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Moral Methodology and the Third Theory of Rights
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Does Judge Jones presiding over a criminal case, and empowered to pass a sentence, have a right to sentence? Debates on such matters can seem like scholastic disputes over the sex of angels. The judge is clearly empowered in that others have duties to respond to her decision-making appropriately. So, as an outsider to these debates might ask, why bring rights into it?

Unfortunately debates on the position of the judge, and on the nature of rights generally, have rarely dealt with the latter question, as if classification need have no upshot. Theorists invariably move swiftly from posing the category question to supplying competing accounts of what they take to be the defining nature of rights. The competition being most notoriously represented by two branches: will or choice based accounts, which I shall call control theories, and benefit or interest accounts, which I shall call wellbeing theories. There are, of course, sub-branches and hybrids. But I shall not linger on the possible permutations of these schools and their alternatives as my aim here is not to engage in the kind of debate that defenders of these accounts have typified. At least, I will say little about their detail beyond characterising the broad aims these two main branches and giving a diagnosis of the intractable nature of the dispute. My principal aim, given that coming diagnosis, is to use a sophisticated version of the ‘Why bring rights into it?’ question to develop a methodology for resolving disputes over the concept of a right.

My focus is, then, on the methodology behind the apparently intractable problem of conceptual definition for normative concepts, which in this case has given rise to much to-ing and fro-ing of arguments between supporters of opposing theories. For, as intense as the debates might be, there is little, if any, discussion of criteria for what would amount to a successful theory in advance of supplying actual candidates. There is even less discussion as to why one should engage in this


2 H. L. A. Hart, ‘Definition and Theory in Jurisprudence’, pp. 26-7, 33-4 proposes a linguistic method but does not explain the rationale behind it. Joseph Raz merely says “A successful philosophical definition of rights illuminates a tradition of political and moral discourse in which different theories offer incompatible views as to what rights there are and why. The definition may advance the case of one such theory, but if successful it explains and illuminates all.” p 166 The Morality of Freedom, but what that means beyond appeal to intuitions (see pp. 171, 174) with some moral ‘throw-in’ is hard to assess. Steiner’s discussion is a little more extended, but not much, advising us to begin with linguistic usages (“because we’re not…in the business of creating a new language.”);
classificatory enterprise to begin with.³ This paper, then, is more than a contribution to that debate, it is also a demonstration of a specific methodology for solving questions of conceptual controversy when normative concepts are at stake.⁴

To sketch: rights, as asserted by one type of theorist, are those duties imposed on others which protect the interests (or elements of the wellbeing) of particular entities (hence interest or wellbeing theory).⁵ Rights, says another kind of theorist, are where a competent agent has a normative power to determine a given outcome (e.g., whether a duty should be performed, or waived or how a dispute is decided), hence ‘control theory’. Holders of each view then proceed to offer a mixed bag of arguments appealing to linguistic practices, intuitions, and moral predilections, in their own support. None asks what the point of the enterprise is, what of value is at stake in the distinction, such that they might develop a view on exactly what constitutes a key disagreement, versus a peripheral one, or the extent to which their enterprises live up to that point.

Below I introduce what might be called the ‘honorific’ sense of the term right. That is the sense in which something being a right makes some difference over it not being a right, or over it being something else. But the difference it makes must be of a special kind: one that matters in our judgements rather than a trivial difference in classification. That is, my starting point is the value, in moral terms, of having the concept, and it is my contention that this starting point will give us a hold on what constitutes a good theory and why: a theory that captures this distinctive role of rights in our moral repertoire in the form of a principle. It is from this additive point of having a right that we can derive criteria of success for a theory of rights.

