University of Helsinki

From the Selected Works of Siegfried Van Duffel

2009

The Nature of Rights

Siegfried Van Duffel, National University of Singapore

Available at: https://works.bepress.com/siegfried/7/
The Nature of Rights

Siegfried Van Duffel

Philosophers writing on the nature of rights have for ages been divided into two sharply opposed camps. Proponents of the Will Theory of rights hold that individual freedom, autonomy, control, or sovereignty is somehow fundamental to the concept of a right, while proponents of the Interest Theory argue that rights protect people’s welfare, and this may include protecting interests that are not directly associated with people’s freedom or control. The debate between proponents of both “theories” has been going on for decades or, if we may include the classical theories, for centuries. Dissatisfaction with this state of affairs has engendered attempts to come up with compromise theories, or alternative approaches. Yet these new approaches have not convinced the proponents of either account.

One of the uncanny features of the debate is that there seems to be no clear and common understanding of what is at stake in accepting either of both theories. At one level the issue is unambiguous enough: since rights occupy a central place in many normative theories, as well as in political discourse, it is important for us to obtain a clear grasp of the concept. Theories of the nature of rights, then, tell us what rights are—or what it is for someone to have a right. So far everyone will concur, but beyond this there is no clear-cut agreement on the nature of the question to be solved. This lack of clarity conceals a serious problem.

The problem can be brought to light if we reflect on an issue over which participants have been divided but that has rarely received any sustained attention—that is, whether we can deduce any normative conclusions from an account of the nature of rights. Many authors have, usually in passing remarks, hinted at some relation between accounts of the nature of rights and normative theories of rights. But few people have explicitly defended the position...
that a conceptual analysis of rights will entail certain normative conclusions. Most participants in the contemporary debate over the nature of rights have shared the assumption that it is possible and indeed instructive to consider the question what rights are in isolation from normative claims. Consequently, they have often insisted that accepting either the Will or the Interest Theory of rights does not entail any substantive normative position. For example, Will Theorists have denied that children can aptly be said to have rights, but this clearly does not entail any position on the desirability of legal protections for children. But if neither Will Theory nor Interest Theory entails any normative position, what could possibly be at stake in affirming either that control is central to the idea of a right or that the function of rights is to protect interests? How should we go about evaluating either theory? I can think of only two options. Neither of these, however, provides a satisfactory characterization of the debate.

The first interpretation is suggested by the way the debate has been carried on for the past few decades. Adherents of both Will Theory and Interest Theory have criticized the other theory for failing to capture some of “our” intuitions about rights. For example, Interest Theorists have argued that Will Theorists must deny rights to children, since children cannot exercise the kind of control that Will Theory holds to be an essential component of a right. And this has generally been viewed as an embarrassment for Will Theory. The fact that we tend to think of children, the mentally challenged, and perhaps even animals as having rights—so it is thought—gives us a good reason to reject any theory about rights that precludes this. Conversely, Will Theorists have charged Interest Theory for identifying the wrong person as the right holder in cases involving third-party beneficiaries. If a son enters into a contract to ensure that someone will take care of his mother during his absence, most lawyers would identify only the son and not the mother as having a right. Again it is assumed that if Interest Theory identifies the mother as the right holder, this may be held against it.

Since participants in the debate have argued for or against either “theory” almost exclusively on the basis of its supposed capacity, or lack of capacity, to accommodate


An exception is Hillel Steiner (An Essay on Rights [Oxford: Basil Blackwell, 1994], pp. 2-3) who suggests that an account of the formal or characteristic features of rights will allow us to dismiss certain candidates for theories of justice, perhaps leaving only one theory intact. Steiner’s attempt has been severely criticized (see Nigel E. Simmonds, “The Analytical Foundations of Justice,” Cambridge Law Journal 54(2) (1995): 306-341) and I know of no other plausible attempts to draw substantive conclusions from an analysis of the concept of a right.


The objection stems from Hart. Whether the Interest Theory is indeed held to identify only the third party as holding a right is disputed. See Kramer, “Rights Without Trimmings,” pp. 66-8, for discussion and references. Also Steiner, “Working Rights,” pp. 284-6.
intuitions that we have about rights, it is natural enough to see Will Theory and Interest Theory as attempts to summarize our intuitions about the proper use of the word “right.” This way of looking, if accepted, may incline us to abandon the debate altogether. Doesn’t the fact that so many people have been unable to resolve the disagreement for such a long time show that it may be impossible to bridge the differences in people’s intuitions? Thus it would be wise to end the debate sooner rather than later.

Yet there are good reasons for taking this characterization of the debate to miss the point. For one, it is rather unlikely that the debate would have taken the form it has if the participants were seriously trying to summarize (supposedly shared) intuitions regarding our use of the word “right.” They would have realized long ago that these intuitions are more complex than either “theory” acknowledges, and they would have tried to come up with summary accounts, perhaps speaking of different kinds of rights. Instead they have, often consciously, written off certain ways of speaking about rights as improper. How could they do this if they were merely trying to summarize linguistic intuitions about our use of the word? They could not.

The second interpretation of the debate understands Will Theory and Interest Theory as two attempts at conceptual hygiene. Since our use of the word “rights” is often loose, ambiguous, and vague, and perhaps even incoherent, there is a need to restrict the ways in which we invoke the word and render its meaning more precise, at least for the purpose of philosophical discussions. This will probably entail our having to discard some of our intuitions, since it is unlikely that any precise notion of rights can accommodate them all. Hence the many remarks to the effect that “any interesting conception of a right will be not merely descriptive of our actual usage, but also partially reconstructive or stipulative.”

However, as soon as one realizes that both “theories” are in fact stipulative definitions, a huge problem of intelligibility arises. How is it possible that so many gifted philosophers have not realized that for such a long time they have been debating stipulative definitions? To be sure, in certain contexts it can make perfect sense to discuss the respective merit of alternative classifications or definitions. For example, if the definitions are embedded in a normative or scientific theory, their merit could be assessed on the basis of the strength of the respective theories. But this is not what the participants in this debate have been doing. Instead of building theories, they have baptized alternative stipulative definitions as “theories” and have defended these definitions on the basis of their adequacy to our linguistic intuitions!


12 Or “explications” in Carnap’s terminology. See Rudolf Carnap, Meaning and Necessity (Chicago: University of Chicago Press, 1988), pp. 7-8. For the present point the distinction can be ignored. See Patrick Maher “Explication Defended,” Studia Logica 86(2) (2007): 331-341, at 335-6. Maher explains that an explicatum is either a theoretical term or a definition. When explication is done by giving a definition, the definition is stipulative.

