. Firstly, the concept of a right is inherently normative: rights concern permissions and duties. Legal rights, for example, concern the legal permissibility and impermissibility of certain actions. The legal right to unionise makes it permissible for workers to unionise. It also makes it impermissible to restrict people from unionising. Secondly, rights are held by right-holders against duty-bearers: duties are in some way closely connected to rights. In the legal

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example given, the right-holders are the workers, who have the right to unionise, and this right is held against any entity capable of restricting their capacity to unionise. Hence, entities capable of restricting the capacity of the workers to unionise have a duty against doing such, as a consequence of the workers’ rights.

However, rights do not concern all permissions and duties. While it may be the case that we have a weak duty to avoid offending others, it is not clear that there is any right against being (merely) offended. A right requires something more than that one merely have a duty that concerns the right-holder. Rights can arise both in virtue of certain intrinsic properties of right-holders, or because of special relations in which agents stand to others. This sets them apart from general duties justified by more general principles. In the above example about the workers’ right to unionise, it is something about the workers themselves that appears to justify the existence of the right. One plausible justification may be that the worker deserves to have their dignity protected by a union due to the asymmetrical power relationship workers often have with their employers. This patient-focused justification is independent of any general good that may be furthered by adhering to this duty. It is something about this patient-focus that makes rights and their associated duties different from more general duties.
Hence, the duties that are derived from rights are directed duties; they are directed towards a specific entity. While I take up this discussion further in Chapter 2, this should be enough to provide a preliminary formulation of rights:

An entity, x, has a right r, if and only if, some entity, y, has a directed-duty towards x.

Given this understanding of rights, I wish to present a brief intuitive view of what human rights might be. This is not intended as a substantial viewpoint, but rather a jumping off point to frame the further discussion. To start, one feature of human rights implied by the UDHR—and in particular the quote given at the beginning of this section—is that all human rights are both inalienable and extendible to all entities that are human beings. This sentiment can be captured in a formulation like the one given below. Call this the Intuitive Theory of Human Rights:

Something, x, is the object of a human right if and only if, for any and all entities, if that entity is a human, then that entity has a right to x.

Firstly, this captures the inalienable nature of human rights. For the necessary and sufficient condition presented in the formulation is violated by the alienation of a human right. In alienating a human right, this would make it the case that there exists an entity that is human, that no longer has a right to x. Either the attempt to alienate the right will be frustrated, as the entity will still have the right or, if the alienation is possible, then x cannot

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3 In the remainder of this thesis I use the term directed-duty to mean, and to only mean, a duty that is correlated to a right. For more on rights and directed-duties see: Sreenivasan, “Duties and Their Direction.”
be the object of a human right on the account given by the Intuitive Theory of Human Rights.4

This is not to say that if there is a human who doesn’t enjoy or have whatever x is, that it is not a human right. Crucially, it is their having a right to x that is normatively required, regardless of whether they actually enjoy that object, x. This point can be elucidated by an example using the right to liberty (as per Article 3 of the UDHR5): By being physically deprived of one’s liberty, one doesn’t fail to have the right to liberty. They still have a claim to their liberty, it is just being violated by deprivation of their liberty. In fact, this is where human rights are most important. One of the most crucial roles human rights play is allowing victims to express their claims against oppressors that both seek to, and do, deprive them of the content of their human rights.

Likewise, the Intuitive formulation captures another important property of human rights—the universality of human rights. Given that the Intuitive formulation states something is the object of a human right if and only if anything that is a human has a right to that object, then this must extend beyond cultural, social, and political boundaries. If human rights were limited by any of these boundaries, it would no longer be the case that human rights extend to all entities that are human. Hence, human rights transcend political, social, and cultural borders.6

4 This is not an uncontroversial commitment. I address this more substantially throughout this thesis.
5 “Everyone has the right to life, liberty and security of person.”
6 The Intuitive formulation asserts only a conditional (not a bi-conditional) relationship between something’s being human and having a right to the relevant object. This is because some of the things taken as objects of human rights may also be objects of the rights of non-
In conclusion, we can see that the *Intuitive Theory of Human Rights* captures at least two commonly posited properties of human rights. Firstly, human rights are inalienable. Secondly, human rights are universal in their scope. In the next subsection, I compare this *Intuitive* formulation with some substantial theories of human rights offered in the contemporary literature.

### 1.2. Contemporary Theories of Human Rights

In the contemporary debate concerning human rights the majority of theories can be split roughly into two categories. The first of these categories is that of the *foundationalism*. Views that fall into the foundationalist camp either directly or implicitly commit to the claim that human rights are grounded in certain foundational principles and/or facts. For instance, views that ground human rights in certain features of being a human being are characteristic of foundationalist accounts. In this sense, foundationalists hold that the truth value of claims about human rights are independent of conventions concerning human rights. The second category is functionalism. While the functionalists often reject the foundationalist’s proposition, they need not. Views in the functionalist category are often characterised by either avoiding the question of how to ground human rights altogether, or providing a grounds that does not rely on foundational principles or facts (i.e. those based on political agreement instead). Rather, they focus on the functional role that human rights humans. At this point, I do not wish to exclude the possibility that certain non-humans may be entitled to some of the things that are also protected for humans by human rights. We may however, wish to add that those rights cannot be held as human rights by non-humans. As currently stated, the *Intuitive* formulation does not capture this sentiment though
play, often focusing on how human rights function in the political and legal spheres. Hence, functionalists need not commit to the position that the truth status of claims about human rights are independent of conventions concerning human rights. Indeed, some functionalists argue outright that human rights are reducible to our conventions concerning them.

In this subsection, I will discuss some examples of human rights theories on either side of the foundationalist/functionalist divide. While I do not (and cannot) offer an exhaustive list of the views and where they align, my aim is to provide enough background to assess the Intuitive Theory of Human Rights. From this, I hope to have provided a rough outline of what we are discussing when we discuss human rights.

1.2.1. Foundationalist Accounts of Human Rights

Foundationalist accounts of human rights are characterised by their commitment—be it implicit or explicit—that there exist some foundational facts from which we can ground human rights. In this subsection, I identify some commonalities between foundationalist theories before providing two examples of foundationalist views.

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7 Note that at times the foundationalist/functionalist divide has also been characterised as the humanist/political divide. While these distinctions are roughly similar—they are often treated as extensionally equivalent—I have chosen the former for what I believe to be a clearer division.

Charles Beitz, in his seminal *The Idea of Human Rights*\(^9\), identifies two elements common to foundationalist theories.\(^{10}\) The first is that foundationalist theories are committed to the position that human rights are distinct from positive legal rights. The second is that human rights are held in virtue of the right-holder’s being human.

The human rights foundationalist commits to this first commonality because they commit to the existence of there being something about being human that grounds human rights independent of the laws of any state. Given this commitment, it may be the case that the positive legal rights that a state or the international community declares to be human rights do not adequately map onto the human rights grounded by the foundationalist’s theory. For example, the human rights legally recognised by the state or international community may fail to account for all the human rights grounded in the foundationalist’s theory, or the human rights legally recognised by the state or international community may not be recognised by the foundationalist’s theory. Hence, in either of these cases there would be a failure for the list of legally recognised human rights to either account for all *actual* human rights, or it accounts for positive legal rights that are not actual human rights. If this distinction is possible, then actual human rights and positive legal rights cannot be identical.

One of the strengths of such a position is that it makes sense of the use of human rights to criticise existing legislation.

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\(^{10}\) Ibid., 49. Note, that while Beitz distinguishes between Naturalistic and Agreement theories, this distinction is extensionally equivalent to that of the Foundationalist and Functionalist distinction.
As to the second commonality, the human rights foundationalist commits to this as an essential part of her thesis. In committing to the thesis that there is something about being human that grounds human rights, the foundationalist commits not only to the extendibility of human rights to all humans, but that it is in virtue of being human that human rights are universal in this kind of way.

Hence, it appears that foundationalist accounts of human rights align quite well with features identified by the Intuitive Theory of Human Rights. In both committing to the independence of human rights from positive law, and to the position that human rights are held in virtue of being human, the foundationalist captures the universality of human rights. In what follows of this section I offer two foundationalist theories that exemplify these more general points.

The first is the account given by Alan Gewirth. Gewirth has argued that the foundational moral principle is his Principle of Generic Consistency [here after PGC], which states that the categorical moral obligation upon any agent is to “act in accord with the generic rights of your recipients as well as of yourself”.\(^{11}\) For Gewirth, generic rights are those rights that are

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\(^{11}\) Alan Gewirth, Human Rights: Essays on Justification and Applications, 1st ed. (London: The University of Chicago, 1982), 52 (italics in original). While I am inclined to refer to this as a categorical imperative, I have chosen categorical obligation so as to differentiate the PGC from Kant’s moral philosophy. Nonetheless, I understand Gewirth’s project to be largely Kantian.
necessary\textsuperscript{12} for the completion of agential activity. Human rights just are those rights grounded in the PGC—of which, Gewirth identifies rights like liberty and basic welfare.\textsuperscript{13}

What makes Gewirth’s account a foundationalist account, though, is his grounding of human rights in something about human beings. Gewirth argues that from certain facts about human beings, like the requirement of certain forms of liberty for the successful completion of agential activity, to the existence of generic rights to those things. Hence, he founds those things in facts about human beings, \textit{qua} agents.

While Gewirth’s own argument for the PGC is sustained throughout his \textit{Reason and Morality}\textsuperscript{14}, his successor Deryck Beyleveld has offered multiple insightful restatements of the argument.\textsuperscript{15} Beyleveld breaks the main argument for the PGC into three main stages.\textsuperscript{16}

In stage I, the agent, recognising herself as an agent, can generalise from the Principle of Instrumental Reason that there are some things that are generically required for any agential purposes. Beyleveld formulates the Principle of Instrumental Reason as follows: “If Albert thinks that doing X is necessary for him to achieve E then he ought to value X as much

\textsuperscript{12} Gewirth’s use of ‘necessary’ in relation to agential action somewhat differs from common usage of the term. Gewirth treats necessity, as it concerns agential action, as being a matter of degrees. In this sense, things can be evaluated as more or less necessary. For more, see Gewirth’s discussion of “The Criterion of Degrees of Necessity for Action” in \textit{Reason and Morality} (Chicago: University of Chicago Press, 1978), 343 - 44.

\textsuperscript{13} \textit{Human Rights: Essays on Justification and Applications}, 52.

\textsuperscript{14} \textit{Reason and Morality}.

\textsuperscript{15} Beyleveld has also offered a sustained defence of Gewirth’s PGC against the vast majority of objections in his \textit{The Dialectical Necessity of Morality: An Analysis and Defense of Alan Gewirth’s Argument to the Principle of Generic Consistency} (University of Chicago Press, 1991).

as he values E, or give up pursuit of E.”

Hence, following from the Principle of Instrumental Reason, things that are generically required for agential purposes the agent must equally value as she values her own agency, or she must no longer value her agency. In stage II, if the agent maintains the value of her agency, she must accept that others both ought not interfere with her generic capacity to act against her will, and ought also defend her generic capacity to act when she can’t defend it herself, unless she does not will the defence.

Finally, in stage III, the agent, recognising that these claims are grounded in her being an agent, ought to recognise that the same claims apply to all agents, qua agents. Hence, she must recognise that all agents have the same internally derived claims against harms to their generic capacity to act because they are agents. While I can’t provide a complete exposition of Gewirth’s view here, it does provide outline of how Gewirth attempts to ground human rights in facts about human beings, qua agents, and why we might consider Gewirth’s account foundationalist.

Another, more recent human rights theory that exemplifies the foundationalist position is presented by James Griffin in his On Human Rights. Griffin offers what he calls the

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17 Ibid., 4.
18 Ibid., 5. This is what makes Gewirth’s argument dialectically necessary: The necessity is internal to the reasoning process of the agent.
19 Ibid.
20 Ibid., 6. It may be of interest that, due to the criticisms available in the literature of stages II & III, Beyleveld has argued that only stage I is necessary to motivate the view that human rights are grounded in the Principle of Generic Consistency. Ibid.
21 Gewirth also gives a succinct statement of this argument in The Community of Rights (Chicago: The University of Chicago Press, 1996), 16-20.
22 On Human Rights (Oxford University Press, 2008). Note: while Griffin does not refer to his account as foundationalist, he does refer to as substantive (pg. 32). He contrasts substantive accounts with structuralist accounts of human rights (pg. 20). This distinction is (roughly) equivalent to the foundationalist/functionalist distinction I use.
Personhood Account. The Personhood Account is characterised by two grounding conditions: personhood, and what Griffin labels practicalities. On the first grounding condition, human rights are protections of our normative status as human-persons. More accurately, they are protections of our ability to live a distinctively normative human life. It is our being normative creatures, who can determine what we believe to be a worthwhile life, and pursue it, that makes our life distinctive in this way. However, on the basis of this condition, it is not that human rights must guarantee each of us the actualisation of the life we ourselves deem worthwhile—rather, human rights must only ensure the ability to live such a life. Hence, human rights, on Griffin’s account, must only secure us those things necessary for the potential to actualise the life we deem as worthwhile.23

While the first grounding condition of Griffin’s account leaves the details of human rights rather ambiguous, he invokes the second to counter this ambiguity. As Griffin notes, “on its own, the personhood consideration is not up to fixing anything approaching a determinate enough line for practice.”24 The problem is that the potential generative capacity of the personhood condition is far too large, allowing for a possibly limitless list of human rights. Hence, Griffin limits this by adding the practicalities condition. The practicalities condition adds that practical considerations must be brought to bear on any list of human rights, in particular the motivational and cognitive capacities of human beings.

23 Griffin identifies the right to life, to security of person, to a voice in political decision, to free expression, to free assembly, to free press, to worship, to basic education, and to the minimal provision required for sustained existence as being grounded by the personhood condition (ibid., 33.).
24 Ibid., 37.
Brad Hooker has offered an insightful explanation of the practicalities condition concerning motivational capacities. Hooker states that certain commitments we make in determining a worthwhile life for ourselves will change our motivational capacities.\(^{25}\) For example, when we commit to certain people, say as a parent commits to their child – deciding for themselves that *being a parent* is the valuable life they wish to pursue – this will change their motivational capacities in certain circumstances. A parent forced to choose between saving the lives of two people or their own child may find it impossible to even consider the former option, and so, given their motivational incapacity and that we accept the ought implies can principle, the parent cannot be under a duty to perform the former.\(^{26}\) Hence, the potential for duties to clash with these practical considerations must be taken into account when determining a list of human rights.\(^{27}\)

What it is that makes Griffin’s position a quintessentially foundationalist position is this concern for the capacity to live a distinctively human life. This is a foundational point, embedded in our being human, that grounds human rights for Griffin. Further, in being grounded in our ability to choose a worthwhile life for ourselves, it is independent of positive law and universal. For any entity that has the ability to live a distinctively human life in the way Griffin expresses it, they are entitled to human rights, and those human rights are grounded by the generative capacity of his theory, not whether they are recognised in positive law.


\(^{26}\) Ibid., 200.

\(^{27}\) However, beyond this, what it actually takes to draw this line is left quite vague. Griffin stating that we must consult “human nature, the nature of society, and so on.” Griffin, *On Human Rights*, 37.
1.2.2. Functionalist Accounts of Human Rights

On the other hand, the most popular alternative to the foundationalist theory of human rights is functionalism. Functionalist accounts of human rights are characterised by focusing on the relationship between how human rights are actually implemented in international politics and how they ought to be. In some cases, this is exemplified by theories that take human rights to be conditions that must be upheld so as to maintain the justification of state sovereignty.

One example of a paradigmatic functionalist account is that offered by political and legal philosopher Joseph Raz in his “Human Rights without Foundations”. Raz charges human rights theories with failing to properly account for the difference between values and rights. Raz argues that merely showing that we value something is not adequate for establishing that there is a right to it. Raz exemplifies this by analysing the claim that there is a human right against genocide. While genocide is an action of the state that would justify the suspension of its sovereignty, it is not clear that there is (or ought to be) a human right against it. In fact, it seems that the right against genocide cannot be a human right at all. Human rights are rights held by individual humans and genocide is not committed against any individual human, but against a community. On a human rights analysis it would make more sense to speak of genocide as a violation of a large set of individual rights against being discriminated on the basis of culture/race and rights against being killed. However, even this does not seem to adequately capture what it is that is so wrong about genocide,

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29 The individual acts of murder are violations of some other individual rights though.
and in particular, the scale of the wrong-doing. Hence, while the prohibition of genocide is definitely something that should be valued, and acts of genocide (if anything) are clearly justification for the suspension of sovereignty, this is not sufficient to make the prohibition of genocide a human right. Raz’s charge here is that a failure to address the concept of right, as it applies in human rights, has led to confusion.\(^{30}\) Merely showing that something is valuable is not sufficient to establish the existence of a human right to that thing. Hence, where many foundationalist accounts had argued that something ought to be valued because of its importance or necessity to something about being human, say like for living a distinctively human life, that is not adequate to show that there is a right, and, \emph{a fortiori}, a human right, to it.

Instead, Raz focuses on the how human rights are actually implemented within the international community – hence, his theory is characterised as functionalist. For Raz, human rights are rights that individuals have against states, such that the violation of these rights have the potential to ground intervention in the sovereignty of the violator state.\(^{31}\)

This directly conflicts with the foundationalist commitment that the truth or falsity of whether something actually is a human right is independent of positive law. In particular, note how very different this position is from both Gewirth’s and Griffin’s, who seek an objective measure by which to judge the actual status of posited human rights. While it is true that not all functionalist accounts are going to look like Raz’s, and they may still commit

\(^{30}\) This point is one that is at the heart of this very thesis. One way of describing my project is that it is an attempt to clarify the concept of \emph{right} as it applies to human rights.

\(^{31}\) A clear statement of the position can be found at Raz, "Human Rights without Foundations," 18.
to finding an objective measure by which to judge human rights, the important point is that functionalist accounts need not be committed to this pursuit, or may even outright reject it, precisely because functionalists are not concerned with finding fundamental principles.

What Raz offers is a view that steps even further away from the foundationalist position. Firstly, to solve the value-right dilemma, Raz adds a condition that for something to be a human right, then it must be such that “under some conditions states are to be held duty bound to respect or promote the interest (or the rights) of individuals. . . .”32 The object of the human right is that very interest. This connects the duty that states are under with some idea of rights.33 The conditions are the conditions as set out by international law and practice.