13 As far as I am aware, only Sumner, Moral Foundation, pp. 66-7, has made a similar consideration.
Consider just how bizarre this is by imagining two groups of biologists debating two alternative “theories” of fish. One group defines fish as “those animals that swim in water, have fins, etc.” The other group situates dolphins and whales outside the category of fish. Imagine further that successive generations have debated basically the same two definitions (though they have become more complex) and that they have done so solely on the basis of their supposed adequacy to our intuitions about the correct use of the word “fish.” Nobody would take these biologists seriously. But this is precisely what we have been able to witness for (at least) the past five decades in analytical jurisprudence!

Structure of the Paper

This paper has two aims: the first is to make sense of the alarming condition of the contemporary debate on the nature of rights. Since my critique of the debate runs the risk of making fools out of the participants, it can only be acceptable on the condition that we can see how brilliant people could have ended up debating stipulative definitions. In order to do that, I will first discuss the language used in the debate: Hohfeld’s terminology. This terminology assumes that duties are owed to someone. However, Will Theory and Interest Theory disagree on what makes a duty owed to someone, and neither, so I will suggest, provides us with a satisfactory criterion. I will then focus on a class of duties that are not obviously owed to anyone and suggest that Will Theory and Interest Theory point in different directions if we ask them to whom these duties are owed. The aim of this exercise is to undermine one of the basic assumptions that keeps the debate going, namely, Will Theory and the Interest Theory are best regarded as competing descriptions of the same phenomenon. Instead, they are better seen as attempts to capture two different conceptions of rights, or so I will argue.

I will show that these two conceptions of rights formed the basis of two strands in the history of natural rights theories. Although most natural rights theorists have tried to combine these, they are really incompatible. Both theories gave rise to two competing models of a legal system, and this, I will suggest, has enabled the transformation of a clash between two incompatible natural rights theories into a clash between two accounts of the nature of rights. The debate between these accounts has taken the specific form that we are able to witness now because either account can only take our intuitions as its data, and these intuitions are formed by a historical legacy of two incompatible conceptions of rights.

The second aim of this paper is to show how we may build a genuine theory of the nature of rights. Such a theory should do more than summarize our intuitions or carve out a consistent set among them. It should tell us something about why our intuitions take this particular form. What allows us to confidently identify certain normative incidences as rights, and not others? An historical account of the development of a rights language is an integral

---

14 Kramer is aware of the problem. See Matthew H. Kramer, “Getting Rights Right,” in Rights, Wrongs and Responsibilities, ed. Matthew H. Kramer (New York: Palgrave, 2001), pp. 28-95; at 31. He writes that “we are not confronting mere quibbles over labelling” because people often attach great significance to the affixing or withholding of the term “right.” But the weight people attach to the word cannot possibly justify quarrels over alternative definitions.
part of such a theory. I will further suggest that a theory of the nature of rights will be a partial
description of the culture that has produced a rights language.

**Hohfeld’s Terminology**

Hohfeld introduced a terminology that is adopted in virtually all contemporary discussions on
the nature of legal and moral rights.\(^{15}\) He observed that the word “right” as it was commonly
used in judicial reasoning tended to cover four fundamental legal conceptions that could be
defined by grouping them in a scheme of “correlatives” and “opposites.” He thought that all
legal relations could be analyzed as relations between two individuals. Every such relation has
two ends and can thus be viewed from two perspectives. This is what Hohfeld called
“correlatives”: descriptions of the same legal relation from the other perspective. In the
following scheme the correlatives are connected by a dotted line.

```
<table>
<thead>
<tr>
<th>claim-right</th>
<th>liberty</th>
</tr>
</thead>
<tbody>
<tr>
<td>duty</td>
<td>no-right</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>power</th>
<th>immunity</th>
</tr>
</thead>
<tbody>
<tr>
<td>liability</td>
<td>disability</td>
</tr>
</tbody>
</table>
```

The diagonals indicate what Hohfeld called “opposites,” but they are more accurately named
“contradictories,” since they are mutually exclusive and together they exhaust the universe of
discourse.\(^ {16}\) The presence of one indicates the absence of the other, and more strongly, the
absence of one indicates the presence of the other. Each legal relation is concerned with one
activity, or omission, of one person. The eight resulting conceptions—the four notions of
“rights” and their correlatives—are fundamental in the sense that all complex legal relations
are aggregates of these fundamental notions. Hohfeld called them “the lowest common
denominators of the law”.\(^ {17}\) The first two concepts that were covered by the broad and
unrestricted uses of the word “right,” as Hohfeld identified them, were claim-right and
liberty.\(^ {18}\) A claim-right is by definition correlative to a duty. Hence to say that Anne has a
claim-right against Benn that Benn shall not eat Anne’s salad is the equivalent of saying that
Benn is under a duty toward Anne not to eat the salad. Written in a formal way the definition
looks like this:

\[
C_{A,B}p \leftrightarrow D_{B,A}p
\]

---


\(^ {17}\) Hohfeld, *Fundamental Legal Conceptions*, p. 64.

\(^ {18}\) In order to preserve the technical sense of the term I use “claim-right” for what Hohfeld sometimes called a
right “in the strictest sense”. “Liberty,” is now generally preferred over the term “privilege” used by Hohfeld.
where $C_{A,B}p$ means that Anne has a claim-right against Benn that he do $p$. In our example $p$ consists in Benn’s refraining from eating Anne’s salad. The definition establishes that we will use this sentence as equivalent to $D_{B,A}p$, which means that Benn is under a duty toward Anne to refraining from eating her salad.

According to the above scheme, a liberty is the contradictory of a duty. Thus if Anne (the owner of the salad) says that Benn may eat it, Benn no longer has a duty toward Anne not to eat her salad. Benn from now on has a liberty of eating Anne’s salad. We can abbreviate this as follows:

$$L_{B,A} \sim p \leftrightarrow \sim D_{B,A}p$$

Apart from claim-rights and liberties, Hohfeld identified powers and immunities as concepts that where covered by the broad and unrestricted uses of the word “right.” Powers and immunities are of a higher order than claim-rights and liberties: whereas first-order relations have actions as their content, they have other normative relations as their content. A power is an ability to change a normative relation. In the previous example, Anne had, by virtue of being the owner of the salad, a power to change a normative relation between himself and Benn. By giving Benn permission to eat her salad, she caused him to acquire a liberty, while Anne lost a claim-right that he had. Powers are correlative to liabilities. In the above example Benn was under a liability to have a normative position changed by virtue of the fact that Anne had a power to release him from his duty. Immunities are the contradictory of liabilities. Since Benn, in our example, is unable to free himself of his duty not to eat Anne’s salad, Anne has an immunity against Benn. The correlative of Anne’s immunity is Benn’s disability to affect his duty toward Anne.