Further, Raz goes as far as to state, “There is not enough discipline underpinning the use of the term ‘human rights’ to make it a useful analytical tool.”34 Hence, an analysis of human rights ought to focus on their function within international relations—the question of foundations is completely pointless. The fallout from this is that, by disregarding any concern for foundations, the universality condition is weakened: It is no longer the case that human rights are grounded in some shared principle about humanity, and so human rights

32 Ibid. Note that Raz’s use of interest here is sufficient to discharge the value/right problem. In many of his other works, Raz has defended an interest theory of rights. For example, see: The Morality of Freedom (Oxford: Oxford University Press, 1986). Though, this is not to say that Raz’s conception of rights itself is not open to being attacked.

33 Raz is committed to the Interest Theory of rights, and so, by connecting the duty of states with the interests of individuals, he makes a direct connection to how he understands rights.

need no longer be necessarily universal.\textsuperscript{35} Hence, the condition given to discharge the value-right dilemma need not necessarily apply universally for something to be a human right.

Here we can see that, whereas foundationalist accounts roughly align with the conditions set out in the Intuitive Theory, functionalist accounts diverge quite significantly. By no longer committing to the position that human rights are grounded in necessary, foundational, features of human nature, functionalists are not necessarily committed to the universality of human rights.\textsuperscript{36} Hence, the universality condition is not a necessary feature of functionalist accounts of human rights.

1.3. Conclusion

In this chapter I have offered an overview of the current main schools of thought within the human rights debate. While there are a multitude of other views, and views that mediate between the two, these two offer the most popular positions in the literature.

Due to the seeming intractability of the debate between these two viewpoints, in what follows of this thesis, I do not attempt to take a side either way on this debate. Rather, I intend to treat both views as plausible, and continue my discussion in a way that is broadly compatible with both. Instead, what I intend to investigate is the problem of rights in human rights. Hence, in the following chapter I turn to a discussion of the anatomy of rights


\textsuperscript{36} That is not to say that functionalists don’t commit to the universality of human rights. Rather, it is merely to say that is not a necessary part of functionalist theories.
Chapter 2: The Analytic Treatment of Rights

As alluded to in the previous chapter, crucial to understanding human rights is understanding what rights are. Essentially the question is, what is it that distinguishes being entitled to a right from other normative terms? Hence, in this chapter I seek to clarify the anatomy of rights by following the analytic understanding of right-relations derived from the work of Wesley Newcomb Hohfeld.¹ This is intended to set the terminology and understanding of rights for the remainder of this thesis.

To begin this discussion, it may help to start with a litmus test for determining whether some posited entitlement might be held as a right. We can administer this test by asking: would some frustration of an agent’s posited entitlement to the good, be considered a wrong-doing against the agent? For example, we may ask if a destitute person is entitled to some charitable donation from a successful business owner. While the failure to give any charity may seem wrong of-itself, it does not seem that the business owner wrongs the individual destitute person by failing to provide them with some donation. However, if the business owner had previously entered a contract to give the destitute person some money, then a failure to do so would amount to a wronging against the destitute person. In the latter case, it would be fair to say that the destitute person has a legitimate claim against the business-owner, where they did not in the former case.

¹ The two original papers in which Hohfeld expressed this view are: "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," The Yale Law Journal 23, no. 1 (1913); and, "Fundamental Legal Conceptions in Judicial Reasoning." However, all of my references are to their reprinted versions in the collected edition: Wesley Newcomb Hohfeld, Fundamental Legal Conceptions: As Applied in Judicial Reasoning (New Haven: Yale University Press, 1919). The first paper comprises pages: 23-64, and the second: 65-114, of the collection.
Implicit in the example above is an emphasis on the *claims* that a right-holder is able to make. To have a claim is to have a legitimate entitlement against some agent, that they perform (or refrain from performing) some act, where the failure to do so would wrong the claimant. Identifying rights as claims in this way is the foundation of Wesley Newcomb Hohfeld’s analysis of *claim-rights*. Much of the contemporary work on rights follows this emphasis and has led to the labelling of such an analysis as the Hohfeldian Analysis of Rights. In the first section of this chapter I give an exposition of the Hohfeldian terminology of claim-rights, before looking at the wider anatomical structure and relations. This chapter is intended to provide the framework from which to address the wider discussion of rights. In particular, the exposition given in this chapter is essential to later arguments concerning the adequacy of the Will Theory for addressing human rights.

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2.1. The Hohfeldian Analysis of Rights

While Hohfeld himself was concerned with legal rights, his terminology has permeated the discussion of moral rights. A thorough and explicit treatment of such can be found in Judith Jarvis Thomson’s *The Realm of Rights*. As Thomson emphasises, legal and moral rights do not make up discrete territories, rather, they are two different modes of the more general concept right. Hence, the litmus test remains one of whether an agent would be wronged by certain actions. Where legal and moral rights differ is that in the moral case we ask if it is a moral wronging. The question becomes whether the frustration of the right-holder’s claim to the right would, *ceteris paribus*, amount to—at least—a *pro tanto* moral wronging of the claimant. The difference between the test of a moral claim-right, and a legal claim-right is merely whether the wrongdoing would be moral or legal; the mode of the potential wrongdoing determines the mode of the right.

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4 While the exposition of the Hohfeldian Analysis given in this section is my own, my understanding is indebted to the expositions given in: Pierfrancesco Biasetti, "Hohfeldian Normative Systems," *Philosophia* 43, no. 4 (2015); M. H. Kramer, N.E. Simmonds, and H. Steiner, *A Debate over Rights* (Oxford: Oxford University Press, 1998); Sreenivasan, "Duties and Their Direction."; Siegfried Van Duffel, "The Nature of Rights Debate Rests on a Mistake," *Pacific Philosophical Quarterly* 93, no. 1 (2012); Wenar, "The Nature of Claim-Rights." I have also benefited greatly from Stig Kanger’s treatment of the Analysis as a form of deontic logic in: "New Foundations for Ethical Theory," in *Deontic Logic: Introductory and Systematic Readings*, ed. Risto Hilpinen (Boston, USA. : Kluwer Boston, 1981), 43-44. That being said, my own emphasis has been on providing a logically consistent treatment of what is as close to Hohfeld’s own position as possible. At times I have diverged from Hohfeld’s position, or added further clarification where ambiguity exists, for matters of logical consistency and clarity. This is most prominent with regards to the entailment relations, which I take to be the most important part of Hohfeld’s schema.


6 Ibid., 73-76.

7 Note that this is not to say that one potential wronging may not satisfy a wronging under both modes. Hence the right would be both moral and legal. One may even wish to argue
The Hohfeldian Analysis of rights is intended to clarify the specific anatomy of any right. This anatomy can be separated into first-order elements and higher-order elements. First-order elements are made up of claims, directed-duties, privileges, and no-claims. I discuss these in Section 2.1.1. Higher-order elements are made up of powers, liabilities, immunities, and disabilities. I discuss these in Section 2.1.2. Finally, in 2.1.3, I provide a discussion of how the elements in the Hohfeldian Analysis provide a full picture of the complexity of any right and its function.

2.1.1. First Order Elements: Claims and Privileges

The fundamental element for the Hohfeldian Analysis of Rights is the claim or claims that a right provides the holder—hence, the term claim-right. I define a claim as follows:

Claim: An agent, x, has a claim against an agent, y, that y perform (or refrain) from some act, \( \phi \), if and only if agent y has a duty-to agent x to perform (or to refrain from) \( \phi \).

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that there is an intimate relationship between the two. Joel Feinberg’s ‘there ought to be a law’ principle is an example of such. For Feinberg, ‘A has a moral right to X’ just means that ‘it ought to be the case that A has a legal right to X’. Joel Feinberg, "In Defence of Moral Rights," in Problems at the Roots of Law: Essays in Legal and Political Theory (Oxford University Press, 2003), 45.

8 While I have used the term higher-order elements, these are often referred to as second-order elements. I have made the change to avoid confusion, as the elements within this category can also be applied to members of the same category, at a third or higher level.
This formulation makes clear that the inverse, or what Hohfeld labelled the correlate, of a claim is to have a duty of a specific kind. This kind of duty is called a directed-duty, which I define as:

Directed-duty: An agent, y, has a directed-duty to some agent, x, to perform (or refrain from) some act, φ, if and only if x has a claim against y that y perform (or refrain from) φ.

Given this definition, a directed-duty is merely a duty that is owed as the correlate of a right—as a duty owed to a specific agent. In any case, where a directed-duty exists the frustration of the duty would amount to a wronging by the duty-bearer to some agent. Hence, while all claims imply duties, not all duties imply claims—only directed-duties imply claims.

To illustrate the relation of a claim to a directed duty, let’s look at the case of Xena agreeing to lend Yann her tent for the weekend on the condition that he return it on Sunday evening. This agreement gives rise to a claim on Xena’s part that Yann return the tent after the

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9 Thomson states that the correlate relationship is just the “...same phenomenon looked at ‘from different directions’...” The Realm of Rights, 72.
10 Hohfeld himself does not use the term ‘directed-duty’, he merely calls them duties. However, I have followed Gopal Sreenivasan’s use of the term in his paper "Duties and Their Direction." to categorise duties correlate to rights as a specific kind of duty. It is this direction of the duty correlate to the claim that makes the normative status of claim-rights unique. Hence, we may want to think of scepticism about claim-rights to be scepticism about directed-duties.
11 This may provide too strong an equivalence relation between the claim-right and directed-duty. One may want to take that the claim-right in fact requires that the directed-duty be directed at an agent who is not also the duty-bearer, hence the directed-duty on its own is only necessary, and, not of itself, sufficient for a claim-right. While my formulation treats the directed-duty as sufficient, one can always treat it as requiring this further condition for sufficiency without major changes to the argument given. For more on this position see: F. M. Kamm, Intricate Ethics: Rights, Responsibilities, and Permissible Harm (New York ;Oxford University Press, 2007).
weekend. As such, it also establishes a directed-duty on Yann’s part to return the tent to Xena on Sunday night. The claim in this example is held against Yann, the duty-bearer, by Xena, the right-holder. The content of the directed-duty is that Yann must ‘return the tent to Xena on Sunday evening’. The potential for wronging Xena is established, since Xena’s agreement to lend Yann a tent for the weekend is conditional upon his fulfilling his duty. Without such a condition, Xena would not have lent Yann the tent. Therefore, Yann would be wronging Xena by not performing his duty.

What makes the claim unique, as compared to other moral terms, is that it is held by a specific agent, against a specific agent, and in a specific kind of way. The claim and its correlate are necessarily directional in a way that other moral concepts are not. In the example, Yann does not merely bear the duty because it would maximise the balance of pleasure over pain, or that Yann could not will the universalisation of not performing the act, or because it is an action that a maximally virtuous agent would perform. Regardless of whether any of these principles also justify his bearing this duty (or whether any of these principles justify Xena’s claim in-itself), he owes it to Xena because Xena has a legitimate claim to his performance of the act. Xena would be wronged if he failed to perform his duty, because Xena has a specific kind of right—a claim-right—to Yann’s performance of his duty.

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12 Presumably, entering into such contracts, and the ability to trust such contracts, is a further right of Xena’s. However, I do not wish to here provide why this is so, as it may lead to commitments that I wish to leave open until later in this dissertation.

13 I include this clause as it could be the case that one of the aforementioned principles is the ground by which the conditional ‘if Yann fails to perform his duty, he wrongs Xena’ is made true. If this is the case, then the claim itself is grounded in one of these principles.
The second pair of first-order elements that Hohfeld identifies are the privilege (also called liberty\(^{14}\)) and the no-claim. A privilege is a right of liberty from a directed-duty. I define the notion of a privilege as:

*Privilege:* An agent, \(x\), has a privilege to perform some act, \(\phi\), with regards to some agent, \(y\), if and only if agent \(x\) does not have any directed-duty to agent \(y\) to not-\(\phi\).\(^{15}\)

Importantly, this formulation specifies not only that an agent has a privilege to perform an act insofar as they are not under any directed-duty not to, but also that an agent can have a privilege with regards to some other agent, \(y\), while not having a privilege with regards to a third agent, \(z\). In this case, we would say that while the agent has a privilege with regard to \(y\), the agent does not have an absolute privilege: they would still be wronging some agent, in this case \(z\), by \(\phi\)ing. Further, the formulation implies that one can have duties that directly...

\(^{14}\) Hohfeld himself uses the term *privilege*, but states “A “liberty” considered as a legal relation. . . must mean, if it is to have any definite content, the same thing as a *privilege*” (italics in original), *Fundamental Legal Conceptions: As Applied in Judicial Reasoning*, 42. M. H. Kramer, "Rights without Trimmings," in *A Debate over Rights* (Oxford: Oxford University Press, 1998). provides an example of where the term *liberty* has been used in place of *privilege*.  

\(^{15}\) I have included the ‘with regard to agent \(y\)’ clause to provide a relational component. It is tempting to treat a privilege as absolute: that is as the negation of the right-holder being held to any directed-duty not to \(\phi\)—indeed, this is one way to read Hohfeld in *Fundamental Legal Conceptions: As Applied in Judicial Reasoning*, 39-41. However, any failure to commit to the strict relational account produces a problem for the logical structure of the Analysis. If we treat the privilege as absolute, then, unlike the other correlate relations, a no-claim would not necessarily entail a privilege of agent \(x\)’s to \(\phi\), since there could exist some other claim of a third agent, \(z\), that held agent \(x\) to be under a directed-duty to not-\(\phi\). Hence, I prefer to follow Kramer in "Rights without Trimmings," 14., in making a privilege relational. This allows that one may have a privilege to \(\phi\) with relation to an agent, \(y\), whilst being under a directed-duty to a further agent, \(z\), to not-\(\phi\). Hence, while agent \(x\) would have a privilege with relation to agent \(y\), agent \(x\) would not have a privilege with relation to agent \(z\). Though this produces the odd result that one may be said to both have a privilege to \(\phi\) and not have a privilege to \(\phi\), it allows that any no-claim will entail a privilege in the same way as the other correlate—element relations. We can also resolve this oddity by treating these privileges as *pro tanto*, and then defining absolute privilege as having maximal *pro tanto* privileges with regards to \(\phi\).
or indirectly entail that one ought not-\( \phi \), but this does not necessarily negate any of their privileges to \( \phi \). A privilege is only negated if the subject of the privilege is under a directed-duty—hence, they have a claim held against them by some agent—not to \( \phi \). Hence, the correlate to a privilege—as a directed-duty is to a claim—is merely the lack of a claim (a no-claim).

Back to the case of Xena and Yann: Xena has an absolute privilege to go camping in the woods on Saturday night, insofar as she has no duty to any agent that she not do so. Now, suppose Xena promises to attend Yann’s house-warming party on Saturday night. Clearly Xena cannot both attend Yann’s party and go camping in the woods on Saturday night. So, it seems that Xena does have a duty not to go camping in the woods on Saturday, since going camping materially necessitates her failure to perform some other directed-duty of hers. The crucial point is in the counterfactual though: if she could both go to Yann’s party and camping that night, Yann would not be wronged by Xena’s going camping. Yann does not have a claim against her that she not go camping, merely that she attend the party. Hence, though Xena has a duty to not go camping in the woods on Saturday night, she does not have a directed-duty not to do so. Though her duty is materially entailed by a directed-duty, the directed nature of the duty is not transferred to the entailed duty. Insofar as she has no directed-duties that she not go camping in the woods on Saturday night, Xena maintains the absolute privilege to do so.

However, if we change the example slightly, Xena’s absolute privilege can be negated. In this new example the woods where Xena normally goes camping have recently been zoned as private property and purchased by a corporation. Xena now has a directed-duty to that
corporation that she not trespass on the land, and so no longer has an absolute privilege to
go camping in the woods on Saturday night—even though she wasn’t going to anyway (she
has to go to Yann’s party after all). The difference between this and the former example is
that her directed-duty now includes within its content—it’s φ component—that she not go
camping in the woods on Saturday. Hence, this latter example satisfies the criteria for the
negation of her absolute privilege, where the previous example did not.16

2.1.2. Higher Order Elements: Powers and Immunities

The Hohfeldian Analysis also provides the rights theorist with terminology to lay clear the
higher-order anatomy of any right. These higher-order elements can be separated into
powers and immunities. A power is the ability to change the status of one or more
Hohfeldian elements within a normative system.17 This I define as:

\[
\text{Power: An agent, } x, \text{ has a power over some agent, } y\text{'s, Hohfeldian element, } \Phi, \text{ if and}
\text{only if it is possible for agent } x \text{ to perform some act, } \Psi, \text{ that negates } \Phi.
\]

As a general rule, if someone owns something as their property, they have a power over
their set of claims to that thing. It follows that, in the case of Xena and her tent, Xena has
some power over the claims to her tent. By performing some act, such as making the
agreement to lend Yann the tent for the weekend (as per the above example), she negates
her claim that Yann not use the tent on the weekend, and introduces a claim against Yann
that he return the tent at the conclusion of the weekend. Furthermore, Yann is now entitled

16 However, note that Xena maintains her relative privilege against Yann to go camping in
this example—the directed-duty is held against her by the corporation, not Yann.
17 This includes higher-order elements themselves.
to a privilege to the use of the tent for the weekend, while Xena no longer has a privilege to
the use of tent for the weekend. In this example, we see that the powers conferred upon
Xena via her ownership of the tent allow her to change at least two claims and two
privileges.

However, Xena’s power over the right to her tent also gives rise to further powers of hers
that don’t just change first-order elements. Xena may sell the tent to Yann. If she does so,
then Yann is transferred the set of powers relevant to the tent. Yann can now perform the
act of lending the tent back to Xena if he wishes. This would entail similar changes in the
elements to those above—just swapping the agents.

Insofar as Yann’s elements/correlates can be changed by Xena’s power, Yann is liable to
Xena’s powers. Further, insofar as Xena’s own elements/correlates can be changed by her
own powers, she is liable to her own powers. Hence, liabilities are the correlates to powers,
as directed-duties are to claims. I define liability as:

\[ \text{Liability: } \text{An agent, } y, \text{ has a liability with regards to some agent, } x, \text{ if and only if agent } x \text{ has a power, } \Psi, \text{ over some Hohfeldian element, } \Phi, \text{ of agent } y\text{'s.} \]

Where an agent is not liable to a power they have an immunity. I define an immunity as
follows:

\[ \text{Immunity: } \text{Agent, } x, \text{ has an immunity with regards to some act, } \Psi, \text{ of an agent, } y, \text{ if and only if agent } x \text{ is not liable to agent } y\text{'s act, } \Psi. \]

Though it may seem counterintuitive to say one has an immunity where one would not
normally find a corresponding power, the formulation given does entail this. Since the
Hohfeldian Analysis is intended to provide a logical framework by which we can assign elements to any potential acts, this is required for the completeness of the system.