**When Is a Duty Owed to Someone?**

In the above scheme, the terms are defined by reference to each other. That is one of the reasons why the system has appeared so attractive: the concepts are related in such a way as to constitute an informal logic.¹⁹ One peculiarity of the system is that the concepts it defines are all descriptions of one side of a normative relation between two agents (but see n.45). A claim-right, since it is by definition correlative to a duty of someone else, is always held against some identifiable entity (e.g., a person or an institution). We can say it is directed.²⁰ Consequently, the Hohfeldian notion of a duty—since it is the correlative of a claim-right—is also directed.

---

And since the concept of a liberty is defined negatively, as the absence of a relational duty, liberties are also directed (and so are no-rights).

Not all our duties, so it seems, are directed.21 We may have “imperfect” duties such as duties to be benevolent or to give alms. Because these duties are general and unspecific, it seems inapt to speak of other people having a claim-right to our benevolence or to imply that a particular pauper has a claim-right to receive alms from us.22 Even in cases where the beneficiaries of our duties are clearly specified, our duties may or may not be owed to them. Most of us do, for example, acknowledge that we have certain duties regarding animals. We have a duty to feed our pets and a duty not to be cruel to animals in general. Nevertheless, not everyone thinks that animals therefore have rights, and it would surely be an odd result of the introduction of whatever terminology to take Hohfeld as deciding this issue. The common practice has been to distinguish between duties that are owed to somebody and duties that are simply regarding someone or something.

The problem is that Hohfeld’s terminology presupposes an understanding of what it is for a duty to be directed. Anyone who endeavors to explain the reference of the set of first-order relations quickly discovers that the notion of a duty seems to do the explanatory work. For example, it would seem natural to explain the notion of a claim-right by saying that it is the correlative to a duty of someone else and not the other way around—we would not start explaining the notion of a duty by saying that it is correlative of a claim-right. Similarly, the notion of a liberty is defined negatively as the absence of a duty or as the absence of a claim-right of somebody else. Hence, if we are to identify claim-rights, we need to be able to distinguish directed duties from nondirected ones and we need a criterion that allows us to identify the direction of a duty.

The Will Theory and the Interest Theory of rights could be (and have been) interpreted as providing rival answers to precisely this question.23 Doing so, however, has some surprising consequences. One is that it will be hard to see how Hohfeld's terminology could function as a medium through which differences between different conceptions can be communicated. If a conception of rights is needed to decide which incidences are claim-rights (or liberties, etc.), proponents of different conceptions will have different sets of incidences in mind when using Hohfeld’s terms. Thus the analysis could hardly provide a neutral platform

21 This has long been recognized. E.g. Joel Feinberg, “Duties, Rights and Claims,” American Philosophical Quarterly 3(2) (1966): 137-142; and David Lyons, “Rights, Claimants and Beneficiaries,” American Philosophical Quarterly 6(3) (1969): 173-185. For the purpose of this paper, I put aside the possibility of duties being directed but not correlative to claim-rights.

22 Of course, no received wisdom goes unchallenged: see Kramer, “Rights Without Trimmings,” p. 25n6. The following argument, however, does not depend on the assumption that certain duties or moral constraints are without direction.

that proponents of different conceptions can use to challenge each other’s positions. That aside, it is doubtful whether either Will Theory or Interest Theory can provide a plausible and useful semantics for Hohfeld’s notion of duty.

Consider Will Theory first. The most influential version is that of Herbert Hart. He thought that only civil law, as distinct from criminal law, confers rights on people because it gives them control over another person’s duty “so that in the area of conduct covered by the duty the individual who has the right is a small-scale sovereign to whom the duty is owed”.\(^{24}\) Hart identified three elements in the control that distinguishes a right holder from a mere beneficiary of someone’s duty. First, the right holder may waive or extinguish the duty (or not); second, she may or may not choose to sue after the duty has been breached; and third, she may waive or extinguish the duty to pay compensation. It is the presence of these abilities to control the duty-right relation that makes it possible to speak of people as capable of exercising rights.

Hart’s position has usually been taken to be straightforwardly translatable in Hohfeldian language as the claim that the beneficiary of a duty is a right holder only if she has a (Hohfeldian) power over the respective duty. However, this formulation is ambiguous. Taking a clue from Hohfeld’s idea that the eight concepts he identified are fundamental in that they are the building blocks of all more complex legal relationships, we might interpret it as maintaining that rights, according to Will Theory, are compounds—in the case at hand of a claim-right and a power to control the correlative duty. When someone only has a claim-right but no power over the duty owed to her, she will not be considered to hold a “genuine” right.\(^{25}\) If we accept this interpretation, however, Will Theory will only provide us with an account of conditions that are sufficient, but not necessary, for a duty to be directed. It will not offer an account of the direction of the duties that are correlative to claim-rights but that are not controlled by the holder of the claim-right. We can only interpret Will Theory as providing us with the necessary conditions for some duty to be directed if we take it to claim that all directed duties are owed to the person able to exercise control over it. If we follow this second interpretation, no directed duties—and thus no claim-rights—exist except those that are controlled by the holder of the claim-right.

This way of construing Will Theory has two serious disadvantages. First, since it makes the existence of first-order positions dependent on the presence of powers, it seriously diminishes the analytic force and scope of Hohfeld’s apparatus. Second, this reinforces the intuitive problems with some of the implications of Will Theory. One is that it seems to disallow talk of inalienable rights.\(^{26}\) A law that disables me to sell myself into slavery is likely seen as strengthening my right not to be enslaved, but for Will Theory it makes the label of “right” inapposite, and this has been regarded as a counterintuitive consequence. However, if we see Will Theory as an account of the directedness of duties, it also implies that the duty of

\(^{25}\) Wellman, *Theory*, chap. 3.
others not to enslave me stops being directed to me when the law disables me from selling myself into slavery. Similarly, a proponent of this version of Will Theory will regard duties to children or even to incompetent adults as not being owed to them. And this is certainly even more counterintuitive than refusing to regard those duties as being correlative to the rights vested in them. It is one thing to reserve the word “right” for claim-rights that are controlled by the holder but quite another to maintain that, for example, people’s duties not to torture me are not directed to me. Thus Will Theory does not provide us with a plausible account of the directedness of duties.