Returning to the case of Xena and Yann: Firstly, Xena has an immunity from Yann changing her rights over her tent in such a way that he takes possession of it. Yann has no power that would transfer the ownership of Xena’s tent to him. Furthermore, Xena also has an additional immunity from Yann insofar as he does not have the power to change her rights with regard to some third party, Zelda’s, rights over the tent.

Finally, we arrive at the disability as the correlate of an immunity.

*Disability:* Agent, y, has a disability with regards to the Hohfeldian element \( \Phi \), of some agent x, if and only if agent x has an immunity with regards to y’s act, \( \Psi' \).

In the case just given, Yann has a disability both with regards to changing the status of Xena’s right to her tent relative to himself, and to Zelda (or any other person). He is unable to perform any action that would alter the Hohfeldian status of the potential actions.

This provides us with all of the terminology of Hohfeldian elements and their correlates. In the following subsection, I give an exposition of how these elements and correlates give us a wider picture of the anatomy and function of rights.

2.1.3. Completing the Hohfeldian Picture

Now that we have an understanding of the Hohfeldian elements and their correlates, I turn to how these bear out a wider-picture of rights. Firstly, the Hohfeldian Analysis provides completeness: all right-elements have correlates and these correlates bear out the relations
between the right-holder and all potential agents in the system. For example, with regards to a simple claim-right, all right holders are either directed-duty bearers correlate to the right or maintain a privilege with respect to the right.

However, each element not only has a correlate, but also has an opposite. The claim is opposed to the no-claim, the privilege to the directed-duty, the power to the disability, and the immunity to the liability. In the case of the claim, the claim requires that the agent towards whom the claim is directed has a duty directed at the right-holder to perform some act, $\phi$. Hence, the right-holder cannot have a no-claim, as this would entail that there is no relevant directed-duty. This opposition should be taken as logical contradiction, since the entailment would lead to the existence of both $y$ being under a directed-duty to $x$ to $\phi$, and also that $y$ is not under a directed-duty to $x$ to $\phi$. However, there is something further that can be inferred from this: when $x$ and $y$ are in a relation with regards to some act $\phi$, $x$ cannot have a claim against $y$ while $y$ has a privilege in the same relation. Again, this would entail that $y$ is both under the relevant directed-duty and not. This reasoning also applies to the higher-order elements, between the power and the immunity.
Since the Hohfeldian system sets out these strict logical relations, we are able to assign a status to any act at the first-order level, or for any Hohfeldian element at the higher-order level, via the entailment relations outlined in Figure 1. This provides the Hohfeldian Analysis with necessary completeness:\(^\text{19}\): If and only if one is not held to a relevant directed duty—as the correlate of a claim—one has a privilege; if and only if one is not held liable to a relevant power, one has an immunity.\(^\text{20}\) All acts within the system will be assigned a Hohfeldian status.

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\(^{18}\) This figure is my own reconstruction of Van Duffel’s in "The Nature of Rights Debate Rests on a Mistake," 106.

\(^{19}\) As identified by Biasetti in "Hohfeldian Normative Systems," 955.

\(^{20}\) I make use of the term relevant to mark out that two elements are in an entailment relationship with regard to the same object, \(\phi\) or \(\Phi\). If one element relates to \(\phi\) or \(\Phi\), but the other relates to some other object, \(\psi\) or \(\Psi\), then the entailment relations do not apply; the elements are not relevant with regards to one another. One should understand any Hohfeldian relationship as between three-parts: the element-holder, the correlate-holder, and an object (an act at the first-order level, or a Hohfeldian element at the higher-order level).
From here, we can begin to establish that rights consist of a set of Hohfeldian elements that will entail further normative commitments throughout the system of rights and their correlated duties. My right to bodily security will consist in claims against all agents in the system, producing in each agent a directed-duty towards me not to perform some act that violates my bodily security. This further entails that certain privileges will not exist, and so on. As in the case just given, these Hohfeldian sets can be made up of innumerable elements. The right to personal security may entail Hohfeldian elements that attach to past, present, future, and merely possible persons. Further, we may also want to say that the right of personal security comes with immunities from any power of another person’s to change the right-holder’s claims, which would entail correlate disabilities throughout the system. Hence, this somewhat simple right is going to consist of a potentially infinite set of Hohfeldian elements.

Glanville Williams stated “...every right in the strict sense relates to the conduct of another”\(^{21}\), and this is the essential characteristic of the Hohfeldian Analysis. However, this very characteristic may seem problematic: for, as Matthew Kramer points out\(^{22}\), our lay-speech about rights—with its emphasis on what a right entitles the right-holder—appears to paint a rather different picture to that of the Hohfeldian Analysis. The Hohfeldian Analysis, at its very core, is concerned with the directedness of duties: The having of a claim is just to be the agent to whom a duty is directed, and the having of a privilege is just to not be held to the relevant directed-duty. Powers and immunities relate either to these incidents, or to


\(^{22}\) Kramer, "Rights without Trimmings," 13-14.
themselves. In this regard, it is misleading to talk of the entitlement to a *good* that a right confers upon the holder; for the object of any right is not a *thing* per se, but a relation held against another agent (or many other agents) and certain restrictions on the performance of—or refraining from—of certain actions by the agent to whom the right is directed.\(^\text{23}\)

### 2.2. Conclusion.

The Hohfeldian Analysis, at its very core, is analysis of the nature of directed-duties. At the start of this section I said that to test a right we must ask: would some frustration of an agent’s posited entitlement to the good conferred by the entitlement be considered a wrong-doing against that agent? The emphasis on this directedness makes clear why, when discussing rights, we are concerned with whether the *agent* would be wronged by certain acts—not merely whether such acts are wrong generally\(^\text{24}\).

Nonetheless, the Hohfeldian Analysis itself remains silent on what justifies the directedness of the duties in-themselves.\(^\text{25}\) This is where one must turn to the major theories of rights—or, perhaps more accurately, the theories of directed-duties—for answers.

\(^{23}\) Hohfeld’s position on this is most clear in the passages contained within *Fundamental Legal Conceptions: As Applied in Judicial Reasoning*, 74-78. This is also the claim that commentators—such as Neil MacCormick and Alan White—have taken issue with.


\(^{25}\) Hohfeld himself held that the elements are *sui generis*. *Fundamental Legal Conceptions: As Applied in Judicial Reasoning*, 36. Hohfeld stating: “thus it is that attempts at formal definition are always unsatisfactory, if not altogether useless.”. I take Hohfeld to be asserting that the relations themselves cannot be analysed in terms other than by the relations themselves. Hence, in this chapter, I have defined all the elements in terms of one another. That being said, I take the directed-duty to be the base element from which the others can be defined. It is the directed-duty that, if any, we should seek an analysis of.
Chapter 3: Are all Theories of Rights Compatible with Human Rights?

In chapter 2 I outlined the Hohfeldian analysis of rights. The Hohfeldian analysis tells us that rights are intimately related to directed-duties. However, the Hohfeldian analysis itself does not tell us what makes something a directed-duty; it merely describes a structure for the relevant relations between right-holders and duty-bearers. In this chapter, I turn to a discussion of the major theories of what makes something a right, or—perhaps more correctly—what makes it the case that a given duty is a directed-duty.

Primarily, this debate has been between two major positions: The Will Theory and the Interest Theory. Will Theorists argue that the essential function of a right is to provide the right-holder with a sphere of agential autonomy. In Hohfeldian terms, the Will Theorist is committed to the position that rights necessarily entail that the right-holder have some power over the relevant claim-right. Contemporary expressions of the Will Theory are exemplified by H.L.A Hart’s statement, “...that in the area of conduct covered by the duty the individual who has a right is a small-scale sovereign to whom the duty is owed”\(^\text{26}\). This emphasis on the right-holder’s sovereignty has become the cornerstone of the modern Will Theory. Hence, the Will Theorist grounds the right-holder’s claim-right in something related to their autonomy.

Contrary to the position held by Will Theorists, the Interest Theory of Rights does not require that a claim-right be coupled with a power over the relevant duty to be a claim-

right. Rather, the Interest Theorist denies that the function of rights is necessarily to protect some area of autonomy. Instead, and as per the name of theory, the necessary function of a right is to protect some interest of the right-holder. Hence, the Interest Theorist holds that it is some interest of the right holder that grounds the right-holder’s having a claim-right.

In what follows of this Chapter and the next, I discuss whether these theories of rights are adequate for addressing rights as they relate to theories of human rights. In section 3.2. I argue that the most viable, if not all, accounts of human rights are going to commit us to positing that at least some rights are inalienable. Hence, in section 3.1., I discuss what it means to say that a right is alienable, before offering this wider argument about rights. In section 3.3. I argue that the Will-Theorist is committed to the position that there are categorically no inalienable rights, and then I turn to look at some recent rebuttals that prominent Will Theorists have given. I argue that none of these rebuttals are adequate. Therefore, I conclude that, given a commitment to the existence of human rights, the Will Theory provides an inadequate account of the function of rights.

3.1. Alienable Rights

Before discussing the problem inalienable rights present the Will Theory, I wish to address what it means for a right to be alienable. In particular, Terrance McConnell’s distinction between rights that are alienable and rights that are forfeitable helps illuminate what we mean when we call a right alienable.27 A right is alienable when one is able to, via their own volition, waive or transfer the right. For example, if a person chooses to represent

themselves in court, they waive their right to legal representation. However, a right is forfeitable when one is no longer entitled to it due to some action they have performed, not necessarily by the right-holder’s own volition. In this sense, while all alienable rights are forfeitable rights, not all forfeitable rights are alienable. This distinction is clear in the differences between two cases: If Alice transfers ownership of a house she owns to Ben, she has alienated her right against Ben that he not use the house. However, if Ben were to trespass on Alice’s house without her transferring ownership to him, he may be arrested by the police. In this second case Ben forfeits his right against being detained, regardless of whether he wills this forfeiture.

The distinction can be drawn out by providing an explanation for why no infringement against the right-holder occurs. In the first case, no infringement occurs because Alice has expressed her consent that the right be transferred to Ben. It is Alice’s consent, as the right-holder, that makes it the case that Ben now has a property right to the house. In the second case, no infringement occurs because Ben’s right is suspended due to his wrong-doing. Whether or not Ben consents to being detained has no bearing on whether an infringement occurs.

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28 We may want to say “trespass” here, however this may cause an issue as the right against trespassing seems to remain in this case: trespassing requires that one enter the property against the will of the owner. Since Alice has given her consent, this is not a case of trespass.

29 Note, that in this case the right is merely suspended. It is not the case that Ben is no longer entitled to the right. Rather, it is the case that some actions that would otherwise be considered infringements upon that right are justified due to Ben’s wrong-doing. This may not be the case with all forfeitable rights though. In some cases, the conduct of the right-holder may justify the permanent removal of that agent’s right.
Given the distinction and examples above, it appears that a right is alienable, if and only if
the right-holder’s consenting to the would-be-infringement can make permissible an action
that would otherwise infringe upon their right. To express this in Hohfeldian terms, the
right-holder must have some power over the right for the right to be alienable. In the case
of a forfeitable right, there must also be some power over the right. However, the kind of
power differs. In the case of an alienable right, there must be some power such that given
the right-holder consents to the waiver or transfer of the right. This is sufficient to justify the
waiver or transfer of the right. If no such power exists, then the right is inalienable. The
power concerning a forfeitable right does not require that the right-holder consent to the
change in the status of the right for the change to be justified. Hence, the right-holder’s
right may be liable to some other agent’s power (for example, a court of law), or their own,
but not one that necessarily requires their consent. Forfeiture merely requires that there is
some action, or set of actions, the right-holder can take that would make it the case that the
would-be-infringement is no longer an infringement.

The consequence of this is that forfeitable rights are not necessarily also alienable rights.
Take for example the right to life. The right to life, if any, is a strong candidate for a right
that is inalienable: merely consenting to being killed is not enough to justify a would-be
infringement of that right. However, if we take this to be true, it is still plausible that the
right to life could be forfeit under certain circumstances. For example, John Locke is

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For the purposes of this example, the right to life should be interpreted as a right that
imposes negative duties. This should be considered to be equivalent to the right against
being killed. I leave questions of whether the right to life is much broader for elsewhere.
famously credited with arguing that the right to life is inalienable.\textsuperscript{31} However, Locke also endorsed the state’s right to the use of capital punishment under certain circumstances.\textsuperscript{32}

While Locke’s position here is not without controversy, it is not an obviously inconsistent view either, and one way to explain why this may not be inconsistent is this distinction between alienable and forfeitable rights.

Perhaps another example may be less controversial. Even if we do not believe in the legitimacy of capital punishment, there may still be plausible scenarios where the right against to life is forfeit. For example, when an agent acts in a way that would threaten the life of another, this may forfeit their right to life. If the most plausible way of negating the threat the agent’s actions are causing is to kill the agent, then killing the threatening agent may be justified. In this scenario it is the actions of the agent that makes it the case that their right no longer applies. Hence, they forfeit their right.

While much more can be said on the nature of the forfeiture of rights and the examples presented above, forfeiture of rights is not of severe consequence to the focus of this discussion. Rather, what is important is that forfeiture is something at least conceptually distinct from alienability. Hence, a right’s being forfeitable does not necessarily entail that

\textsuperscript{31} Some philosophers, such as A. John Simmons in "Inalienable Rights and Locke's Treatises," \textit{Philosophy and Public Affairs} 12, no. 3 (1983), have argued that crediting Locke with this argument is incorrect. Even if this position is incorrectly attributed to Locke, my purpose here is to merely point to an example of a view that is able to draw out the distinction between alienation and forfeiture, without being (obviously) inconsistent.

\textsuperscript{32} For example, see §3 of Locke’s Second Treatise. Note that it is contested how far Locke endorsed the use of capital punishment. See: Brian Calvert, "Locke on Punishment and the Death Penalty," \textit{Philosophy} 68, no. 264 (1993); A. John Simmons, "Locke on the Death Penalty," \textit{ibid}.69, no. 270 (1994).
the right is also alienable. This is true even if it is the case that all alienable rights are also
forfeitable rights. The consequence of this is that committing to the inalienability of a right
does not necessitate that the right-holder is at all times and for all purposes entitled to the
claims that make up their right.

There is one further critical distinction to make when discussing inalienable rights. Joel
Feinberg offers a distinction between a right being alienable in the sense that one can
alienate the content of the right, with that of a right where the right itself is alienable. In
the former case, the right remains, but the correlated duty is temporarily revoked and can
be reinstated at any time. This is a case of waiving a right. In the second case, the right itself
is permanently revoked and cannot be claimed in the future. This is a case of relinquishing a
right. For example, I may choose to allow a friend to live in my house for a period while I am
on vacation. In this case, my friend is no longer duty bound to avoid using my property.
However, if I choose to return earlier than planned from my vacation, I may choose to
invoke my claim that my friend cease to use the property. My friend must allow this
regardless of my earlier waiver. Hence, my right to my house remains regardless of my
previous waiver. This is an example of mere waiver. However, if I choose to sell the house to
my friend, I transfer the right and cannot invoke it in the future. While my friend may allow
me to stay in the house sometime in the future, I no longer have a claim against her that I
be allowed use of what was my house. Hence, I am no longer entitled to the right to live in
the house. This is an example of relinquishment.

33 Feinberg, "Voluntary Euthanasia and the Inalienable Right to Life."
One consequence of this distinction is that we can identify two forms of inalienability. When a right is such that the right-holder cannot ever waive it, the right is strongly inalienable. When a right is such that the right-holder cannot relinquish the right itself, the right is weakly inalienable. The right against being killed seems an example of strong inalienability. Intuitively, an agent’s consenting to waive the duties of other agents with relation to not killing the agent is not sufficient to negate those same related duties. Hence, the agent cannot alienate the content in relation to their right against being killed—they cannot waive the right. However, rights like the right to property do not seem to be inalienable in this strong sense. Rather, the right to property, if it is inalienable, is inalienable in the weak sense. An agent is able to waive their ownership over specific pieces of property. They can even waive their ownership over all property—as some monks and priests do. However, this does not mean they are unable to then acquire property again in the future. The right remains so that, if the agent chooses to acquire some things in the future, those things are still their property by right. Hence, while they do not relinquish the right, they can waive the content of the right. In this case, while it does not seem impossible that an agent relinquish their right to property, intuitively it appears that the right shouldn’t be able to be relinquished.34

With these distinctions cleared up, the important question in what follows is: Which form of inalienability is the defender of human rights committed to?

34 One reason I could offer for this conclusion is that if an individual were to completely relinquish their right to property, this is likely to severely increase the risk that they will either become destitute or a burden on others. Given these negative effects, it shouldn’t be the case that one can relinquish their right to property.
3.2. The Inalienable Nature of (at least some) Human Rights

It is arguable that at least some of the goods that human rights protect are of such importance that to provide the right-holder with the power of alienation can only be to the detriment of the right-holder. This sentiment is reflected in the opening words of the Preamble to the Universal Declaration of Human Rights, that states: “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”\textsuperscript{35}. Hence, the defender of human rights, at least on the basis of this paradigm, is likely to be inclined towards the existence of some inalienable rights.

Recall, in Chapter 1 I introduced the \textit{Intuitive Theory of Human Rights}. The Intuitive Theory can be stated as:

\begin{align*}
\text{Something, } x, \text{ is the object of a human right if and only if, for any and all entities, if that entity is a human, then that entity has a right to } x.
\end{align*}

Given this formulation, a property of human rights is that they are universal and, hence, extendible to all entities that are human beings. However, if the holder of a human right is able to relinquish the right itself, this would contradict this universality. The problem is that there would exist some entity such that the entity is a human being and is no longer entitled to the human right. Hence, that right cannot be a human right on this formulation. It follows that any theory of human rights that commits to this kind of universality is also going to be committed to the position that any right that is a human right cannot be relinquished. Hence, since it is the right that cannot be relinquished in this case, this commitment is to

\textsuperscript{35} The United Nations, "The Universal Declaration of Human Rights".
weak inalienability. On this account, it is still plausible that the content of human rights could be alienable.

Nonetheless, not all theories of human rights necessarily commit to this universality feature—particularly some functionalist accounts. Furthermore, this rather demanding commitment to the inalienability of all human rights may be offered as a reason for revising or rejecting any theory of human rights that entails it. Hence, in what follows, I offer two reasons intended to support the claim that the human rights defender is committed to the existence of inalienable rights. The first is that there exist certain goods secured by human rights such that it would be irrational for any agent to will the alienation of their rights to these goods. The second is that if it were the case that agents could alienate certain basic rights, they would be unable to have any rights at all. Hence, unless the human rights defender is willing to accept that there may be no rights at all, she must commit to the existence of these basic rights and that, in committing to the existence of these basic rights, she commits to the existence of at least some inalienable rights, namely these basic rights.