As far as I can see, none of the different versions of Interest Theory provide a plausible account of the directedness of duties either. The simplest version, which has been ascribed to Bentham, holds that a person has a right whenever he or she “stands to benefit” from the performance of a duty. But this cannot be right. No Interest Theorist would assume that I have claim-rights against everyone that they abstain from killing any of the people I love. Your duty not to murder someone I love may be owed to that person, but you wouldn’t consider it to be owed to me as well. Yet I certainly benefit whenever someone abstains from murdering any of the people I love. Some attempts to avoid the obvious flaws of the simplest version of Interest Theory appeal to the lawgiver’s intention. If the lawgiver imposes a duty in order to protect some interest of mine (or an aspect of my interest) or if an interest of mine is a reason to impose duties, then, and only then, shall we say that I have rights correlative to these duties. But such formulations generate even more difficulties in identifying rights. How shall we decide what exactly the intentions of the lawgiver were in outlawing murder? Given that certain duties are imposed, how are we to decide whether some interest is, or was, a ground for imposing them? Moreover, it seems that some rights, such as the right of journalists to protect their sources or many political rights, are not primarily justified by reference to the interests of the right holder.

Matthew Kramer suggests that we can use Bentham’s test to ascertain the direction of duties.

If at least one way of proving the breach [of a certain norm] will involve nothing more than a demonstration that a certain person has undergone some detriment (some unreceived benefit or some inflicted loss) at the hands of the duty-bearer(s), then that person holds a right under the relevant contract or norm.

Unfortunately if we expect it to provide a sufficient condition for someone to hold a right, the test will deliver similar counterintuitive results as the simple version of Interest

---

27 Of course, Will Theorists who see no problem in collapsing claim-rights and powers (like Simmonds, l.c.) will not consider these to be different things.


Theory.\textsuperscript{32} Proving a breach of the duty not to kill can be done by demonstrating that a person has been killed. The crucial question, however, is, “Who has undergone some detriment by the killing?” Obviously the person that has been killed has. However, if I loved the deceased, I will have undergone some detriment. Thus the test establishes that I have a right that my loved one shall not be killed. In response to such criticism, Kramer stipulates that the relevant interest most be nonvicarious. If something is in my interest simply by dint of a benefit conferred on some close relative or friend, and thus independent of my gaining from it in any other way, the interest is not sufficient to constitute the basis for ascribing a right to me.\textsuperscript{33} However, my interest is not vicarious in this sense. I have an interest in the survival of my loved one over and above my interest in her well-being, since I am better off by her being alive.

Thus we may conclude that neither Will Theory nor Interest Theory has provided us with an adequate account of the direction of duties.\textsuperscript{34} Whereas Will Theory gives a very narrow account of relational duties and collapses the distinction between claim-rights and rights that are under the control of the right holder, Interest Theory gives a very profuse account of relational duties, which leads to an implausible proliferation of rights.

**The Direction of Public Duties**

The conclusion that neither Will Theory nor Interest Theory provides a satisfactory account of the direction of duties still leaves several options open. One may join the debate and try to build a more sophisticated version of either “theory.” The argument thus far should make it obvious that I have no intention of going in that direction. Alternatively one may try to build an account that tries to combine the virtues of both. This strategy proceeds from the assumption that it is possible to provide a monist analysis of the direction of duties. In this section I will argue that that assumption is unwarranted. Duties are directed in two distinct ways, and Will Theory and Interest Theory are best seen as attempts to capture each of these.\textsuperscript{35}

To see why this should be so, we need to take a closer look at some cases where our intuitions about the direction of duties are less secure, and ask ourselves what Will Theory and Interest Theory would say about these. Since the subject is more manageable, I will for the time being restrict my attention to legal rights and duties. Consider a class of duties that are not obviously directed—call them “public duties.” Some examples are the duty you have to pay taxes, the duty not to smoke under a certain age, the duty to wear a helmet, and the duty to not drive without a license. What would Will Theory and Interest Theory have to say about their direction? Even though the question has hardly ever been considered, and though there is

\textsuperscript{33} Kramer & Steiner, “a Third Way?” p. 303–4.
\textsuperscript{34} For a careful analysis of these problems, see Sreenivasan, “Direction.”
\textsuperscript{35} Brouwer & Hage, “Basic Concepts,” have more radically suggested that the notion of a relational duty doesn’t make sense. They claim that there is no difference in the kind of duty between duties that correlate with rights and duties that don’t. This, however, is consistent with the suggestion that all duties are relational.
perhaps some room for disagreement among Will Theorists and Interest Theorists, we will see
that the most plausible assignment of correlative rights is very different for both theories.

Consider Interest Theory first. It seems that Interests Theorists can take different
paths. One is to construe “the public” (or the state) as an entity that may have interests of its
own, over and beyond the interests of the individuals that constitute it. It is after all not so
easy to determine whether all interests that are being protected by public duties can be
analyzed as simple shorthand for an aggregate of interests of individuals. If certain laws
generate duties that protect some of those interests (say, of the state) that are not
straightforwardly analyzable as an aggregate of the interests of citizens, this may incline the
Interest Theorists to construe public duties as owed to the state. However, in the vast
majority of cases the interests protected by the law are the interests of citizens (or private
corporations), so in these instances a talk of duties owed to “the public” is merely a loose way
of talking about duties owed to each and every citizen. Just like my duty not to kill is plausibly
construed as intended to protect the interest of each citizen (and perhaps beyond), so my duty
to not drive without a license could be seen as intended to protect the citizens’ interest in safe
streets.

So let us consider the second option. Could Interest Theorists consider everyone (or
every citizen) to have claim-rights correlative to public duties? Could we imagine my duty to
not drive without a license being owed to everyone in my country so that everyone has a
claim-right against me that I don’t drive without a license? Hohfeld thought that claim-rights in
rem (i.e., rights held against the world) are nothing more than bundles of many specific
rights—all of them held against specific individuals. Similarly we might think that talk of a
“public” duty like the duty to not drive without a license is properly speaking only shorthand
for a bundle of specific duties that are all owed to specific individuals. There are two problems
with this move. First, it is not clear whether we would still be able to make sense of the idea
that your duty not to harm me is not owed to everybody else in the same sense as it is owed to
me. Second, we might not be able to avoid the conclusion—which would amount to a
reductio—that everyone has claim-rights against everyone that they obey the law in almost every
respect. This conclusion cannot be avoided by a classificatory fiat—but simply stipulating that
whereas public duties are owed to everyone, private duties are not. The distinction should be
supported by substantive reasons to assume that private duties are not owed to everyone the

---

36 I know of no Interest Theorist who has suggested this. It is not very clear which option Kramer, “Rights
Without Trimmings,” pp. 58-9, has in mind, but his insistence that general claims should be analyzed as bundles
of specific claims suggests that he would assign correlative claim-rights to everyone.
37 Hohfeld’s analysis of rights in rem is hotly debated. For defence of Hohfeld, see Lars Lindahl, Position and Change
Press, 2002), p. 120ff; and Simmonds, “Cutting Edge,” pp. 151-2. For criticism, see Max Radin, “A Restatement of
way public duties are (i.e., independent of the desired result of eliminating such worries). There are, however, independent reasons to think public duties cannot be owed to every citizen the way private duties are to specific individuals.

The reason why it is a mistake to analyze public duties as bundles of duties directed to private citizens emerges more clearly if we take a closer look at the logic of Hohfeldian duties and liberties. Suppose that you promised your friend Lisa that you will join her at the theater this evening. You now have a duty to fulfill your promise. Since your promise was made only to Lisa and not to anyone else, it seems that your duty is owed only to her. And since having a duty to do something is compatible with having many (Hohfeldian) liberties not to do it, it follows that you have many liberties (against everyone except Lisa) to not go to the theater with her. In this respect, Hohfeldian liberties are fundamentally different from duties—Hohfeldian or otherwise.38 Someone having a duty means that some action (or omission) of that person is normatively required. Hohfeldian liberties, on the other hand, only indicate the absence of a directed duty. But the absence of a directed duty to do something is compatible with the presence of a directed duty to some other party to do it. Hence no liberty, by itself, determines the normative quality of an act.

Conversely it seems that every Hohfeldian duty, by itself, refers to a normative constraint on some action. Our understanding of the meaning of first-order conceptions in the Hohfeldian scheme depends on our intuitive understanding of the notion of a duty. And the core of this intuitive understanding seems to be the idea that whenever one is under a duty, other things being equal, one is required to do (or omit) some action. We could say that whenever one has a Hohfeldian duty, one also has a duty simpliciter—where duty simpliciter would simply refer to the normative quality of an action (being obligatory), making abstraction from the question whether or not this duty is directed. A duty simpliciter is not an entity separate from the directed duty that implies it; it is merely a way of referring to the fact that whenever someone has a directed duty, some act or omission of that person is required. Having a duty or obligation does not necessarily entail that one ought to do it all things considered.39 On the other hand, a duty simpliciter should not be mistaken for a mere prima facie duty. After all, prima facie duties are—properly speaking—not duties at all.40 It is useful to introduce another term here: let us call the contradictory of duty simpliciter “permission.” Like “duty,” “permission” indicates the normative quality of some action. Whereas “duty” denotes the presence of normative constraint on an action, “permission” indicates its absence. We can also see that whereas directed duties imply, but are not implied by, duties simpliciter, with liberties it is the other way around: directed liberties are implied by permissions (if one is permitted to do something, one does not owe anyone an obligation to do it), but not vice versa. These relations are visualized in the following scheme:

40 See Harry Beran, “Ought, Obligation and Duty,” *Australasian Journal of Philosophy* 50(3) (1972): 207-221, for an excellent discussion of “duty” and “ought,” and for a critique of the notion of prima facie duty (pp. 213-4). For my purpose it is not necessary to distinguish between “duty” and “obligation.” Many thanks to Saladin Meckled-Garcia for this reference.
If we now restrict our attention to the normative consequences of a particular legal decree, we may say that public duties can be reduced to bundles of directed duties to private citizens if and only if permissions are also reducible to bundles of liberties directed to citizens. One reason for rejecting these reductions is the indefiniteness of the number of directed duties and liberties implied by public duties and permissions. When I acquire permission to drive, this supposedly implies directed liberties to drive against everyone. Whenever a new citizen is born, I would acquire a new liberty. But it is hard to see how a mere bundle of directed duties or liberties could entail additional directed duties or liberties. The more important reason, however, is that the proposal upsets the relative difference in strength of the different notions. An aggregate of directed liberties does not entail a permission because the latter notion is a stronger one. Similarly “directed duty” is a stronger notion than “duty simpliciter.” Public duties are much more plausibly analyzed as the contradictory of permissions than as aggregates of duties directed to citizens. To hold, however, that a duty simpliciter can be analyzed as a number of duties directed to citizens would imply that some duties simpliciter (D, p) entail an indefinite number of directed duties: D, , B p, D, , C p, D, , D p, D, , E p,... As I said, this upsets the relative strength of both notions. (And again it is unclear how we could avoid the conclusion that any directed duty entails an indefinite number of similar directed duties—since any directed duty D, B p again entails a duty simpliciter D, p.) This would simply remove the notion of directedness of its substantive content.

If an account of public duties as bundles of duties directed to individuals is indeed incoherent, the most likely alternative for Interest Theory would be to deny that public duties are directed. In some cases, this seems to be by far the most plausible position. The law may forbid smoking under a certain age, but it may well be that the only intended beneficiary of this duty is the minors who are prohibited from smoking. In such a case, it would certainly be awkward to claim that they have a right that they not smoke, which is correlative to their duty to not smoke, which is owed to themselves. Hence an Interest Theorist may feel that this duty has no direction. And if there are some duties that are not directed, perhaps our duties to pay our taxes and our duties to not drive without a license are part of the same category of duties that are not correlative to anyone’s claim-right. Hence, the most plausible Interest Theory account of the direction of most public duties may be to deny that they are directed.

---

41 The problem was first noted in relation to general rights by Radin, “A Restatement of Hohfeld,” p. 1155.
Consider now possible answers of Will Theorists to the question of the direction of public duties. Like Interest Theorists, Will Theorists can regard public duties to have no direction. Some Will Theorists, however, have suggested that public duties may be owed to the state or to state officials.\textsuperscript{42} This conception is unavailable to Interest Theory. But the idea is not completely unproblematic.

Hillel Steiner has argued that Will Theory can locate legal rights correlative to criminal law duties in state officials, since these officials can exercise legal powers over those duties. However, state officials are clearly not able to waive every criminal law duty. Steiner counters this objection with a conceptual argument: To claim that no state official can waive a criminal law duty, he writes, is to claim that any such official is encumbered with a disability that is unwaivable by the holder of the correlative immunity.\textsuperscript{43} Such a disability entails a correlative immunity in a higher official. And if this higher official is also unable to waive the immunity, there must—again—be a higher official who holds a correlative immunity. An otherwise infinite regress can only be stopped by positing an immunity that is waivable. Thus Steiner concludes, “Unwaivable immunities (eventually!) entail waivable ones.” Unfortunately for Steiner, the argument is flawed. The disability of an official to waive the criminal law duty of a citizen is correlative to an immunity of the person under a duty, not to a disability of a higher official.\textsuperscript{44} Moreover, even if we would grant that the correlative immunity would be located in the higher official, Steiner’s conclusion would still not follow, for the disability of this higher official to waive the immunity would correlate with an immunity located in the very same official.\textsuperscript{45}

What matters for the present purpose is not so much whether Steiner’s argument is successful but the motivation behind it. The basic idea underlying Will Theory is that duties (or, more generally, normative constraints) are owed to an agent who has the ability to normatively control them. Steiner and other Will Theorists have suggested that in the case of criminal law duties we can locate such an agent somewhere in the government of a country, and this seems certainly correct if we interpret “government” loosely enough, for the legislative body that has generated those duties usually also has the power to extinguish them.\textsuperscript{46} It is only natural, then, for a Will Theorist to stipulate that criminal law duties are owed to the lawmaker.