The first of these reasons is exemplified in the work of Alan Gewirth. For Gewirth, the relevant grounds for human rights is that of the possibility of human action, and, in particular, our ability to act as agents. Gewirth argues that there are some rights such that one cannot consistently reject that they have the right, whilst also accepting their own status as an agent. These rights are what Gewirth calls generic rights and, for Gewirth,

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when generic rights are applied to the specific conditions of human agential activity, we are able to derive a list of human rights.

Gewirth’s argument begins by identifying that there are some things that are generically required for any agential purpose. For example, I may make the decision to go to the park later today. However, if I find my legs to be bound, I cannot walk there. Hence, I require that my legs not be bound for me to achieve my purpose. However, this requirement is not a generic requirement. Under different circumstances I may be able to achieve my going to the park, or other purposes, while my legs are bound. Rather, the generic requirement here is some form of liberty substantial to allow me to achieve my purpose. In this sense, some form of liberty is necessary for the possibility of agential activity. What exactly this liberty amounts to is going to be context sensitive, but nonetheless, the generic condition can still be stated.

By recognising the existence of generic conditions for the possibility of agential activity, I must also accept that, insofar as I am an agent, and my agency should be respected, I am also entitled to respect for those things that are generically necessary for the possibility of my engagement in agential activity. Hence, I have a basis from which to ground my claim that I am owed these things on account of my agency and the value ascribed to agency. This grounds my claim—rights against others that they have duties so as to protect my access to

38 Gewirth treats the term ‘necessity’ as it concerns the possibility of agential activity as a matter of degrees. While things can be more or less necessary in this sense, Gewirth’s argument concerns those things which are generically necessary. For more, see Gewirth’s discussion in “The Criterion of Degrees of Necessity for Action” in Reason and Morality, 343 - 44.
these generic capacities for agency. Furthermore, since it is on account of my agency, the same reasoning that grounds my claim-rights must apply to any other entity that is an agent, and so they are also entitled to equivalent claim-rights.\textsuperscript{39}

The upshot of this argument is that the agent must accept that she, as well as any other agent, are entitled to these rights, in virtue of their being an agent. However, a further consequence of this is that these rights are inalienable. If the agent must accept that every agent is entitled to these rights on the grounds that they are necessary for the possibility of any agential activity, on the same grounds, the agent would be irrational to waive them without also accepting the waiver of their agency. Hence, we can establish the conditional that if it is the case that the agent waives any of her generic rights, then she must also accept the waiver of their agency. However, being an agent is a matter of fact independent of whether the agent themselves believes that she ought to be considered an agent. Therefore, all other agents ought to uphold the belief in the first agent’s agency, and her entitlement to the generic rights in virtue of such, regardless of the agent’s own beliefs about her agency. Hence, the agent’s attempt to waive her generic rights would be frustrated by her status as an agent who has the potential to waive any rights at all.

While Gewirth’s argument refers specifically to his own theory of generic rights, parts of the argument can be generalised so as to capture the connection between inalienable rights and human rights for foundationalist theories more generally. Foundationalist theories tend

\textsuperscript{39} For the purpose of a short exposition, I have avoided stating the strict logical relations that Gewirth does. For Gewirth’s own succinct statement of the logical commitments see: \textit{The Community of Rights}, 16-20.
to follow a somewhat similar schematic to Gewirth’s. Broadly, the general foundationalist argument can be separated into three steps: The first begins by identifying something about being human or about human existence that is fundamental to living what can be considered a distinctively human life—as Gewirth does with agency. In the second step, the foundationalist assesses those things that are necessary for the living of a distinctively human life in the way they have identified in the first step. Finally, in the third step, the foundationalist attempts to make a connection between the necessity of these things for living a distinctively human life with the justification that every human has a legitimate claim to these things as a right.

By grounding these claims in things that are necessary for living a distinctively human life, the sacrificing of these claims comes at the cost of the possibility of fulfilling a distinctively human life. Insofar as a human ought not give up the possibility of living a distinctively human life, one ought to not have the power to alienate these rights. Hence, one ought not have the power to alienate these claims.

The second reason I offer for the claim that the human rights defender is committed to the existence of inalienable rights is exemplified in the work of Henry Shue. In Shue’s Basic Rights40 he argues that there are some rights that if an agent was not entitled to them, no other right the agent could have would be secure. These are the rights that Shue calls basic. It follows from this, that for an agent to have any secure rights, they must also be entitled to any basic rights.

Shue’s argument centres around his understanding of what it is for something to be a moral right. Shue is particularly concerned with the way a right should remove certain potential vulnerabilities the right-holder might otherwise be exposed to. Hence, he states that: “[a] moral right provides (1) the rational basis for a justified demand (2) that the actual enjoyment of a substance be (3) socially guaranteed against standard threats”. It follows from these conditions that if something is such that it is universally required by all rights for the social guarantee against a standard threat, a right to that thing is entailed by the existence of any moral right. These rights, again, are those which Shue calls basic rights. They are the rights that are necessary for the possibility of having any rights at all, because they are part of the social guarantee for any right. Hence, if we accept there are some rights, as the defender of human rights does, then those rights require that the right-holder also be entitled to the set of basic rights. These rights cannot be relinquished without relinquishing the possibility of having any other right.

However, so far Shue’s argument only shows that if there are any basic rights, they are necessary for the ability to have any other rights. We could always argue that there just aren’t any basic rights. That being said, Shue offers liberty, security, and subsistence rights as examples of rights that appear to be basic. Shue offers many reasons for thinking that these are basic rights, but broadly, they are the kinds of things that, if we did not have rights

41 For example, Shue avoids a conception of rights that allows for merely accidentally fulfilled rights, such as when no one just so happens to be violating the right (ibid., 16-18.). He also wishes to avoid a conception that will allow for rights that potentially leave the right-holder no better off than if they lacked the right(ibid., 32-33.).

42 Ibid., 13.
to them, then it would be rational to trade the enjoyment of any other right for the enjoyment of these things. Consider the case where a person is deprived of their enjoyment of security: at any moment a threat could occur to the person’s life, and with it, a threat to the enjoyment of any other thing they may have a right to. Under these conditions they could not have a social guarantee against standard threats to anything, and, thus, they cannot have any rights. Hence, if we are already committed to the existence of some human rights, we must be committed to the existence of those basic rights required for the securing of those rights to which we are already committed.

Where the previous reason only applied to foundationalist accounts of human rights, this second reason appears to apply more broadly. If Shue’s argument is correct, even accounts that are functionalist will have to recognise the dependency of any human right on the right-holder’s being entitled to the basic rights. For example, even if human rights are merely grounded in political agreement and international practice, these rights are still not held as rights by an agent unless that agent is entitled to all the claims entailed by that very right, of which the basic rights are a necessary subset.

While I do not believe these are absolute, nor exhaustive, reasons that the human rights defender is committed to the existence of inalienable rights, I offer them here to express two examples of why the human rights defender is likely to be committed to this position. Likewise, they also contribute to framing the kind of inalienability that it appears the human rights defender is likely to commit to. Both of these reasons for believing that the defender of human rights is committed to the existence of inalienable rights express a certain kind of inalienability. Not only do they show that the human rights theorist ought to commit to the
inalienability of the rights themselves, they also show that the human rights theorist ought to commit to the claims at least some of these rights provide the right holder. In Gewirth’s case, there are certain rights that cannot be alienated because to alienate the content of such would be to reject one’s own ability to engage in agential activity. In Shue’s case, there are some rights that are part of the content of other rights. Most importantly, there are basic rights that are part of the social guarantee of any other right, and hence these are the content of other rights. Hence, the inalienability that these reasons are concerned with is that of strong inalienability.

3.3. The Will Theory and Inalienable Rights

In the chapter so far, my intent has been to establish evidence for believing that the defender of human rights is committed to the existence of inalienable rights. While this in itself may not seem an overly controversial issue, I now turn to discussing why this commitment may be an issue for those who would wish to explain human rights through the Will Theory of rights.

One pressing objection to the Will Theory is that it cannot account for inalienable rights. The problem comes with the Will Theory’s commitment to the right-holder having a necessary power over the relevant claim-right. However, if a right is inalienable, then it appears that the right-holder cannot have a power over that same right. The argument can be summarised as follows:

\[43\] In Hohfeldian terms, we may consider some of the directed-duties imposed by the non-basic right to be that there is a duty to uphold the basic rights of the right-holder.
P1: If the Will Theory is true, then all rights are such that the right-holder has a power over the relevant claim-right.

P2: If there exist inalienable rights, then there are some rights such that the right-holder does not have a power over the relevant claim-right.

SC: The Will Theory is true, if and only if there exist no inalienable rights.

However, as I have argued above, the defender of human rights is committed to the existence of some inalienable rights. Hence, we can add another premise and derive that the human rights defender should not endorse the Will Theory. This can be summarised as follows:

P3: The human rights defender is committed to the proposition that at least some rights are inalienable.

C: Therefore, on pain of contradiction, the human rights defender should not endorse the Will Theory.

In what remains of this section, I explore this argument. Firstly, I begin by discussing why the Will Theorist is committed to the claim that all rights are alienable. I then turn to Neil Simmonds\(^44\) argument that the Will Theorist need not commit to the all-things-considered permissibility to alienate every right.

Finally, I return to a defence of inalienable rights against a recent criticism offered by Hillel Steiner. Steiner argues that the concept of an inalienable right is incoherent.\(^45\) Hence, there

\(^{44}\) Kramer, Simmonds, and Steiner, *A Debate over Rights*.

\(^{45}\) Hillel Steiner, "Directed Duties and Inalienable Rights," *Ethics* 123, no. 2 (2013).
are no inalienable rights. Consequentially, inalienable rights are not a problem for the Will Theorist, as there just can’t be any. If Steiner is correct, then the human rights defender must either give up on their commitment to the existence of human rights, or reformulate their theory so as to avoid the commitment to inalienable rights.

I defend the existence of inalienable rights from Steiner’s criticism, responding that Steiner’s criticism rests on an unsound premise. Hence, the defender of human rights need not give up their commitment to human rights, nor the existence of inalienable rights. Hence, I conclude that, if human rights do exist, the Will Theory appears inadequate to properly account for them.

3.3.1. Is the Will Theory Incompatible with Inalienable Rights?

Since for the Will Theorist, a right is a protection of individual autonomy, this must include the ability of the right-holder to express their autonomy over the right itself—they are not just a passive benefactor of the right. As concerns legal rights, this is exemplified by the right-holder’s ability to enforce or waive compliance and retribution for non-compliance with the claim. For example, an assault, as the violation of the assaultee’s right, is a wrong against the assaulted. Hence, the assaulted can enforce their right in pressing civil charges, but also has the option to forgo pressing civil charges. The assault, as a violation of a claim, provides the claim-holder the opportunity to enforce or waive their claim. In this regard, the Will Theory explains how a claim legitimises enforcement via the autonomy of the claim-holder.

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46 In this sense the criminal wronging is done against the state, for it is the state that has the power over any criminal charges.
Consider what this means for the Hohfeldian Analysis of a right. The Will Theory, with its emphasis on autonomy, implies that for something to be a directed-duty—hence, to be the correlate of a legitimate claim-right—it must include the right-holder’s power over the relevant claim and duty (this is outlined in Figure 1 below).

**Figure 1: Anatomy of Will Theory Rights**

\[ x: \text{Power} \quad \cdots \quad \text{Claim} \]

\[ y: \text{Liability} \quad \cdots \quad \text{Duty} \]

[Where: solid lines = correlates; and, dotted-lines = ranges over]

For the Will Theorist, a duty is directed *only* when its bearer is liable to some power, and its direction is towards whomever has a power over that same duty. This entails that one only has a claim if they have a power over the correlate duty: the power to enforce the duty or waive the duty. I define this form of the Will Theory as follows:

Will Theory: an agent, x, has a claim that some agent, y, perform (or refrain from) some act, \( \phi \), if and only if x has a power over y’s duty or privilege to \( \phi \).\(^{47}\)

In Hohfeldian terms, both enforcement and waiver amount to setting the status of lower-order elements concerning the relevant duty. Hence, both enforcement and waiver—crucial

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\(^{47}\) Since this definition follows the same structure of my definition of a claim, merely without the reliance on the use of duty condition, the Will Theory can be understood as a definition of what it is to have a directed-duty, and, hence, a claim.
features of the Will Theorist’s analysis of rights—are captured by the power condition. Further, since the power condition establishes a power over a duty (as opposed to any other element), enforcement and waiver logically exhaust the possible powers that can be applied to the duty.

By making powers essential to rights in this way, the Will Theory gives a Hohfeldian expression to the statement that rights are essentially protections of the right-holder’s autonomy. The power condition embeds the claim-holder’s ability to enforce and/or waive the relevant duty. When a right-holder enforces a duty, the duty becomes binding because the right-holder wills it. When a right-holder waives a duty, the duty no longer applies because the right-holder wills it. In this sense, the Will Theorist asserts a justificatory relationship between the will of the right-holder and the status of the related duties.

This provides the Will Theory with the ability to capture the intuition that rights protect a sphere of autonomy for the right-holder. It is the will of the right-holder, as expressed through Hohfeldian powers, that grounds the justification for the existence, or lack thereof, of the relevant duty.

However, it is this commitment to the power condition that is incompatible with the existence of inalienable rights in the strong sense. For the Will Theory’s power condition makes necessary that the right-holder have the ability to waive the associated duties in order for them to have any claim-right at all.
3.3.2. Simmonds’ Unilateral Will Theory

Nigel Simmonds presents a view of the Will Theory that does not commit to the necessity of the permissibility of both the powers of enforcement and waiver. 48 Simmonds argues that there is a distinction between the permissibility of the use of a power and the ability to choose to use a power. Given this distinction, Simmonds argues that the Will Theory only requires the ability to choose to use a power—the permissibility or impermissibility of making that choice is another issue. If Simmonds’ argument is correct, and if inalienability is conceived as a mere permissibility constraint, then Simmonds’ Will Theory is compatible with inalienable rights.

Simmonds begins by addressing a distinction in two forms of H.L.A. Hart’s version of the Will Theory. Originally, Hart had identified the choice of a right-holder as the commonality amongst the things we class as rights. 49 However, in Essays on Bentham Hart makes the stronger claim that a ‘bilateral liberty’—understood as a paired permission to either waive or enforce a duty—is what is central to the claim-right. 50 Simmonds argues that Hart’s latter movement is not necessary and, in fact, mistaken. This movement, Simmonds claims, confuses the concept of moral liberty 51 with that of choice. 52

50 Ibid., 188.
51 Simmonds uses the phrase ‘judicial liberty’ as his discussion falls within jurisprudence. However, the point applies to rights generally. Hence, it is applicable in the case of moral rights also.
52 Simmonds, "Rights at the Cutting Edge," 220.
Simmonds’ argument can be laid bare by an example: It is possible that there are cases where it is impermissible for a right-holder to use a Hohfeldian power (say of transfer), but that they still can choose to use it. Simmonds offers the example of cases where a seller of goods may be wronging someone by selling the goods and so, although it is not morally permissible to sell the goods, the sale nonetheless confers the transfer of the property rights over the goods to some other party.\textsuperscript{53} Hence, in this case, though it is not permissible for the seller to use the power associated with the transfer of property rights, they can still \textit{choose} to use it. It is this choice that authorises the change in duties, and so, a bilateral liberty—understood as a paired permission—is not required. Hence, Simmonds concludes that the Will Theorist ought to understand the power condition as merely concerning actions that the right-holder can choose, as opposed to the stronger position concerning actions it is permissible for the right-holder to choose.

3.3.2.1. Normative vs. Descriptive Inalienability

If Simmonds’ version of the Will Theory is correct, then it appears the argument from inalienability may no longer be a problem for the Will Theory. For if inalienability is merely the case that the right-holder does not have a moral permission to relinquish the right, then this is compatible with the Will Theory when conceived as involving choice. While the right-holder morally ought not alienate the right, they can still choose to.

\textsuperscript{53} Ibid. While the example Simmonds offers is a legal example, the moral consequences appear to be parallel to the legal consequences.
However, I believe that this is not the kind of inalienability that concerns rights. To claim that a right is inalienable is not to merely claim that it shouldn’t be waived by the right-holder, but rather, the stronger claim that the right-holder cannot alienate the right. The distinction here between a normative claim of inalienability that the use of the power to relinquish the right is not justified, and the descriptive claim that the right-holder’s attempt to relinquish the right would not be sufficient to ground any changes in the set of duties concerning the right. In the normative form, I may be under some external duty to not relinquish the right: For example, I may have accepted a deposit from my friend so that they may buy my bicycle the following week. However, I may then choose to sell it to some other person for a greater amount. While my selling the bike to this third person wrongs my friend, it still makes it the case that ownership is transferred to this third person. In this case, my transfer right entails alienating it from myself.

Alternatively, as regards the descriptive sense, the permissibility of the action that changes the status of the right is not in question. It just is the case that no possible action has the consequence of changing the status of the right. Take for example the attempt to relinquish a right we consider inalienable, like the right against being killed. Actions that in many cases would relinquish a right, say like an expression of consent, are unable to achieve that end as it applies to the right to life. Hence, the right-holder does not even have the choice to relinquish the right, even though they may materially relinquish the content of the right. In this descriptive sense, we would be describing this feature of the right by calling it inalienable. Hence, the term descriptive inalienability: it is by the very makeup of inalienable rights that they cannot be alienated, not merely the case that they shouldn’t be. I take this to be the correct way to interpret the claim that a right is inalienable.
If I am correct that the claim that rights are inalienable should be interpreted in this way, then even Simmonds’ Will Theory cannot avoid the issue of inalienable rights as it applies to rights. If these kinds of inalienable rights exist, the agent does not have a choice over whether to waive the relevant right. Since, Simmonds’ Will Theory still requires the agent to have choice for them to have a right, Simmonds’ Will Theory is incompatible with the existence of inalienable rights and, therefore, does not make the Will Theory any more applicable for the analysis of human rights.

3.3.3. Steiner’s Denial of Inalienable Rights

Even if it is true that Simmonds’ version of the Will Theory is liable to incompatibility with inalienable rights, Hillel Steiner has argued that inalienable rights are incompatible with the Hohfeldian analysis of rights. If Steiner is correct, we have good reason to give up on any commitment to inalienable rights. Proponents of inalienable rights face a dilemma: (a.) that a Hohfeldian analysis of any inalienable right is going to produce an infinite regress of further possible powers of alienation, or (b.) the denial of the core of the Hohfeldian system. Steiner argues that accepting either horn of the dilemma is untenable. Therefore, the defender of inalienable rights is better off giving up on their commitment to inalienable rights. Consequentially, if we do not accept the existence of inalienable rights, then the Will Theory’s incompatibility with them is a non-issue.

The strength of Steiner’s charge comes from establishing the legitimacy of the first horn of the dilemma. Due to the prevalence of Hohfeldian analysis in discussion of rights it would be

54 Steiner, "Directed Duties and Inalienable Rights."
an incredibly costly concession for the defender of inalienable rights to take up the second horn.

However, the first horn does not establish itself so obviously. Steiner’s point essentially turns on the nature of the Hohfeldian system itself. In the Hohfeldian system, wherever an agent has a lack of a power, the agent has a disability. However, this disability may be liable to some further power that may replace the disability with a power itself. Hence, a regress can be established: Agent x lacks the power to waive a duty, A. Thus, x has a disability as regards A. This disability itself may be the object of a further agent, y’s, power to alter the state of Hohfeldian elements so that x may come to have the power to waive duty A. That is, x’s disability may be liable to some further power of y’s. If this is not the case, then we must ask the same of y’s disability in regard to altering x’s disability; we must ask if some further agent, z, does not have a power over y’s disability over x’s disability, so on and so forth. This motivates the infinite regress that the insistence of an inalienable right is going to commit us to. Steiner concludes that this regress is akin to “…a game whose rules include a stipulation that, at the end of any round, there is someone who is empowered to demand and secure a further round”\(^{55}\).

For example, we may believe that an agent has an inalienable right to life as codified in law. However, an agent, X, who is terminally ill wishes to challenge this and so they bring a case to a court and argue that the court ought to make it the case that they have the authority to alienate their right to life. The court informs the individual that they do not have the right to

\(^{55}\) Ibid., 239.
give the individual authority to alienate their right to life, and whether they have this right or not is a matter for the legislature. X now brings the argument that the court ought to have this right to make these kinds of changes to the legislature. However, the legislature is unable to make these changes because the constitution does not provide such powers to the legislature. At this point X may be forced to look to a referendum, or they may have to look even further as to why a referendum is unable to make these changes in this case. What X is looking for is a way that the system of powers can be changed so that the court would have the authority to alienate their right, and, hence, X would be able to argue their original case, possibly win, and, therefore, make it the case that X would be able to alienate their right to life. The point is that there is always some further possible power holder that could make it the case that there is a possible state of affairs where changes in the system of powers could make it the case that the right is under certain circumstances alienable.

The problem this regress presents inalienable rights is that for any right that we may believe to be inalienable, there is always a further layer of the Hohfeldian elements to check. All it takes is for one of these infinite layers to present a power where a disability should be, for the potential of a chain of changes in the system that would eventually leave the first right liable to some power that would allow the right-holder’s consent to change the status of the relevant duties and, hence, it would not be inalienable. Essentially, the problem is that we can never actually determine a right to be inalienable under this Hohfeldian analysis.

However, Steiner’s argument suffers from an elementary confusion between the Hohfeldian analysis of inalienable rights and the substantive matter of whether such rights really do exist. I shall argue two points for this: Firstly, the Hohfeldian analysis is intended as an
analytic tool for describing the structure of rights, it is not intended to tell us what kind of
rights there are. Secondly, following the former, if we are to commit to inalienable rights,
we can, rather simply, answer any question that derives from the regress: if we know the
right to be inalienable, we know there is no potential configuration of Hohfeldian elements
that would allow for the waiver of the right, hence, we can answer that there are disabilities
all-the-way-down. Essentially, I argue that the reverse direction of explanation is the correct
one, and so the infinite regress is not problematic.

Steiner’s primary charge is that the infinite regress leads to the impossibility of determining
any inalienable rights. The problem being that there is always another element to check
for—the possibility of a power that will make possible the alienation of the right under
certain circumstances. While I agree with Steiner that if this was the case, it would be a
problem for the defender of inalienable rights, I disagree that this is the correct way to
assess the inalienability of a right. Laying the problem out further may help: given the
nature of Hohfeldian analysis, any disability is necessarily matched with a correlate
immunity. If it is the case that you cannot change a certain duty (or lack thereof) of mine,
then I have an immunity relative to you. Steiner establishes that the inalienable right
establishes a disability of the right-holder’s, but fails to establish a correlate immunity, since
it remains open whether the right-holder’s disability is liable to some further chain of
powers.

Steiner is mistaken to consider this a problematic regress. We can investigate the
inalienability of a right independent of a Hohfeldian analysis, and this will allow us to
determine certain Hohfeldian elements on the basis of considerations independent of the
Hohfeldian system.\textsuperscript{56} In fact, this is the proper application of Hohfeldian analysis. Hohfeld’s system does not allow us to discover features of rights; rather, it acts as a tool for describing the anatomy of rights. This is evident in Hohfeld’s own project. In establishing his system, Hohfeld sought to find those features by which all the things labelled rights can be categorised. What we are left with is a set of elements that allow us to describe the parts that are there in front of us when we look at a right and how they relate to one another. This clarifies our understanding of the rights prior to a Hohfeldian analysis, but is not independent of our pre-Hohfeldian understanding. In fact, the Hohfeldian analysis should be guided by our pre-Hohfeldian understanding of any right in question.

Hence, when we analyse a right we already believe to be inalienable we do not require a Hohfeldian analysis to know that it has the feature that it cannot be alienated under any circumstance—this is part of what it means to be \textit{inalienable}. When we call a right inalienable, we have to offer reasons for believing that it is inalienable. For one, we must offer reasons that are able to mitigate the charge of paternalism in stating that a right-holder does not have control over the alienation of the right, and these are the kind of reasons that will be independent of any Hohfeldian analysis. Hence, we can derive a conditional on the basis of this pre-Hohfeldian analysis: If we posit that a right is inalienable, it both comes with a correlated disability and an immunity from any power that could possibly make it alienable.

\textsuperscript{56} For example, consider the arguments given earlier in this chapter that provide evidence to believe in the inalienable nature of some human rights.
The crux of this is that this immunity has priority within the Hohfeldian analysis of the inalienable right. By giving this immunity priority, it allows us to answer any of the questions brought about by the regress. For any question about whether an agent has a power relative to making the right alienable, the answer is a resounding no; they have a disability, exactly that disability correlate to the immunity that Steiner claims is missing. Hence, the infinite regress is not a problematic regress. Though we may always ask the further question, the answer is already established by the independent reasons for believing that the right is inalienable. Steiner’s mistake is to try and find the immunity at the end of his Hohfeldian analysis, rather than positing it as part of the pre-Hohfeldian gaze.

3.4. Conclusion

In this chapter I have argued that the human rights theorist ought to commit to some form of inalienability. However, the Will Theory of rights is unable to account for this kind of inalienability. Recent responses offered by Will Theorists have been unsuccessful in avoiding this issue. Hence, given the inadequacy of the Will Theory to capture inalienable rights and the human right theorist’s commitment to the existence of inalienable rights, the Will Theory is not an appropriate theory of rights for analysing human rights.

In what follows, I turn to the Will Theory’s predominant rival, the Interest Theory, and discuss its plausibility as a theory for analysing human rights. I defend the Interest Theory from some critiques and argue that the failure of the Will Theory gives us a reason for taking up the Interest Theory in the analysis of rights.
Chapter 4: A Theory of Rights for Human Rights

In the previous chapter, I argued that the Will Theory is unable to capture the inalienability of human rights. In this chapter I argue that, keeping all else equal, the failure of the Will Theory to capture inalienable rights provides a reason to take up the Will Theory’s main rival, the Interest Theory, for the analysis of human rights. I begin this chapter by introducing the Interest Theory and exploring its compatibility with the existence of inalienable rights. Here I argue that, because the Interest Theory does not commit to the necessity of a right-holder’s power over a right that the Will Theory does, we have reason to take it up for an analysis of human rights. I then move to defend this conclusion from two potential objections: Firstly, the general objection that the Interest Theory is over-inclusive, and, secondly, that there may be a more plausible ‘third-way’ theory of rights for the analysis of human rights.

4.1. Towards an Interest Theory of Directional Duties

Before I can give a defence of the Interest Theory’s compatibility with human rights, and in particular, inalienable rights, some further exposition of the kind of Interest Theory that we may wish to endorse appears necessary. In this section I seek to fill out the details on some of the specifics about the kind of Interest Theory we ought to endorse when analysing human rights. This shall lay the foundation for a discussion of the Interest Theory’s, and in particular a specific kind of Interest Theory’s, compatibility with an analysis of human rights as rights.
The Interest Theorist holds that interests are in some way necessary to the existence of claim-rights. Restated, a duty has directionality only when the fulfilment of that duty is in the interest of some entity. We can then identify the duty’s direction as towards the benefactor. Hence, we can state the simplest form of the Interest Theory:

*Simple Interest Theory:* an agent, x, has a claim-right that some agent, y, perform (or refrain from) some act, \( \phi \), only if y has a duty to (or to refrain from) \( \phi \) and y’s performing (or refraining from) \( \phi \) would protect some interest of x’s.\(^1\)

Note that this version of the Interest Theory merely states that interests are in some way necessary for something’s being a claim-right—or, stated differently, the interest is necessary to the duty’s directionality. That is not to say that there cannot be duties that do not concern interests, just that under the Simple Interest Theory they are not directional.\(^2\)

Hence, they cannot be the objects of claim-rights. Nonetheless, the Simple Interest Theory remains silent on whether interests amount to a sufficient condition on a duty being directional.

However, because this simple form of the Interest Theory only makes necessary the duty being in some way connected to the interests of the right-holder, it is not liable to the charge of incompatibility with inalienable rights. Hence, it at least appears better in this

\(^1\) Note that this formulation of the Interest Theory does not exclude rights that may be best expressed as powers. In the case of property ownership, because the right-holder, as property-owner, has an interest in their ability to exclude/include others use of the property, or to transfer the ownership itself, the right-holder has a power over the duty. Where the Interest Theory differs from the Will Theory is in its explanation that this power is grounded in the right-holder’s interest, rather than the power being what grounds the right-holder’s right.

\(^2\) For example, while I may have duties to give to charity, these are not duties owed to someone. No one has a justified demand against me that I give to charity, though my failure to give to charity may be wrong nonetheless.
regard than the Will Theory for the analysis of human rights. However, I want to go further and say that we not only have a reason for rejecting the Will Theory for the analysis of rights, but that this is in fact a reason to take up the Interest Theory. To do this I argue that current ‘third-way’ theories of rights have been inadequate, and therefore we are left with a choice between the Will Theory and the Interest Theory. But first I wish to address a general worry with the Interest Theory and offer a modification intended to avoid this.

One problem with leaving the Interest Theory at this level is that it underexplains claim-rights. While providing one necessary condition, it does not tell us anything further about what it would take for something to satisfy being a claim-right. The problem becomes clear when we examine the general challenge that the Interest Theory appears to be too inclusive. Take for example the case of Alan and Beth: Alan promises Beth that he will give her grandmother $100. While Beth has an interest in having promises to her fulfilled, her grandmother also has an interest in receiving the $100. But it appears counter-intuitive to say that her grandmother has a claim against Alan that he performs his duty. Further, we can potentially find further benefactors from the duty: Perhaps Beth’s grandmother will use the money to take Beth’s grandfather out for dinner. Hence, there may be a fourth-party, and so on. In these kinds of cases, the Interest Theory may run into the issue of entailing problematically expansive amounts of rights over individual duties.

The Simple Interest Theory could be vulnerable to these charges if it is interpreted as offering a sufficient condition. However, even if it is interpreted as only offering a necessary condition, it fails to offer any clear reason why there may be a difference between Beth’s interest and her grandmother’s in relating to Alan’s duty. All that the Simple Interest Theory
allows us to say is that it is possible either person has a claim-right. In this sense it helps us little with the problem of determining the actual direction of duties. Therefore, I wish to explore Joseph Raz’s somewhat controversial modification to the Simple Interest Theory.³

The Modified Interest Theory can be stated as:

**Modified Interest Theory:** an agent, x, has a claim that some agent, y, perform (or refrain from) some act, φ, if and only if y has a duty to (or to refrain from) φ, and x has an interest sufficient to ground y’s duty to (or to refrain from) φ.

What is essential to this version of the Interest Theory is the role sufficient interests play. While some Interest Theorists take the position that it is necessary that the interest justify the duty⁴, others do not.⁵ It may be best to think of this in terms of counterfactuals: While we may ground one individual’s claim against another by appealing to something, x, that is not an interest, given the counterfactual where x does not exist, but the relevant interest still does, the interest is sufficient to ground the individual’s claim.⁶ For example, we may appeal to an individual’s autonomy to ground their right to liberty, but if they did not have a sufficient interest in their having liberty, then they would not be entitled to liberty as a right.

It is this sufficient interest that is the anchor that determines directionality. A consequence of this is that the Modified Interest Theory is able to capture the rights Will Theorists are concerned with in a way that also captures the intuitions that motivate the Will Theory.

While the Will Theorist may use an appeal to the autonomy of the right-holder in justifying

⁴ Ibid., 169-72.
⁵ Kramer, "Rights without Trimmings."
⁶ While I can only imagine this applying in cases where the grounding relation is overdetermined, I am not committed to saying, at least in theory, that the grounding relation must be overdetermined.
some specific right, the modified Interest Theorist is able to accept this justification for the right, but instead state that the directionality is still anchored in some further interest of the right-holder’s in having their autonomy over the duty protected by the right.

The Modified Interest Theory goes further than the Simple Interest Theory, explicitly committing to the position that a mere interest is not sufficient to establish the directionality of the right. The interest must be such that it could ground the claim itself. Returning to the example of Alan and Beth: Alan has promised Beth that he will give her grandmother $100. Beth’s interest in having promises fulfilled is sufficient to ground Alan’s duty to provide Beth’s grandmother with $100. But there is a further interest involved here: Beth’s grandmother also has an interest in receiving the $100. However, the Interest Theory I have endorsed above does not state that it necessarily follows that Beth’s grandmother has a claim over receiving the $100. The problem is that the directionality of the duty is essential to claim-rights, and while the duty is owed to Beth, it isn’t owed to her grandmother, since her grandmother’s interest is not sufficient to ground the duty, at least intuitively. If Alan had not made the promise to Beth, then he would not be under any duty to Beth’s grandmother. However, if Beth’s grandmother did not have any interest in receiving the $100, Alan would still have a duty grounded in Beth’s interest that promises to her are respected. This is the case even if Beth’s reason for entering into the promissory-agreement—her grandmother’s interest—no longer exists.

4.1.1. Sufficient Interests

In this section I attempt to offer a little more clarity about what sufficient interests may amount to. To begin this, I provide a brief discussion of Joseph Raz’s Interest Theory and his
introduction of sufficient interests to the literature. From this, I look at some of the criticisms Raz’s position has received. I finish this section with a fleshed-out expression of the Interest Theory and how we ought to understand sufficient interests.

Joseph Raz in his *The Morality of Freedom* presents a version of the Interest Theory that makes central sufficient interests. In this regard, Raz’s position is similar to the view I have called the Modified Interest Theory. However, Raz offers a substantial account of what things might satisfy being sufficient interests. For Raz, rights are an intermediate step between arguments from ultimate values to the imposition of duties. Crucially, this embeds rights within the ethical reasoning from fundamental principles to applications in action; rights are not morally independent considerations. Rather, rights should be understood as situated within justificatory arguments for or against certain actions.

Hence, Raz is able to offer three conditions for an interest’s being sufficient to ground a right:

*Raz’s Conditions for Sufficient Interests:*

An argument for the right’s existence must be such that,

1.) The interest must be part of a non-redundant premise.

2.) There must exist a non-redundant premise or non-redundant premises that supply the grounds for attributing the right a certain level of importance, and/or for the right to be relevant to a particular person or class of persons.

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7 Raz, *The Morality of Freedom.*
8 Ibid., 181.
9 Raz is particularly aiming to avoid views that place rights as being prior to other moral concepts. See ‘Right-Based Moralities’ in ibid.
3.) The premises that satisfy the above must be sufficient by themselves to justify the conclusion.\textsuperscript{10} Given that the above is satisfied, and there are no further conflicting considerations, the interest that satisfies the first condition can be taken to be a sufficient interest.

While this shows us the justificatory role that sufficient interests are intended to play, it remains opaque what kind of interests are likely to be part of an argument that satisfies these conditions. Raz’s example of journalistic rights may provide some insight here. Journalists have rights to protect their sources. These rights are grounded in journalists’ interests in collecting information as part of the requirements of their role as journalists.\textsuperscript{11} The reason that this interest is sufficient to establish the journalists’ rights, as opposed to the average citizen, is because the public has a general interest in a functioning press. This second consideration also grounds the importance of the right of the journalist. Hence, both condition 1 & 2 are met. Given that these considerations are enough to produce a sound argument for the existence of journalists’ rights, we can establish that journalists do have a sufficient interest to ground the right.

Of note here is the role that premises satisfying condition 2 play. These need not be interests themselves. But they state something about the normative conditions at play that make the interest-based premise sufficient to ground the existence of a right. These necessarily include normative contextual content. For example, we may wish to include certain generally accepted justifications, like the appeal to the normative importance of a

\textsuperscript{10} Ibid., 181.
\textsuperscript{11} Ibid., 179.
free press used in the journalist example. Of course, we can always press for further justification for these premises, effectively extending the justification for the right out further, but this is a consequence of situating rights in the movement from ultimate values to duties. Anyone willing to accept the latter ought to have no problem with the former.

While Raz leaves open which interests matter most when considering sufficient interests, he does offer a passing comment that provides some insight. As per the journalist example, the interest that matters is not the interest of the individual person in wanting to keep their source confidential, but rather the interest they have as a journalist in performing the functions of their role, as a journalist. This, their role-based interest, is what matters most. Roles can be assessed as to the interests that we can expect any person in that role to have. In particular, many of our roles come with duties, or ends, towards which those roles are directed; having the rights that allow an agent to adequately fulfil the duties of their role is necessarily in the interests of the agent in that role.

That being said, this does not mean that we have every right that could allow us to perform the duties bestowed upon us by our roles. For example, if I am acting as a striker in a soccer match, my role provides me with the duty to attack the opposing goal. I will better perform my duty if the opposing defence did not defend the goal. However, this is not sufficient to ground a right against the opposing defence. Sufficient interests, while being conceived of as role-based, require more than merely being role-based. They require that they still satisfy Raz’s conditions for sufficient interests. Hence, some normative conditions must make it the case that the having of certain role-based interests are sufficient to ground the duties correlate to the right.
In the soccer example, the striker finds themselves under the normative conditions of a match, in which fair competition is essential to the whole game. Hence, a defence that did not defend would undermine the structure of the whole system. What this shows is that, for Raz, there exists a normative web that makes it the case that certain interests are given weight based upon the role the right-holder is playing. These role-based interests are weighed on the basis of the wider normative structure in which they are found.