\textsuperscript{43} Steiner, “Working Rights,” pp. 253-4. I refer to the later version of the argument, which responds to certain criticisms by Simmonds, “Analytical Foundations,” pp. 317-20, on an earlier version (Steiner, \textit{Essay}, pp. 70-3).

\textsuperscript{44} Simmonds, “Analytical Foundations,” pp. 318-9.

\textsuperscript{45} And perhaps also an immunity of the lower official. A Hohfeldian power always applies to a relation between two agents, so strictly speaking (and contrary to what is usually assumed) it correlates with at least two liabilities. Disabilities therefore correlate with two immunities.

\textsuperscript{46} This seems to me true even where the ability of the legislative body is constrained by constitutional restrictions. I’m leaving aside the question whether it is best to identify an actual legislative body as lawmaker or, rather the agents in the choice situation of a contractarian theory. (cf. Graham, "Will Theory.")
A problem with this suggestion is that it seems arbitrary, at least if the proposal is meant to apply only to criminal law duties. If your duty not to kill me is owed to the legal authority of my country, there is no reason why my duty to not drive without a license shouldn’t be owed to the same authority. Even if we enlarge the category so that it incorporates all public duties, the impression of arbitrariness will not disappear. We may as well ask why my duty to honor a contractual obligation is not similarly owed to the legislative authority that has generated the duty to honor contractual obligations. The fact that in these cases we can find another agent who also has some normative power over these duties is certainly insufficient to justify the disparity, since the conception of the direction of duties that allows us to identify the lawgiver as having rights correlative to criminal law duties applies equally to all other legal duties. None of these duties (qua legal duties) would exist if the lawgiver had not proclaimed them and the lawgiver has similar powers over all of them.

The easiest way to circumvent this problem would be to construe Will Theory as an account of the rights of the legislative authority. Steiner suggested that whereas criminal law duties are owed to government officials (who thus have the correlative rights), ordinary citizens can be seen as third-party beneficiaries of criminal law duties. Likewise, one could go further and construe all legal duties as owed to the lawgiver, so that only the lawgiver has rights correlative to them. In fact, this amendment to Will Theory seems implied in a reply of Steiner to one of MacCormick’s criticisms. MacCormick had objected that Will Theory would, contrary to English law, assign a right to the third-party beneficiary of a contract in case the contract stipulates that the goods are only to be delivered if the beneficiary requests such. Steiner responds that the beneficiary does not have a right if the contractual provision is revocable. According to Steiner, the role of the request of the beneficiary “is essentially that of an operative fact, not a set of powers.” The rationale for denying powers to the beneficiary is the fact that these can be overridden by the contracting parties. By the same token, one could deny powers (and thus Will Theory rights) to any ordinary citizen if the existence of these powers is dependent on the law remaining unchanged. Hence it seems that at least Steiner should be committed to assigning rights correlative to legal duties only to the lawgiver. According to this conception, no ordinary citizen has rights. Instead, citizens are (mere) beneficiaries from duties owed to the lawgiver by other citizens.

In several respects this account is a very neat one. It provides a clear and unequivocal conception of the direction of duties. Moreover, it can be interpreted so that it resolves the debate between Will Theory and Interest Theory in a rather surprising—and, I believe, illuminating—way. Since Will Theory is construed as providing an account of the rights of the lawgiver, we could continue to see Interest Theory as an attempt to describe how some duties are owed also to citizens whose interests are being protected by them. Consequently, Will Theory and Interest Theory become complementary instead of rival conceptions of the

47 Steiner, Essay, p. 66.
49 Steiner, Essay, p. 64.
direction of legal duties, and hence, they must also be seen as providing accounts of two different kinds of rights. If accepted, we could consider the lawgiver to have “Will Theory rights” and citizens to have “Interest Theory rights.”

The disadvantage of this proposal is, of course, that Will Theory stops being an account of legal rights as is commonly understood. As such, one could object that it sidesteps the issue at stake in the debate between Will Theory and Interest Theory rather than providing a solution to it. Not only has the subject been changed, the debate has also become senseless. Whereas the participants in the debate were convinced that they were discussing rival accounts of rights, it now turns out they were not. Yet, the proposal has the virtue of drawing attention to the fact that Will Theory and Interest Theory are not necessarily opposed to each other. This is true even if both are seen as accounts of the rights of ordinary citizens. In the much-discussed case of third-party beneficiaries, Will Theory could be seen as providing an account of how the duty is owed to the contractor, while Interest Theory could be viewed as describing how the duty is directed to the beneficiary (or beneficiaries, perhaps including the contractor). The belief that Will Theory and Interest Theory are incompatible therefore remains an unargued background assumption necessary to keep the debate going—an assumption that is at odds with the recognition that both accounts are also (“partly”) stipulative.

To sum up, the debate between Will Theory and Interest Theory generates puzzles that should leave any observer perplexed. Why have people simply assumed that Will Theory and Interest Theory are incompatible, when in fact they are not? They would, of course, be incompatible as attempts to describe all instances that we commonly take to be rights, but that position is unsustainable, since each account clearly involves stipulation. Why have people continued to believe that accepting either account of rights could generate normative conclusions, in the absence of any convincing attempt to show that it can? Instead we have an abundance of rhetoric about the alleged importance that people attach to the word “right,” as if this were a philosophical argument in its own right. Why have generations of philosophers continued to debate the respective merits of stipulative definitions on the basis of linguistic intuitions? And, above all, how could they have believed that such a stipulative definition constitutes a theory about the phenomenon in question?

I would like to suggest that we can only understand the absurdities in the current discussion if we understand its history. Several authors have traced the antecedents of the contemporary debate to earlier disputes—to the nineteenth-century clash between adherents of the “formalism” of Savigny and the “instrumentalism” of Jhering respectively, to the opposition between Kantianism and Benthamism in the eighteenth century, and further back to disputes over alternative natural rights theories in the High Middle Ages. It is uncontroversial that in the course of such a long history some of the questions may have undergone a radical transformation. Some of the ideas that rendered certain propositions

---
intelligible in a previous intellectual context may have disappeared at a later stage. Some of the background intuitions may have remained but may have become hard to justify in the absence of other beliefs that are no longer accepted. My thesis is that this has happened to the question regarding the nature of rights.