One of the major benefits of focusing on role-based interests, as opposed to the actual interests of an individual, is that we avoid problems with having to be aware of what all-things-considered is in an individual’s best interest when assigning a right. As Leif Wenar notes, we may enter into agreements that are not in our individual best interests.\(^\text{12}\) If we are considering an individual’s interests, then the right-holder may not have a right to the satisfaction of an agreement that does not further their interests. This appears counter-intuitive, for we wish to believe that even if an agreement is not in the interests of the individual, they should still be able to enter into it, and this will justify their demanding that the requisite duties be fulfilled. If we no longer consider the interests of the individual in this way, but rather in the interests associated with roles, this problem can be mitigated. If we don’t consider the right-holder as individual, but as a party to the agreement, the interest in having agreements upheld and enforceable is available to ground the right.

However, Leif Wenar has argued that Raz’s own journalist example shows the flaws of Raz’s Role-Based Interest Theory: for it is not the interests of the journalists that ground their rights, but the interests of the whole public in having an independent media.\(^\text{13}\) This shows that the Interest Theory, or at least the kind of Interest Theory Raz is motivating, requires erring as to what counts as an appropriate interest. However, if we focus on the structure of roles within normative systems, it is clear why the rights of journalists exist; they exist on the basis of the role journalists play within the wider normative structure.

The problem is that Wenar’s criticism fails to adequately account for Raz’s argumentative structure of justification. In particular, recall Raz’s second condition that “Ps, as members of P, want these kinds of duties to be fulfilled”. This, I believe, is able to discharge this challenge. While there is an appeal to public interest, this is not what is justifying the right directly. The appeal to public interest instead justifies why the interests of a journalist are sufficient to produce directed-duties of a certain kind within the normative web. It is because, as members of the public, we have an interest in the existence of an effective and independent press that the journalist’s interests, as opposed to just any person’s interests, are sufficient to justify the journalist’s right to protect her sources. Hence, it is still the interests of the journalist that are non-redundant in grounding the journalist’s right. For without the movement to the journalist’s interests, the public interest in a free press would lack the mediating premise by which we can establish a sound argument for the right to protect sources. Further, by taking account of Raz’s second condition, we are able to capture the reasons why roles have specific rights associated with them.

\(^{13}\) Ibid., 204.
One of the advantages of Raz’s position is his treating rights as grounds for directed-duties. This justificatory interpretation allows him to understand rights through an argumentative nexus, of which rights are just an intermediate conclusion. This allows the Razian Interest Theorist the ability to analyse the structure that grounds the right itself in a way so as to assess the importance of the right against other competing considerations. Further, it allows the analysis to make clear the role the right plays in the wider normative structure.

4.2. Defending the Dichotomy

I return now to the argument I offered in the last chapter, where I attempted to show that the Will Theory is an inadequate theory of rights for assessing human rights. Hence, the failings of the Will Theory to adequately ground human rights provides a reason to believe that we ought to utilise some other theory for the analysis of human rights. In this section I seek to turn what has been a purely negative argument, the argument that the Will Theory is inadequate for the analysis of human rights, to a positive argument that the human rights theorist ought to take up the Interest Theory of rights. In support of this conclusion, I look at two recently proposed ‘third-way’ theories and argue that they are unsatisfactory. Given that they are unsatisfactory, I believe we have good reason to continue to consider the debate over claim-rights to be a battle between the Will Theory and Interest Theory. Given that we have good reason to uphold this position, the inadequacy of the Will Theory for assessing human rights does provide a reason to turn our attention to the Interest Theory alone.
Gopal Sreenivasan’s Hybrid Theory currently appears to be the most plausible ‘third-way’ theory offered in the literature on rights, and has received serious engagement from both prominent Will and Interest Theorists. The Hybrid Theory attempts to combine the Will and Interest Theories into a theory that is able to mitigate the problems of both. In particular, the Hybrid Theory is measured by its ability to capture ordinary talk of rights; where it has been argued that the Will Theory captures too little and the Interest Theory captures too much, the Hybrid Theory is intended to be just right.

As I argued in the last chapter, the Will Theory suffers because of its commitment that a right-holder must have power over a duty for them to have a claim-right over that duty. While I argued that this is a problem because of the human rights theorist’s commitment to the existence of inalienable rights, it is often also pressed as an issue for the existence of less-than-agent right-holders. For the Will Theory, if an entity is such that they cannot exert agential control over a right, it is not even possible that they have a power over the right. Hence, on the Will Theorist’s account, non-agents—like small children, the severely mentally disabled, and animals—categorically cannot have rights. This problem is not easily mitigated by introducing surrogates either. The Will Theorist is committed to the connecting of claim-rights to the power holder. Hence, the Will Theorist is committed to the counter-intuitive conclusion that, where surrogates exist to mitigate these issues, the right is the surrogate’s right.

In an attempt to avoid the charges of problematic exclusivity pressed against the Will

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Theory, and the charges of excessive inclusivity charged against the Interest Theory, Sreenivasan motivates his Hybrid Theory.

**Hybrid Theory:** Suppose X is duty-bound to φ. Y has a claim-right against X that X φ just in case: Y’s measure (and, if Y has a surrogate Z, Z’s measure) of control over a duty of X’s to φ matches (by design) the measure of control that advances Y’s interests on balance.¹⁵

There are two vital conditions that standout in this formulation: the matching condition, and the design condition. The matching condition states that the vesting of control over a duty-bearer’s duty correlate to a right must be in the right-holder’s interests on balance. This means that if it is in Y’s interests, on balance, that no-one has control over X’s duty to φ, then X’s duty to φ can only properly directed at Y if no-one has control over X’s φ-ing. Likewise, if it is in Y’s interests, on balance, that a third party have control over X’s duty to φ, and Y has a right to X’s φ-ing, then the third party that satisfies this condition must have control over the X’s φ-ing—this accounts for surrogates in the case of incompetent right holders (e.g. children, animals, and the severely disabled). Likewise, the design condition also allows the Hybrid Theory to avoid the inclusivity charge laid against the Interest Theory. In third-party benefactor cases while the effect of the enforcement of the duty may be in the third-party’s interests, the vesting of control over the duty does not match their interest. As applied to the earlier example from this chapter, Beth may waive Alan’s duty, regardless of the interests of her grandmother. Hence, the Hybrid Theorist would correctly say that Beth’s grandmother does not have a claim-right over Alan’s duty.

The design condition asserts that the matching condition must be met by design, and not by mere coincidence. Sreenivasan takes this to mean that the matching condition must hold over relevant counterfactual scenarios. Hence, the matching condition must track that design that furthers Y’s interests on balance, even if this results in vesting less than total control over the correlate duty to the surrogate. This protects Sreenivasan’s theory from falling prey to objections concerning potentially negligent surrogates. For example, in cases like those with children where a surrogate must be present, the design of the control must be such to be in the interests of the child on whole. If say the child was entitled to some money, perhaps from an inheritance, the surrogate would only be able to waive their duty not to take the child’s money if it is in the child’s interests on balance. For if the surrogate was able to waive their duty not to take the money merely for their own interests, then the vesting of power would fail to be in the child’s interests by design. In these cases, the control will be vested in such a way that the surrogate will not have complete authority over the money, or relevant duties surrounding it.

Sreenivasan’s alternative theory of rights has received criticism from both the Interest Theorist Matthew Kramer and the Will Theorist Hillel Steiner. They argue that, where Sreenivasan intended to capture the strengths of both theories without their respective weaknesses, he has in fact created a theory that has counter-intuitive consequences both predominant theories avoid. They offer the example of John, Ken, and Tony: John owes Ken

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16 "Duties and Their Direction," 490.
17 Similar to how restrictions may be put on the legal powers of trustees.
£100. Ken is a selfish person who would be unwilling to waive John’s duty even if the fulfilment of the duty would make John destitute. An official considering the case believes this may be a reason to take Tony, a third party known for his reasonable judgement, to have control over the duty and its waiver. However, if Tony ever were to waive John’s duty, Ken would become violent towards Tony. But neither would Tony want to enforce a duty that would make John destitute. Hence, Tony has an interest in not being vested control over the right. The official, considering this, decides to not vest Tony with control over the duty. Recall that the Hybrid Theorist is committed to the position that a duty is directed towards that agent for whom, by design, the vesting of power over the duty is in their interests. In this case, the vesting of power with Ken is in Tony’s interests, and because this was one of the official’s considerations in assigning the power to Ken, this appears to be by design. Hence, the Hybrid Theorist is committed to holding that John does not only owe his giving £100 to Ken, but also to Tony.

However, while this appears to be correct, Sreenivasan offers a reply. He argues that while the matching condition is met in Tony’s case, the design condition is not met. While Tony’s interests are advanced by not being vested with control over John’s duty, vesting Ken with this power is not that assignment of control that best advances Tony’s interests by design. This is because some other assignment could better advance Tony’s interests, or even some assignment to nobody. Even if this is the best assignment for Tony’s interests in this scenario, it does not hold across relevant counterfactuals. If it were the case that Tony’s interests were best advanced by assigning no-one control over the duty, this would not

19 Gopal Sreenivasan, "Duties and Their Direction," ibid.120, no. 3 (2010): 490.
justify assigning no-one control over the duty. This is because Ken’s interests in the assignment of control are still a major consideration. Hence, the design condition is not met for Tony.

However, Sreenivasan goes even further to say that in the example described the design condition isn’t met for anyone. This is because when the official brings in considerations beyond just those of Ken’s interests when assigning control, it becomes the case that had Ken not threatened Tony, Tony would have been vested with control. However, if Tony was vested with control, this would not be the assignment of control that best advanced Ken’s interests, since the consideration for assigning Tony control involved John’s interests. Hence, in the counterfactual where no threat to Tony exists, the matching condition would not even be met for Ken. Therefore, as the example has been offered, the design condition is not met in the actual case and, thus, Ken does not have a right over John’s duty either.\(^{20}\)

However, I believe there is another example that may be more pressing for the Hybrid Theory. It appears that the Hybrid Theory fails to adequately capture the right to a minimum wage in the correct kind of way. While it is in the interests of all workers that they have a right to a minimum wage, it is not in the interest of a specific agent, x, to have an inalienable right to a minimum wage in all circumstances. Agent x may find herself in a position where,

\(^{20}\) While this may be unsatisfying to some, it appears less counter-intuitive than the conclusion that Tony has a right over John’s duty. Also, while Kramer does offer a response to this, he appears to take Sreenivasan’s response as missing that the official had considered Tony’s interests in assigning control over the duty. Hence, Kramer merely clarifies the original example. Since I do not believe this is Sreenivasan’s response, I do not engage Kramer’s response here. See: "Some Doubts About Alternatives to the Interest Theory of Rights," ibid.123, no. 2 (2013): 261.
given others have an inalienable right to a minimum wage, she herself could waive her right to a minimum wage in order to gain a comparative advantage to secure employment. Hence, it would be in agent x’s interest to have control over her minimum wage right.

However, this completely undermines the purpose of a right to a minimum wage; we have a right to a minimum wage to protect us from exactly these situations where a free-market may make it advantageous for individuals to undercut the wages of others in this way. Minimum wage rights are only protected when all people are enforcing the right, regardless of whether it may be in their individual interest. If these sorts of waivers on the basis of the individual’s own interest are allowable, then having a right to a minimum wage becomes indistinguishable from its absence.²¹

However, this is the exact consequence of the hybrid theorist’s analysis. Ceteris paribus, vesting the individual right holder with power over the alienation of their right to a minimum wage is what most promotes the right-holder’s interests on balance. Hence, the individual right holder must be vested with this power for the matching condition to be satisfied. Further, the design condition demands that control be vested to the individual right-holder: For the relevant counterfactual holds that those who are most liable to violations of their minimum wage, for example the long-term unemployed, are those most likely to benefit from being able to waive their rights so as to gain a comparative advantage when competing for employment. Hence, it is in the interests of these agents across what can be considered relevant counterfactuals. Hence, the right-holder’s control is required by both the matching and design conditions. The consequence of this is that, if the Hybrid

²¹ In fact, it appears that there may be a plethora of similar prisoner dilemmas types of cases that would offer similar challenges for the Hybrid Theory.
Theory is true, then either minimum wage rights require that right-holders have the power to waive that very right, or what we call “minimum wage rights” are not rights at all.

The problem here is the competition between the interests of the right-holder as an individual vs. the interests of the right-holder as a member of a collective.\(^2\) The Hybrid Theory is likely to fail to correctly designate the power over a right when that right is such that it protects the interests of a right-holder as a member of some wider collective. Hence, the Hybrid Theory is not an adequate alternative to the predominant theories of rights for the assessment of human rights (as rights).

Another alternative to the Will Theory and Interest Theory is Leif Wenar’s Several Functions Theory.\(^3\) The Several Function Theory, which Wenar accepts, rejects the predominant theories’ commitment that rights should be understood merely as claim-rights. Instead, Wenar argues that we can capture all of those things that ordinary speakers call rights by extending our theory to capture all the different Hohfeldian elements, regardless of the existence of a claim-right. Hence, there is not one function that all rights have in common. Rather, there are many functions rights can perform. What they have in common, and what makes them rights, are these specific functions. Wenar identifies the functions of exemption, authorisation, entitlement to protection, provision, and performance as exhausting the relevant functions rights can play.\(^4\) While not exhaustive of all incidents or

\(^2\) Sreenivasan himself states that it is “nothing but a balance of the individual’s own interests” that determine where the vesting of power should lie. Sreenivasan, "A Hybrid Theory of Claim-Rights,” 271-72.

\(^3\) Leif Wenar, "The Nature of Rights," Philosophy and Public Affairs 33, no. 3 (2005); "The Nature of Claim-Rights."

combinations of Hohfeldian elements, Wenar argues these functions capture all, and only, those incidents or combinations that we correctly label rights.

However, Matthew Kramer and Hillel Steiner have argued that this does not significantly differ from the Interest Theory. In particular, they argue that Wenar is incorrect to assume that Interest Theorists are committed to the position that rights must function as protections of the right-holder’s interests. They state that, while some Interest Theorists have presented theories that do place the interest in this functionary role, Interest Theorists need not. Kramer himself has argued elsewhere for a form of Interest Theory that considers the right-holder’s interest in effect, not function. On this account, the Interest Theory only requires that the right protect some interest, not that it functions to do so. Hence, the right’s protecting an interest could just be a consequence of whatever other function the right is intended to perform. Understood this way, rights that perform all the functions Wenar identifies can be considered to be in the interests of the right holder, even if only as a consequence of their performing these other functions. When the Interest Theory is understood in this way, Wenar’s Several Function Theory is no longer significantly distinct.

26 Ibid., 289.
28 While I am not entirely convinced that we can separate protecting some interest from functioning to protect some interest in the way Kramer does, I think the argument could be restated to hold that a necessary consequence of performing these functions is that they function to protect associated interests also.
This brief survey clearly does not give us an exhaustive response to potential alternative theories. However, I believe it does show that there are substantial difficulties for ‘third way’ theories of rights. In particular, the Several Functions Theory’s failure to be a substantially distinct theory shows the pervasiveness of the current dichotomy. On the grounds of this evidence, and the lack of available plausible alternatives, I believe we have good reason to uphold the position that the Will Theory and Interest Theory are the only plausible theories of rights. Hence, they are the only current plausible theories for assessing human rights (as rights).

4.3. Conclusion

At the beginning of this chapter I set out an argument for why we ought to utilise the Interest Theory in the analysis of human rights. As I’ve argued in this chapter, the Interest Theory does not fail where the Will Theory did, because it does not require that right-holders have power over their rights, and, hence, it does not require that rights be alienable in any way, let alone the way that gives birth to the Will Theory’s incompatibility with human rights. The Interest Theory merely requires that some interest of the right-holder be protected by the right. However, the modified view I have presented in defending the Interest Theory from the charge of over-inclusiveness makes the stronger commitment that this be an interest sufficient to ground the right. But nothing about this more particular version of the Interest Theory makes it that case that right-holders require power over their rights either.

Furthermore, it does not appear that an adequate ‘third-way’ theory of rights has been presented in the literature. That being said, this is not to say that some adequate ‘third-way’
theory could not be presented in the future, but for now it appears that those ‘third-way’ theories offered will either not differentiate themselves adequately from the theories already offered, or they will fail to capture our intuitions about rights in the way that both the Will and Interest Theories can. Given the above, we can conclude that we have good reason to believe that the Interest Theorist is the appropriate theory of rights to use in assessing human rights.
Chapter 5: Fundamental and Derivative Rights

In this final chapter of the thesis I take a slight detour from the flow of the thesis so far. In what has come before, I have argued that the Interest Theory is the appropriate theory of rights for analysing human rights. In this chapter I look to a potential avenue for discussing some of the issues within the human rights literature through the lens of the Interest Theory. This is intended to highlight the way in which addressing the rights in human rights may have some wider consequences to the debate at large. While I cannot in the space here offer a substantial view built off the back of what has come before, I hope this chapter highlights the potential that utilising the Interest Theory (and rejecting other theories) of rights may have for the human rights theorist.

In particular, I look at the issue of human rights that do not appear to be properly universal. To do this, I explore the idea that we can distinguish between different levels of human rights that have different levels of universality. I start, in Section 5.1., by making a distinction between fundamental human rights and those human rights that are derived from such. This is made possible by endorsing the Interest Theory of rights, and follows closely the Interest Theory proposed by Joseph Raz.

Further, this motivates my making the distinction between fundamental human rights and what I call institutionally-embedded human rights—a form of derivative right. In Section 5.2. I discuss the way that we can derive institutionally-embedded human rights, through an analysis of the institutional conditions that a right-holder is subject to and those human rights that we are willing to endorse as fundamental.
Finally, I finish this chapter with some remarks about the potential of fundamental-derivative distinction to offer some new conclusions about human rights. In particular, it may offer some potential for mediating the perceived conflict between the need for universal human rights and differences in values across boundaries, as well as the potential to offer some insight into the plausibility of socioeconomic rights against substantial criticisms.