This matters for two reasons. One is that an historical account of the debate will allow us to understand what has gone wrong with the contemporary debate and draw lessons from this. In the context of medieval discussions about natural rights, the question “What is a right?” invited an approach very different from contemporary conceptual analysis. Any answer to the question had to be consistent with an acceptable religious justification for people having rights. Historically, two basic models of such a justification have given rise to two quite distinct conceptions of rights that cannot be reduced to a more basic common conception. These conceptions of rights were originally part of two theories of natural rights. The fact that these theories are incompatible, I submit, is the source of the intuition, current among analytical philosophers today, that their “theories” are competing accounts of the nature of rights rather than explications of alternative—and compatible—conceptions of rights. As accounts of the way we speak about rights nowadays, however, there is no reason to see them as incompatible.

An historical account matters, second, in that it generates constraints on theory formation. It does so, partly, by identifying the particular historical trajectory that has brought into being “our” intuitions about rights. A theory of rights, I suggest, should do more that merely isolate a consistent set of intuitions about the subject: it should be able to explain in a non-ad hoc manner, why one cultural tradition (as opposed to other cultural traditions) has created “the realm of rights” and why it has taken this particular form. The influence of Christianity in Europe is a crucial part of this account. Many of our intuitions about the subject are shaped by theological concerns, but these are no longer recognized as such. A theory of rights should therefore take into account the extent to which the Western legal tradition is, in the words of Harold Berman, secularized theology. This is an additional reason why a historical account is an essential part of a theory of rights.

Two Concepts of Rights in Natural Rights Theories

Natural rights theories developed as early as the High Middle Ages. Richard Tuck has argued that from the onset of their development we can witness a debate between theories of “active” and theories of “passive” rights. His analysis of these theories was severely criticized, both conceptually and historically, but his basic inkling, I submit, was nonetheless correct. There

---


are two conceptions of rights at work in even the earliest debates over natural rights, and from these we can construct two “pure” versions of natural rights theories that have radically different normative implications.  

At the root of the two conceptualizations of rights is a tension in Christian thought concerning the use and possession of material goods. Throughout European history, a substantial majority of Christian thinkers accepted the institution of private property as legitimate. At the same time, most Christians believed that God had intended earthly goods to provide for the sustenance of each human being. But concentration of property all too often blocked access to basic necessities for the poor, leaving them in dire destitution. Hence, Christian thinkers and writers felt a need to try to square the institution of property with the normative necessity that all human beings have access to the goods required for survival. Many church fathers held that the rich were under an obligation to use their superfluities to provide for the poor. However, it remained unclear what, if anything, could be done in case the rich turned a deaf ear to pleas for help.

The first natural rights theory grew in response to this tension. In the twelfth century canon lawyers began to ask whether a pauper could licitly take something from the superfluities of a rich man—even without the latter’s consent—in case he would perish without it. Huguccio, the most influential of the early canon lawyers, formulated the principle that was to guide all future reflection on the subject: “By natural law all things are common, which means that in times of necessity they must be shared with those who need them.” Subsequent canon lawyers applied this principle to the case of extreme necessity, as it came to be called. A man (or woman) in case of extreme necessity could legitimately take whatever he (or she) needed to survive. The principle soon became a standard doctrine, not just in canon law, but also in theology and civil law, and it remained virtually uncontested until the second half of the seventeenth century. The most widely accepted justification for it drew on distinctions between natural and positive law and between use and property. Before human law instituted private property, human beings had only the right to use earthly goods but no property in them. This right continued to exist even after the institution of property. Whereas other people’s property rights would normally limit this right of use, they would not do so in cases of extreme necessity. The most salient feature of the right to use was that it did not allow the right holder to exercise any normative control over the things he or she was entitled

53 Many natural rights theorists have tried to combine both conceptions, but that inevitably lead to inconsistencies.
54 See e.g. Charles Avila, Ownership: Early Christian Teachings (Maryknoll, New York: Orbis books, 1983).
55 Couvreur Les pauvres p. 99.
57 See e.g. Ockham Work of Ninety Days, pp. 442-4.
to use. For example, it did not allow the user to exclude anyone else from using the thing. In the terminology of those days, the right to use was distinct from any dominium or lordship. In some views, this feature made the natural right to use crucially different from all other rights.

The second natural rights theory grew as a result of various reflections on the origin and nature of human dominium. The term dominium was sometimes used as equivalent to “property.” In other contexts, however, it tended to cover rights in general and all kinds of normative power, such as jurisdiction. In principle, all Christians agreed that all dominium was ultimately God’s, but few doubted that God had granted some of his dominium to human beings. One of the thorny questions was, “to whom?” Toward the end of the famous poverty debate between the Franciscans and their adversaries, Pope John XXII answered that question by saying that even before the fall, God had given Adam dominium over the earth. A few decades earlier, the French Dominican John of Paris had already argued in a very different context that private property rights are not dependent on human law but originate in human labor, and two decades later the German theologian Konrad von Megenberg would do the same. The basic operative idea in these theories is that of creation. Human beings acquire sovereignty over those things that they have made, just like God is sovereign over the universe because he has created it. As the notion of dominium came to be used broadly to cover any right, the concept of creation was correspondingly stretched so that it became possible, for example, to ground the idea of a human right to freedom in the claim that human beings have dominium over themselves (on account of their freewill). In the sixteenth century, Vitoria grounded the dominium of the American Indians in the fact that they are able to master their own actions. From this he derived the conclusion that American Indians had natural property rights in the land they were living on and also the right to rule themselves.

At the heart of these two natural rights theories are the two different conceptions of rights that are being disputed in the debate between Interest Theory and Will Theory. While one natural rights theory conceptualizes rights (of using the produce of the earth) as created by the sovereign to protect the interests of human beings, the other theory conceives a right itself as the normative control of a sovereign.

60 This was already suggested by Tuck, Natural Rights Theories, pp. 29-31. See my “Libertarian Natural Rights,” in Critical Review 16(4) (2004): 353-375, for a defense of the suggestion that creation is the basic notion in these theories.
These roots in the natural rights tradition account for some of the intuitions underlying the contemporary debate. One of these is the belief that only one of both accounts of the nature of rights can be true. This obviously holds for the two natural rights theories that emerge from these distinct conceptions of rights: the theories are incompatible because they generate conflicting normative implications. But when taken as a statement about our linguistic intuitions about rights, the idea that only one conception could be true ceases to make sense. Another of these beliefs is the idea that accepting one definition of “right” (rather than another) matters normatively: it certainly does when the definition is part of a natural rights theory. Detached from a theory, however, neither a stipulative definition nor an analytic statement about the language of rights entails any normative implications, despite the many suggestions that it might. Yet, while this hypothesis sheds light on the pedigree of many problematic assumptions in the contemporary debate, one may still wonder how a clash between natural rights theories could evolve into an austere analytical debate. The story of this historical transformation remains to be written, and I can only hint at it briefly here.63