5.1 Motivating the Distinction

Some human rights theorists have identified problems with treating rights that have implicit connections to certain institutional conditions as human rights.¹ Since these rights implicitly suggest certain institutional conditions, problems may arise when they are taken out of those institutional contexts. Given that human rights are taken to be universally applicable, any right that has institutionally dependent content may have problems satisfying this universality condition. The major problem this presents is that many of the rights offered in the Universal Declaration of Human Rights [UDHR] appear to be vulnerable to this charge.

I refer to this problem as the Misfit Problem. It can be described as follows:

**The Misfit Problem:** Some rights may not fit within certain institutional conditions.

That is, it may be unjustified², or even nonsensical, to claim certain rights within certain institutional conditions. At least two rights stated in the UDHR suffer this

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² In an earlier version of this paper I had split the justification case into its own problem. However, I no longer think that it is distinct enough to warrant this division. Nor do I think that the division is of any importance to the paper/thesis.
problem: the right to form/join trade unions\(^3\) and the right to marry\(^4\). The right to form/join trade unions implies a certain labour structure, in which individual workers are vulnerable to positions of little power over the conditions of their employment. Outside of labour arrangements that are adequately similar, the right may lack a clear justificatory reason. Likewise, the right to marry implies some institution of marriage. In a society that has no institution of marriage, such a right seems nonsensical. It cannot be fulfilled. However, the failure to fulfil it does not seem to count as a wrong-doing either.\(^5\)

One response that some may wish to offer is that rights like the right to marriage are conditional rights. The rights themselves may be universal, but the content of the right may include some conditional such as *if an agent is in institutional conditions X, then they are entitled to marry and found a family.* In such a case the antecedent wouldn’t be satisfied in institutions where the right would otherwise appear nonsensical, and so the consequent would not necessarily follow.

However, I worry that allowing conditionals into the content of universal rights undermines the intended meaning of calling a right universal in the first place. If we were to allow for these kinds of conditional universal rights, then there would be a way of describing any right

\(^3\) Article 23(4) of the *Universal Declaration of Human Rights*: “Everyone has the right to form and join trade unions for the protection of [their] interests”.

\(^4\) Article 16(1) of the *Universal Declaration of Human Rights*: “Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.”

\(^5\) This could be extended to the issue of extending human rights to uncontacted peoples.
as being universal. We need only establish the appropriate antecedent conditions that would pick out those right-holders and only those right-holders for whom it actually is the case (or for whom we may want it to be the case) that the consequent holds, to show that any right, regardless of how counter-intuitive it would be to call universal, could be called universal. Perhaps more worrying, certain rights could be described in such a way to exclude certain right-holders from making claims. The antecedent of a right could be such that its conditions never pick out certain groups of people, hence those people in their actual lived lives would never be entitled to the claims found in the consequent. In particular, I worry that treating universal rights in this way could deny that certain duties are owed to oppressed and disadvantaged peoples. This seems exactly the thing that we intend to avoid when referring to some rights, and particularly human rights, as universal. Hence, I believe this is a misguided response to the Misfit Problem.

Rather, I believe a better way of addressing the Misfit Problem is by viewing it as the consequence of inappropriate generalising. It involves the attempt to generalise rights that include content that cannot be properly general so as to appropriately range over the domain required by the universality condition. For example, the right to join a trade union brings with it too many assumptions about particular labour conditions. I suggest that to resolve this issue we should take the universality condition only to apply to those human rights that are most fundamental: human rights that are not treated as human rights on the grounds of an appeal to some further human right. These are to be distinguished from the human rights that are grounded as human rights only because they are conditions for the fulfilling of some more fundamental human right.
5.1.1. Institutional Conditions and Existential Possibilities

Before we can move on to assess the distinction between fundamental and derivative rights some time must be spent cleaning up the concept of institutional conditions and the applicability of the Misfit Problem. In this section I use the Misfit Problem to outline and explore the relationship between institutional conditions and justifications for rights. In particular, I focus on the relationship that institutional conditions have on shaping the kinds of lives that individuals can imagine themselves as having and the relation this has to practicality of certain rights.

Firstly, why is an analysis of institutional conditions important for human rights? Institutional arrangements can make supposed human rights appear as nothing more than words or mere aspirations, or they can be that which protects and enforces these rights. Hence, exploring the relationship between institutional arrangements and human rights is critical in assessing how human rights play out in the everyday lives of individual persons.

As Seumas Miller has identified, the term ‘institution’ is often used somewhat ambiguously by philosophers. However, contemporary sociology has come to consistently understand the term in a broadly continuous way. The paradigmatic case of the sociological conception is captured by Jonathan Turner, who takes an institution to be:

“...a complex of positions, roles, norms and values lodged in particular types of social structures and organising relatively stable patterns of human activity with respect to fundamental problems in producing life-sustaining resources, in

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reproducing individuals, and in sustaining viable societal structures within a given environment”.\(^7\)

This understanding is mirrored by the philosopher, Rom Harre, who states that an institution is “…an interlocking double-structure of persons-as-role-holders or office-bearers and the like, and of social practices involving both expressive and practical aims and outcomes”.\(^8\) It is these definitions that I have in mind when using the term. Particularly, I wish to emphasise the role that institutions play in embedding certain norms, values, and practices in complex social structures. It is this that is most important in how institutions shape the kinds of lives individuals can live (and imagine themselves living): and it is in how institutions shape the lives that individuals can live, that effects what kinds of human rights may fit, or not fit, within certain institutional conditions.

However, I do not intend institutional conditions to be merely taken as directly synonymous with the above understanding of ‘institution’. Institutional conditions are the societal arrangements that individuals find themselves subject to. In this sense, institutional conditions are the aggregate structure of all the institutions an individual finds themselves subject to, as well as the individual’s relationship to this aggregate structure. This includes, but is not limited to the historical, social, political, economic, and religious institutions that determine much of the structure of one’s existence. The institutional conditions relevant to an individual are the conditions that determine the institutional constraints and privileges the individual’s life is shaped by. This includes not just the life that they actually live and will live, but the potential life and lives they can live. For example, the institutional conditions

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\(^8\) *Social Being* (Oxford: Blackwell, 1979), 98.
corresponding to myself are made up not only of the institutional structure of the state of which I am citizen, but also the global institutional structure, as well as my relationship to them—e.g. as a citizen and as a person.

But differences in institutional conditions need not require vast differences in individuals. The current institutional conditions corresponding to Non-Indigenous Australians are different to those relating to Indigenous Australians. Non-Indigenous Australians were not subject to the same post-colonial institutional conditions that, up until recently, ignored the claims of Indigenous Australians to equal rights. An Indigenous Australian who may be very similar to me in most other respects finds themselves the subject of a different set of institutional conditions and the lasting effects of those institutions, regardless of whether we live in same suburb, attend the same university, and have a similar job. Hence, while Indigenous Australians are subject to relatively similar institutional conditions to me in some regards, the totality of institutional conditions that Indigenous Australians are the subject to and their relationship to them are not the same. Particularly, they are the subject of institutional conditions that perpetrated historical (and continuing) wrong-doings to their community. This, in turn, effects the relationship they have with the current institutional conditions they find themselves subject to.

The above exemplifies that when discussing institutional conditions, we ought to begin from a patient-centred perspective, otherwise we are likely to miss a large part of the picture. In the above scenario, if we avoid the patient-centred perspective, we may miss important

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9 Indigenous Australians only came to be recognised in the Australian Constitution after the 1967 referendum.
institutional circumstances that change the relationship the individual has to those institutional conditions. This, in turn, obscures any analysis of the kind of effects that these institutions will have on the life and potential life of the individual.\textsuperscript{10}

Further, the patient-centred focus allows us to adequately direct attention to the role that this individual’s embeddedness within institutions plays in the relationship between the individual and the institutional conditions they are subject to. This is because, while the individual can attempt to enact small changes on these institutional conditions, more often than not, the individual finds herself in a similar position to that of Kafka’s Josef K.\textsuperscript{11} The individual is thrown into institutional conditions not of their choosing, that often also appear obscure or intellectually inaccessible to them. It is not only that the majority of institutional conditions are beyond the individual’s control, but, in many regards, these institutions, and the individual’s relationship to them, control the possibilities that are open to that individual—placing conditions on the individual’s agency—without the individual having a clear perception of just how all these institutions shape the possibilities available to them. It is this control of possibilities that is most crucial to my discussion of institutional conditions and human rights.

These possibilities are the possibilities for the kind of life an individual can live. Institutional conditions, and by extension institutions, not only have the ability to limit, but also add to

\textsuperscript{10} Indeed, one of the major problems with many public policy approaches has been to ignore exactly this, instead treating persons who are related to institutions differently, as being related to those institutions in the same way.

the possibilities that an individual can realise in their life. While institutional conditions that include conceptions of property (similar to current free-market standards) may alienate individuals from making use of certain things (i.e. someone else’s house), it also opens up the institutional protection of goods that an individual justly claims ownership of (i.e. their own house). This changes not only certain material conditions of the individual’s existence but changes the possibilities that shape the way the individual views and directs their future existence.

Hence, these possibilities are *existential-possibilities*. They shape not only the way that an individual may live, but also the way the individual may imagine their life. The institutional conditions the individual finds herself subject to can determine how accessible certain goals are, including which goals are inaccessible. For example, institutional conditions that afford the individual greater liberty are likely to open up the possibilities that the individual can realise in their life. We can compare the life of a person, A, born in a contemporary liberal democracy, with that of a person, B, who is born into a territory controlled by an autocratic cult. Person A has the ability to pursue many different things that A would like to. Whereas person B is much more limited due to the institutional conditions determined by the autocratic cult. For example, the cult may restrict members to never leave the territory that the cult controls. This vastly limits the possibilities of person B, compared to person A. This produces flow on effects that may limit other possibilities, such as in the areas of education and their career.

Taking a further look at the example above, travelling outside of the territory controlled by the cult is inaccessible to Person B. Hence, this kind of travel is inaccessible to Person B.
However, accessibility should not be considered as a binary concept. Accessibility also concerns the potential, as determined by the institutional conditions, to realise those very same possibilities. It is quite clear that institutional conditions that are patriarchal limit the potential for women to realise possibilities, while these same possibilities remain more accessible to their male counterparts. That is, the potential of some male counterpart realising these possibilities has a much higher likelihood, given the institutional conditions (and keeping all else equal). Hence, while the same possibilities may be open to different individuals, the accessibility of those possibilities is a relevant factor to their lived experience of those institutional conditions.

In this case, since the potential to realise many of the possibilities that are institutionally open to women is severely limited, those institutional conditions may reduce the effect those existential possibilities have on the lived-experience for women within the population. Hence, they may no longer consider these possibilities as possibilities that they are likely to actualise in their life, ignoring them and shifting their efforts in favour of other possibilities that appear more accessible. Even though some women may beat the odds and realise those possibilities that are less accessible to them than men, this limited accessibility will affect the goals that women under these institutional conditions may direct their efforts towards. This indirectly nullifies the effects of an open possibility in the lived-experience of those persons who do not see it as an adequately accessible possibility. For if the individual does not imagine it as an adequately realisable possibility, in terms of the effects on their lived-experience, it may as well not be a possibility for them at all.
However, these existential-possibilities should not be understood as metaphysical possibilities. The concern here is political; it is the possibilities open to the individual given the institutional conditions they find themselves subject to that are the focus of this analysis—it is the relationship between individual and the institutional structure they find themselves in that is key. Physical and metaphysical conditions may also limit the individual’s life in other ways, and these may have to be considered in the political analysis at some point. But because they are external to the scope of questions concerning the relationship between individual and institutional conditions, they are not included in this discussion. For example, if it is the case that hard-determinism is true, in that the individual could not live any other life than the one they actually live, this does not have an effect on any analysis of the existential-possibilities as constrained by institutional conditions. While the individual in this scenario is not metaphysically free to live some other possible life, the existential-possibilities available given the constraints of institutional conditions still remain. The analysis here is concerned merely with how the institutional conditions limit or make open these possibilities, regardless of other constraints. Of course, this is not to say that certain other constraints will not play into this analysis: i.e. the way that physical disabilities may change the way institutional conditions relate to the individual. In this case, this would be a part of the relationship the individual, as a person who has a physical disability, has to the institutional conditions they are subject to.12

Hence, when assessing institutional conditions, both the possibilities that are institutionally

12 We may want to say that in case where the possibilities for the disabled are limited, this is thrust upon them by the institutional conditions they are subject to. Hence, institutions ought to be appropriately designed or modified so as to change the relationship between the individual and the institutions in such a way that will open up these possibilities.
open and the potential to realise those possibilities are important factors. The glass-ceiling is not something that should be ignored. For it is in both these ways that institutional conditions are able to shape the lived-experiences of the individuals subject to those conditions.

I do not wish to further define what can be considered within the conceptual boundaries of the institutional conditions an individual is subject to. For I leave open just where the boundaries of institutional conditions may be. This is for the individual human rights theorist to make clear. The important point to take is that, however we choose to draw these boundaries, institutions have direct effects on the lives of the individuals that are subject to them.

Given that institutional conditions control the possibilities open to a person, they also affect the ways that one may actualise the life they live. Hence, as regards human rights, it is important to consider how institutional conditions may limit the ways that one’s human rights may be realised—regardless of where the conceptual line is drawn around those institutional conditions. Since, as I have argued in the previous chapters of this thesis, it is interests that ground rights, we must consider how to best advance those interests in this analysis. In the following section, I use this understanding of institutional conditions, and the clash between the claim that human rights ought to be universal and the way that different institutional conditions can shape human lives, to carve a distinction between fundamental and derivative rights.
5.2. Making the Distinction

In Henry Shue’s seminal *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*\(^{13}\) he offers the distinction between basic and non-basic rights. Shue’s distinction relies on his definition that “a moral right provides (1) the rational basis for a justified demand (2) that the actual enjoyment of a substance be (3) socially guaranteed against standard threats”\(^ {14}\). From this, Shue derives the concept of a basic right as that right for which, “any attempt to enjoy any other right by sacrificing the basic right would be quite literally self-defeating, cutting the ground from beneath itself”\(^ {15}\). The sacrificing of any basic right would undermine the social guarantee against standard threats condition. Hence, the non-basic right would not be held as a right. For Shue, one cannot properly enjoy the entitlement of any other right without the right to subsistence, since any rational person would forgo any other right to secure the right to subsistence. Thus, threats to subsistence would amount to threats to any other right. Hence, the failure to hold as a right, the right to subsistence, would amount to a standard threat against any other potential right.

One thing to note about the right to subsistence—as with the other rights Shue identifies as plausible basic rights: i.e. security & liberty—is that it is not going to suffer from issues related to the *Misfit Problem*. This is because it does not implicitly rely on any institutional structures. The subsistence right itself can be applied to conditions where a variety of means may be utilised in the fulfilment of that right. Hence, it is *at least* better situated to

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\(^{13}\) Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*.

\(^{14}\) Ibid., 13.

\(^{15}\) Ibid., 19.
satisfy the universal condition, without running into the problems identified above than less basic rights.

Where Shue argued that we should treat certain rights as fundamental, I look at the fundamentality of rights from a different direction, concerning myself with how we can derive rights from more fundamental rights. Hence, my suggested criteria for fundamental human rights\(^\text{16}\) is this:

\[
\text{A right is a fundamental human right (FHR) if and only if it does not itself necessarily rely on some other human right/s to justify its being treated as a human right.}
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Given the above criteria, while other human rights may in fact contribute to the justification of an FHR being treated as a human right, they can only play a non-necessary role in justifying the FHR’s being treated as a human right.\(^\text{17}\) Otherwise it is not a fundamental human right. Hence, for a right to be an FHR, it must be such that it has the possibility of being justified independent of an appeal to any other human right.\(^\text{18}\)

\(^{16}\) I use the term ‘fundamental’ to distinguish my position from Shue’s basic rights.

\(^{17}\) Martha Nussbaum’s human capabilities approach provides an example of such. The capabilities she identifies are sometimes mutually justifying, but they do not require those justifications for their being treated as human capabilities. Hence, they may contribute further justification for each other human capability being treated as a human capability. See: Martha C Nussbaum, "Capabilities and Human Rights," *Fordham L. Rev.* 66 (1997).

\(^{18}\) Another way to interpret fundamental rights is as rights that can be self-justified as human rights. This is not to say that it is self-evident that they are human rights. Rather, it is that once a coherent theory of human rights is identified, the fundamental human right is directly justified under that theory as being a human right. For example, James Griffin’s right to the pursuit of a worthwhile life, under one’s own view of what a worthwhile life is, would be one fundamental right given the personhood account of human rights he presents in *On Human Rights.*
The right to justification, as presented in Rainer Forst’s constructivist theory of human rights\(^\text{19}\) provides a clear illustration of this fundamental role. For Forst, the dignity of a human person, as a special kind of moral subject, grounds their being owed the possibility of adequate justification for any action that affects them, in virtue of their being this kind of moral subject. What it means to have this right to justification is that “[Right-holders] have a qualified ‘veto right’ against any justification that fails the criteria of reciprocity and generality and which can be criticized as one-sided, narrow, or paternalistic, as the case may be”.\(^\text{20}\) While there is much that can be said of Forst’s right to justification, I offer it here to exemplify the fundamental human right relationship. For Forst, this right is the fundamental human right by which all other human rights can be grounded. What further rights are necessary for satisfying this right to justification are dependent upon a myriad of contextual factors and cannot be pre-specified at the purely theoretic level. However, once we include those contextual factors we can derive further, non-fundamental, human rights based on this right to justification. However, these derived rights, unlike the fundamental right to justification, need not apply to all humans at all times. They need only apply when circumstances are such that being entitled to the derived right is necessary to secure the fundamental right to justification.

In this sense, I take rights, like the right to protection against unemployment\(^\text{21}\) to fail the FHR test. The right to protection against unemployment appears to be justified as a human

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\(^\text{21}\) As per Article 23 of the *Universal Declaration of Human Rights*. 
right based on its role as a means for securing other more fundamental human rights (i.e. subsistence). It is not the kind of human right that is justified as a human right for its own sake. There are scenarios we can imagine where it would seem that one did not have a justified claim to protection from unemployment, yet they did not have any human right violated—say like in a society that offered a universal basic income instead. For if the right-holder was already entitled to a universal basic income, their interest in having subsistence guaranteed would be protected by their having access to a universal basic income.\footnote{22} Unemployment in such a state might not increase the probability of a person finding themselves destitute. In fact, we could imagine a utopian society that takes advantage of automation and provides a substantial universal basic income such that employment becomes a luxury for those who wish to pursue it, rather than, for many, a necessity to avoid destitution. In such a state, it would appear odd to claim that protection against unemployment ought to be considered as a human right.