A striking characteristic of the universal consensus surrounding the principle of extreme necessity from the thirteenth to the second half of the seventeenth century was that, even though it was considered a proper legal principle in both canon and civil law, its application was thought to give rise to an exception to the normal functioning of the law. Gratian’s Decretum introduced canonists to the maxim: “necessity has no law,” and one of the most widely accepted justifications for the principle was that the presence of extreme necessity would initiate a lapse to the state of nature, where there are no property rights and no other legal restrictions imposed by human law on the use of goods. The principle of extreme necessity thus defined one of the limits of the functioning of positive human law. Precisely this feature became the focus of the sometimes harsh denunciations after the seventeenth century. The motivation behind this shift, I would like to suggest, is a strengthening of the idea of legislative sovereignty. One of the consequences of this evolution was that the notion that there could be lapses into a state of nature began to appear increasingly odd: hence the protection of individual rights had to be internal to the law, perhaps as a result of a moral obligation of the lawgiver. Another consequence was an increased tension between two conceptions of human law. According to one model, legal rules exist to protect preexisting dominia of sovereign citizens. Law’s primary function is to punish those trespassing the borders of these domains and arbitrate in disputes between citizens over their legitimate entitlements. According to the second model, legal entitlements are created by the law and the primary purpose of the law in creating them is to promote the interests of those governed by it. The first model better fits the theory of natural property rights, but it is incompatible with (genuine) legislative sovereignty. The second model, however, seems to disallow entitlements of citizens prior to those generated by the law, save those entailed by the moral obligation of the lawgiver to protect their interests. In an intellectual world where both the lawgiver and

63 Simmonds, “Cutting Edge,” and Singer, “Legal Rights Debate,” provide insightful discussions of parts of this transformation.
individual human beings were increasingly considered sovereign beings, both models were necessary and problematic at once.⁶⁴ This tension fueled the successive debates between different conceptions of a legal system that are the predecessors of the twentieth-century debate over the nature of rights.

Changed background assumptions account for the absurdities in the contemporary debate. As long as natural rights theories were still part of the received paradigm, an inquiry into the nature of rights was fundamentally an inquiry into the nature of the rights that God had given to human beings. The basic question was, Is *dominium* natural for human beings, or is it only a product of human law? This question was—at least in principle—answerable. When natural rights theories were no longer authoritative, the feeling remained that there was an important question to be answered, but it could only be answered by an appeal to linguistic intuitions. Since these intuitions were themselves the product of a long tradition of conflicting theories about rights, the debate remained irresolvable. This is as good a reason as any to abandon the debate, but it also raises the question, what can we do instead? Given that the theories of natural rights have lost the authority they once had, can we do anything else than summarize linguistic intuitions, if we want to answer the question, what are rights?

**Is a Theory of the Nature of Rights Possible?**

Wenar has usefully summarized the current state of theorizing about the nature of rights: Because theorists of the nature of rights cannot set a list of the phenomena to be explained without making hotly contentious assumptions, “they have tested the explanatory power of their theories not against what rights there are and could be, but against what rights people say that there are and could be.”⁶⁵ Unfortunately, according to Wenar, the debate over the nature of rights has become a proxy debate in the battle between substantive theories. Because of this, it has made no more progress than has the debate between these substantive theories themselves. He concludes that an analysis of an ordinary understanding of rights has its own integrity as a subject of scholarly inquiry. We can read this as a plea to clearly distinguish between the practice of summarizing linguistic intuitions about rights—that is, of explicating what rights people say there are and could be—and that of developing a theory of rights.

How could a theory go beyond what people say about rights in answering the question, what rights are? The theories of rights that we are familiar with are normative theories, and these, it seems, can only be “tested” against our intuitions. For any such theory, we can ask whether the concept of rights that it stipulates excludes some of the commonly accepted uses of the word. We can estimate to what extent the rights it postulates match the rights we think people really (ought to) have. But this is still not very different from what the crazy biologists

---

⁶⁴ On this evolution, from a different perspective, see my “Natural Rights and Individual Sovereignty” in *Journal of Political Philosophy* 12(2) (2004): 147-162.

⁶⁵ Wenar, “Analysis.”
were doing in my analogy earlier. In this sense it may seem unfeasible for a theory of rights to resemble anything like a scientific theory.66

What else is possible? My critique of the contemporary debate on the nature of rights should have made it clear that we need a historical account of the development of rights much more than is commonly acknowledged. Even the problematical assumptions underlying the current debate appear to be the result of a particular historical process. Only a historical approach will enable us to understand what has kept the debate on the nature of rights in a deadlock and, more generally, to ask why our intuitions about rights have this particular structure. When we do this, we will have already stopped to regard these intuitions as inevitably fixed elements of the human condition. Rather, they will start to appear as the product of a particular historical development.

The next step is to remember that the language of rights, and the intuitions that structure it, are the property of a particular culture. They did not develop in other cultures, perhaps not even in the culture from which the medieval lawyers inherited much of their vocabulary—that is, ancient Rome.67 Historical analyses have revealed a remarkable constancy in the structure of our thinking about rights, at least since the thirteenth century.68 Suppose that we can indeed detect an underlying pattern in our thinking about rights that has remained relatively stable for many centuries, and that was absent in other cultures. We could then ask why this culture has structured the domain of ethical and legal thought in this particular way. We could ask which elements in the culture where it existed sustained this pattern. If more can be said in answer to these questions that merely historical influences between authors, there is no a priori reason why the question cannot be answered in a scientific way. Such a theory would be a partial description of the culture in which theories of rights developed. Whatever the fate of such an inquiry, the point to be made here is that when we embark on it, we have already moved far beyond the current debate over the nature of rights.

66 This is part of what Berman called the deep crisis in the Western legal tradition: the belief that stimulated the growth of law faculties in Europe from the 12th century onwards—that the law can be studied scientifically—is now largely lost to our culture; See Harold J. Berman, Law and Revolution (Cambridge, Mass.: Harvard University Press, 1983), p. 558.

67 Villey famously argued that Roman lawyers did not have the concept of subjective rights. Charles A. Donahue, in his “Ius in the Subjective Sense in Roman Law: Reflections on Villey and Tierney,” in A Ennio Cortese, eds. Maffei & Birocchi (Rome: Il Cigno Edizioni, 2001), pp. 506-35, has convincingly shown that Justinian's Digest contains many instances where the word ius is used in a way such that it is aptly translated as “right” in the subjective sense. This does not, however, settle the matter I am interested in. A more fruitful approach is that of E. J. H. Schrage, Actio in Subjectief Recht. (Amsterdam: Vrije Universiteit, 1977).