However, the justification for treating something like the right to subsistence as a human right is at least more likely to be for its own sake. For all human-persons it is in their interest to hold as a right the right to subsistence, since subsistence is necessary for continued-existence. Hence, subsistence is more likely to be an FHR than the right to protection from unemployment.

\footnote{22} There may be scenarios where universal basic income is inadequate at performing this. Say for example where a universal basic income is provided, but it fails to provide enough resources so that the right-holder can secure all the basics required to subsist. In such cases universal basic income would not be adequate to discharge the duties associated with the right to subsistence.
In attempting to answer how we may go about deriving rights from fundamental rights it may help to look at a similar distinction offered by the Interest Theorist Joseph Raz in his *The Morality of Freedom*. For Raz, the distinction is between “core” and “derivative” rights, arguing that the relationship between the two is one of “the order of justification.” Derivative rights are justified on the grounds of core rights. This is exactly how one should conceive of the relationship I offer between fundamental human rights and derivative human rights.

Recall that the Interest Theory states that an individual has a right if, and only if, some interest of the individual is sufficient to ground the correlative duty. In the relationship between core and derivative rights, the core right is grounded in the significant interest to the right-holder so as to ground a myriad of different duties corresponding to further, derivative rights. Take, for example, the case of a right to physical autonomy over one’s own body. This may act as a core right in justifying further rights against unlawful restraint, physical assault, sexual assault, to accessible infrastructure, etc. Further, from a core right like that to bodily autonomy generally, we can derive rights that are held as claims against individuals. My right to bodily autonomy justifies my claim against you that you not infringe upon my bodily autonomy, while also justifying those further derivative rights already identified, but also as individual rights against you. Hence, from a general core right, it’s possible to define particularised rights, not just in duty, but in direction.

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23 Raz, *The Morality of Freedom*.
24 Ibid., 168 - 70.
25 Ibid., 169.
26 One worry that may appear here is that since core rights appear to lack clearly defined duty-bearers and/or duties, core rights may not always be rights in the strict Hofeldian sense. I’m willing to accept this interpretation. It may be more accurate to think of rights
Crucially, the definition of a right given by some Interest Theorists rejects a strict Hohfeldian analysis of rights. Joseph Raz argues that a right need not at all times be in the form of the direct correlate to a directed-duty (i.e. a claim-right), but rather, that it be the sufficient grounds by which we can justify at least some claim-right/s.27 This means that, for any core right, there are a nexus of potential Hohfeldian relations that can be generated through the derivative process—but not necessarily any specific claim-duty relation. Which of these potential claim-rights actually apply in any individual case is sensitive to the context of the very case at hand. Hence, this necessitates a contextually sensitive approach to analysing the Hohfeldian relations when a right is invoked—the fundamental/derivative distinction between human rights achieves this contextual sensitivity.

This move is available to the human rights theorist, given that, as I argued earlier in this thesis, the Interest Theory is the theory of rights most suitable for an analysis of human rights. Recall that some Interest Theorists argue that a right is defined as the protection of some interest sufficient for grounding duties. Since the right only need be sufficient to ground duties in others, it is not necessary that there actually be any direct correlate duty for the right to exist. This opens the Interest Theorist up to allowing rights to be complex in this order of justification way, rather than as indicating a specific correlated directed-duty.28

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28 Note this is not open to the Interest Theory’s primary rival, the Will Theory, since the Will Theorist’s definition of a right requires a direct duty or privilege over which the right-holder has the correlate power. This power then justifies the claim-right against that duty or here as mediating between core principles and action. In this sense, core rights may be closer to principles than Hohfeldian claim-rights. While I’m sympathetic to this view, this is far too large a topic for me to treat adequately here.
Hence, we can now offer some answer to the question how one may claim something like the right to protection from unemployment as a human right. This claim is grounded in what I call an *institutionally embedded human right*: it is a right that can be derived from an FHR under certain institutional conditions. This is a right that necessarily includes, within the justification for its being claimed as a human right, certain institutional content.

This institutional content is some, if not all, of the institutional conditions the human rights claimant is subject to. The determining factor for the relevance of specific institutional conditions to the deriving of a right is whether that institutional content does hold for the claimant, and whether that institutional content can, alongside some FHR, provide a justification for the derived right. Given that institutional conditions can limit and expand the possibilities open to individuals, some analysis of these conditions seems necessary in determining how in a specific case we may fulfil fundamental human rights. This can be captured by an analysis of the requirements for fulfilling the FHR under the institutional conditions that the claimant is subject to. Those things that are necessary under these conditions can be justified as non-fundamental human rights (or derived human rights).

One way to analyse the grounding of the further right is as an argument. Consider the following argument for the conclusion that the right to protection from unemployment is a human right:

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privilege. Hence, for the Will Theorist the only relation between rights can be one of a cluster, and not one of justificatory ordering: there is no directional grounding relation.
P1: All human persons are entitled to subsistence as a fundamental human right.

P2: Protection from unemployment is a necessary means, under institutional condition/s A, for the fulfilling of a human person, P’s, fundamental human right to subsistence.

P3: If some object O is necessary for the fulfilment of some individual’s right, then that individual has a justified claim to O.\(^{29}\)

P4: To have a justified claim to O is to have a right to O.\(^{30}\)

C: Hence, person P has a right to protection from unemployment.

P1 is the statement of a certain FHR taken from a given theory of human rights. P2 is a condition for satisfactorily holding the fundamental right stated in P1 under a certain institutional condition. The conclusion can be derived from a principle that asserts transitivity of claims between the object of a right, and the necessary means for obtaining that object. When we take Judith Jarvis Thomson’s Means Principle for Claims\(^{31}\) (P3 above) with the Hohfeldian conception of claim-rights\(^{32}\) this follows by transitivity. Hence, from the argument formed by the FHR and the institutional context, we are able to derive a right that while less general (for it requires institutional content), provides a more particular

\(^{29}\) As per Judith Jarvis Thomson’s the Means Principle for claims in *The Realm of Rights*, 157.

\(^{30}\) As per the Hohfeldian concept of rights presented in Chapter 2 of this dissertation. This follows the concept presented by Hohfeld in *Fundamental Legal Conceptions: As Applied in Judicial Reasoning*.

\(^{31}\) *The Realm of Rights*, 157.

Henry Shue identifies a similar principle. Shue writes: “1. Everyone has a right to something; 2. Some other things are necessary for enjoying the first thing as a right, whatever the first thing is; 3. Therefore, everyone also has rights to the other things that are necessary for enjoying the first as a right.” Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, 31.

\(^{32}\) See Chapter 2 of this thesis.
instantiation of the general right. This particularity brings the right closer to the realm of practicable action and a clearly specified duty.

Furthermore, since this derived right is held because of the satisfaction of the human-person condition, we may be willing to call it a human right (in a weak sense). This justifies its being claimed as at least part of a human right, even if it does not satisfy the universality condition outside of the institutional context. However, these rights still have some form of universality. The universality just differs from that given in the universality condition. The universality required of these kinds of human rights is merely internal to the institutional condition given in P2 of the argument. Any agent, x, such that x is both human and a person can claim that thing as a right within those institutional conditions. To take the earlier example of a human right to protection from unemployment, within an institutional structure that creates conditions in which it is necessary that a right-holder have protection from unemployment (to fulfil the FHR to subsistence), then any entity satisfying the human-person condition within these institutional conditions has a right to protection from unemployment in virtue of their satisfying the human-person condition.

Note, however, that this does not entail that across all institutions the right to protection from unemployment be recognised as a human right. It is a different kind of universalism than that identified in the universality condition. This limited universalism applies to the entities for which the right is applicable, as opposed to the universality of the right-itself.

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33 Note, this is what I refer to as the human-person condition. It is identified in an earlier chapter as a necessary condition for the treating of some right as a human right. This is intended to capture the intuition that a human right is any right held in virtue of the right-holder’s being both a person and human (in a normative sense).
This is evident from the justification for derivative rights given above. For the derived right is not self-justified as a human right, nor is it justified by the FHR itself. It requires the institutional context as part of its justification. Hence, the justification given in one institutional condition may disappear in another context that is sufficiently dissimilar from the former. This shows that the analytic justification for derivative rights itself also supports this shift in the understanding of the universalism required as applied to derivative rights.

Concerning the relationship between fundamental and derivative human rights themselves, one must keep in mind that all actualised human rights claims are claimed in the particular, or must be, to be made actionable. All actioned human rights claims are made within a particular institutional context. That is, they are made within an institutional structure, including—but not limited to—the cultural, historical, political, social, and economic conditions in which the right is claimed. Any right claimed is indexed to a specific agent, P, making the claim at a specific location, I, at a specific time, t. This indexing of the claim gives us access to the institutional context in which the right is claimed. Hence, for every actualised human right claim, there exists an institutional context, which is analysable, in the making of the claim. This allows us to perform the derivation of any further rights by taking an FHR and assessing the potential means for fulfilment within the institutional structure. Hence, this offers a way of mediating problematic general rights that fail to provide a clear particular duty that must be performed to discharge the associated duty.34

The particularised form of institutionally embedded right offers further information,

34 Here I have in mind arguments pressed against socioeconomic rights. See Onora O'Neill’s criticism of socioeconomic rights offered in "The Dark Side of Human Rights," International Affairs 81, no. 2 (2005).
potentially determining what duties are owed and by whom they are owed. Thus, this brings us closer to filling out the claim as an actionable claim-right with a clear associated duty.

By bringing this into conversation with a commitment to the Interest Theory of rights the question essentially becomes: *what is required under these institutional circumstances to secure the right-holder’s interest in the object of right X?* Without this commitment this question would not be so clear. It is this question that I think that beginning from an analysis of *rights* in human rights leaves the human rights theorist.

### 5.2.1. Institutional Conditions and Human Rights Failures

At this point I want to attempt to fend off a potential worry. Given that I have argued for the deriving of particular human rights from an analysis of general fundamental human rights applied to the relevant institutional conditions, my process of deriving human rights in this way can be charged with failing to make sense of how human rights can be utilised to criticise institutional conditions. If this is the case, it is a major problem; for it undermines the widely accepted view that one of the primary functions of human rights is to ground challenges against unjust institutions and institutional conditions. If my thesis for deriving institutionally embedded rights is unable to be reconciled with this function of human rights, all the worse for my thesis. However, I will argue that this worry may be avoided with some qualifying remarks about the relationship between institutional conditions and the potential for the fulfilment of human rights.

The first qualifier is that there is a bi-directional component to the analysis of the
relationship between fundamental human rights and institutional conditions. It would be inadequate to merely take the fundamental human rights and apply them in the given institutional condition: While we assess the potential for fulfilling those fundamental human rights within the relevant institutional conditions, we can also assess the viability and appropriateness of the potential means of fulfilment as determined by those very same institutional conditions. In this regard, the analysis I offer requires both the descriptive question: **what would amount to fulfilment of the fundamental human rights under these conditions?** As well as the normative question: **do there exist adequate possibilities for the realisation of the fundamental human rights?**

Institutional conditions shape both the possible lives individuals can actually live, and the lives individuals can imagine themselves living. This, in turn, shapes the possibilities and ways in which fundamental human rights can be fulfilled. This relationship is illustrated in **Figure 5.1.** below: Both the fundamental human rights and the institutional conditions determine the potential means of fulfilment. The fundamental human rights give ends that are sought, while the institutional conditions restrict the potential means for achieving those very ends. From this, as discussed in the previous section of this chapter, we can determine what further human rights can be derived under those institutional conditions.
Figure 5.1: The Relationship Filled Out

Institutionally

Embedded

H-Rights

Potential Means

of Fulfilment

Fundamental

H-Rights

Institutional

Conditions

Given that institutional conditions can shape the means for fulfilling fundamental human rights, inadequate means for the fulfilment of those fundamental rights may provide evidence of unjustifiable institution conditions. Hence, a critique of the possibilities of fulfilment of an FHR under a given set of institutional conditions provides the opening to ground criticisms of institutional conditions.

Firstly, institutional conditions that make it impossible to fulfil fundamental human rights are going to be inadequate. In these institutional conditions, it is necessarily the case that fundamental human rights are violated. Given that human rights, broadly understood, are intended to protect the right-holder against circumstances that undermine their moral status as human-persons, institutional conditions that make impossible the fulfilment of FHRs cannot be considered adequate institutional conditions. Hence, there is an issue with
the relationship between the individual who holds the right and the institutions they are subject to. Therefore, adherence to human rights standards would make necessary some change in this relationship. On these grounds, I believe that my analysis of human rights is still able to offer criticisms of institutions through a human rights framework.

However, this is not the only way that institutional conditions can be inadequate. Human rights violations are not minor slights. They are substantial wrong-doings that undermine the moral status of persons. Given the high moral priority of human rights, the standard that we must hold institutions to must be more than that they just make it possible that human rights can be fulfilled. Hence, there must be some further grounds by which to criticise institutions for being inadequate on the basis of their relationship to the possibility of fulfilment of human rights.

As Henry Shue has argued, it is not merely enough that human rights should be claimed, but that there are societal guarantees against standard threats.\(^{35}\) Without such, human rights claims would be impotent in the very circumstances they seem most important: Without some form of societal guarantee protecting and enforcing rights claims, when a person finds their right unfulfilled or violated they would have no recourse but that which they themselves, through their own efforts, can mount—the same thing they would have with or without the claimed right.\(^{36}\) The claimant in such a case would be no better off than they would be in the Hobbesian state of nature, and so, for all material purposes, they would be no better off than if they had no claim-right at all. To avoid this issue, peoples that assent to

\(^{35}\) Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*.

\(^{36}\) Essentially undermining the concept of having a right completely.
uphold human rights must provide some social guarantee against such threats. These societal guarantees are institutional conditions that facilitate circumstances in which it is not just possible that human rights are fulfilled, but that they are reasonably protected against violations. Foreseeable problems for human rights should be mitigated as far as possible by the institutional conditions themselves, without sacrificing anything of equal moral worth. Where this mitigation cannot occur compensation and potentially punishment should work as a secondary line of defence. Hence, the concern of institutional conditions should be with nullifying the contingent possibilities of violations, within reason, and providing means for enforcement of compensation and/or punishment for violations. In so far as institutions are directed towards achieving this, they uphold a concern for human rights; in so far as they fail to be directed towards this, they disregard human rights.

Take the example of the right to personal security:37 The right to personal security grounds certain requirements for legal punishment and the enforceability of that punishment, against those who would threaten or who have previously violated personal security rights. While it is not the case that such violent individuals need exist within the society, the mere likeliness of their existence justifies the imperative that institutions be designed in such a way, given the acceptance of the legitimacy of the right to personal security. Otherwise, the right claim would fail to confer anything of substance to the right-holder above what they themselves could defend by their own efforts. Hence, this would render the right useless in situations where violations are likely to occur or have occurred—the exact situations where rights are most important.

37 I offer here a similar analysis to that of Henry Shue in Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy, 17.
However, while this may seem a stringent requirement of human rights, it is not the claim that institutional conditions should make it necessary that all human rights are fulfilled at all times. I can imagine no set of institutional conditions that would make it the case that it is impossible for any person to have their right against arbitrary violence violated. It would seem only a physical law could make this true, and over physical laws institutional conditions have no power. For no matter the institutional conditions, all it takes is one excessively violent person to violate such a right. The only institutional context that comes close to this kind of protection against the potential for such violations would be to remove individual freedoms so far as to make talk of human rights, or rights at all, ridiculous. What this example makes clear is that there is an equilibrium that must be established between the institutional conditions in so far as they facilitate an adequate potential for all human rights to be fulfilled and the realities of what the conditions are that would make that state of affairs possible.

Thus, for the institutional conditions to be adequate, they must facilitate circumstances in which the fulfilment of all fundamental human rights are probable beyond a certain threshold. This threshold is dependent upon relevant material restraints, concern for other human rights, and concern for other moral restraints. Beyond these restraints, institutional conditions can be criticised as inadequate in so far as they fail to provide an adequate potential for human rights to be fulfilled.
5.3. Conclusion

In this thesis I've focused on how we ought to think about the rights in human rights. In the first two chapters I laid down the foundations for this, exploring the current predominant views in the human rights literature in Chapter 1 and then laying out the Hohfeldian analytic of rights in Chapter 2.

In Chapter 3 I turned to the main argument of the thesis. Here I addressed the Will Theory of rights and its incompatibility with inalienable rights. I argued that because the Will Theory is committed to a specific kind of alienability of all rights on the basis of their commitment that a right-holder must have a power over the duties correlated to their claim-rights, the Will Theorist is unable to capture inalienable rights. I then offered some reasons to believe that the human rights theorist ought to be committed to the view that at least some human rights are inalienable in the kind of way that the Will Theorist must categorically deny any rights can be. Hence, I concluded the Will Theory is not an adequate theory of rights for the analysis of human rights.

In Chapter 4 I utilised the Will Theory's failure to capture these kinds of inalienable rights to offer an argument that the Interest Theory is the correct theory. To do this, I defended the Interest Theory from some common criticisms, and then argued that the current ‘third-way’ theories offered in the literature appear inadequate. Given that the Interest Theory is an adequate theory of rights, and that there appear to be no adequate ‘third-way’ theory of rights, we are left with a choice between the Interest Theory and the Will Theory. However, as I argued in Chapter 3, the Will Theory is inadequate for the analysis of human rights, and
so the human rights theorist ought to utilise the Interest Theory in the analysis of human
rights.

Finally, in this chapter I attempted to offer a new way of thinking about human rights that is
premised on understanding human rights through the lens of the Interest Theory. While I
have not given a completely thorough analysis of the distinction between fundamental and
derivative rights I offered, I’ve offered it here as a potential way that moving to an interest-
based view may change our way of thinking about human rights.

Likewise, while I’ve touched on some of the issues concerning human rights and how the
interest-based way of thinking may change these, I have not adequately addressed them.
Rather, I leave these as new avenues for discussion. In particular, by weakening the
universality condition for derived human rights there may be a myriad of issues that could
be avoided by no longer thinking of all human rights as requiring universality. For example,
issues with duties associated with socioeconomic human rights could be mitigated by no
longer considering the claims themselves to be universal, but rather a particularised
derivative of a more general human rights, like subsistence.

In a way, this brings my project full circle. It is searching for the rights in human rights that I
originally set out with. While I do not think what I’ve offered here conclusively solves the
issue, by offering some clarification about a theory of rights to endorse for the analysis of
human rights I hope that we may be able to reframe some of the debates about human
rights on the basis of utilising the interest-based analysis. It is by attempting to clarify the
issue of rights in human rights that I hope I have opened up the wider discussion of human
rights to some potentially clarifying points, or, at the very least, made clear the importance of the question of rights in human rights.
Bibliography