³ Other than references to ‘analysis’, M. Kramer, ‘Rights Without Trimmings’ pp. 74 ff, precision and the task of philosophers; ‘theoretical adequacy’ as ‘mapping more significant theoretical boundaries’ or ‘illuminating solutions’ to theoretical problems regarding which kinds of agents can have rights, Rainbolt, ‘Two interpretations of Feinberg’s Theory of Rights’, Legal Theory, 11, 2005, pp 229-30, or for that matter “…knowledge of all the essential features of the thing it is a concept of...” J. Raz, ‘Can there be a theory of law?’, in The Blackwell Guide to the Philosophy of Law and Legal Theory, Malden Mass.: Blackwell, 2005, p. 326, all of which beg the question.
⁴ This methodology is more explicitly set out, contrasted with alternatives, and defended in general terms in Chapter xx of this book.
⁵ I accept a distinction between justificatory and classificatory interest theory. Justificatory interest theory would say that rights exist where there is a reason based in an interest for holding another person under a duty. Classificatory interest theory, such as that held by Matt Kramer, (roughly) holds that rights are merely a classificatory category which applies when there exist duties (based in whatever reason) which protect the interests of another. The later critique of interest theory in this version of the paper is mainly directed at the justificatory version, which I think is the more tenable version.
I should also say that I don’t distinguish the aim of explaining what counts as a legal right from explaining what counts as a moral right. Unlike many theorists, I take the moral notion to illuminate the legal notion, rather than the other way round. Legal powers, liberties, claims, and immunities cannot be understood other than in terms of clusters of duties (or their absence). Christening any of these as rights in the honorific sense of the term implies we have an account of that honorific sense. That is, an account of the value of the concept, the point of employing it, in practical reason. In that respect only the moral account will do the trick. Indulging any legal remainder, conceptually speaking, would seem to serve no serious aim; a case of the ‘trivial classification’ I have in mind to avoid.

My explicit methodology for developing theories of moral concepts stands in radical contrast to existing approaches to the concept rights, which have relied on an unsystematic collection of types of argument, unguided by any explicit and shared criteria as to what would amount to success. In what follows, I first diagnose the problem of resolution as lying with both the form of arguments and the lack of perspicuous methodology in the literature and then explain the alternative methodology I will employ (I). In II I move on to develop an account of the specific value contribution of the concept of a right. From that I derive criteria of success for a theory of rights. In III I show how the key contenders in the existing debate fail when measured up against those criteria, and in IV I offer a candidate theory that satisfies them, which I defend from key objections.

An objector to this account of rights will have three avenues for dispute. They can show that my methodology is faulty; that the point and purpose of employing the concept is not the one I attribute to it: that I have failed to grasp the added value of rights; or that the theory of rights I supply does not do justice to the criteria I derive as identifying the concept’s point and purpose.

I Diagnosis
Existing rights theorists, whilst adopting differing views on the defining nature of rights, are united by one thing. They lack a single, perspicuous, explicit and common methodology for assessing the success (or lack of it) of a theory of rights. By methodology I mean an account of how one’s approach to developing a theory of a concept such as a right, is justified in terms of its propensity to track truth about concepts.

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7 As he referred to only legal positions, then Bentham was thus far right in saying rights must reduce to duties. J. Bentham, The Limits of Jurisprudence Defined, New York: Columbia University Press, 1945, p. 55, n. 3.
Whilst the existing debate has appealed to a mixed bag of arguments, there are three main types offered in favour of candidate theories of rights. First, there is appeal to the evidence of linguistic practices. Theorists try to show how their accounts explain more, or key, ways in which the word right is used compared to rival theories. Secondly, theorists appeal to intuitions over the classification of examples. They try to settle disputes by showing how, given the intuition that a given case is a clear example of a right or a clear example of something that is not a right, their theory explains why it is so, or explains more such cases than opposing theories. Finally, there is also some appeal to conformity with desirable moral aims, where a favoured value, such as autonomy or individual wellbeing, is produced, and the favoured theory then shown to better conform with that value than the alternatives.

Each of these approaches has its own problems, which is compounded by the fact that they are offered together in an unsystematic way, and also often not adequately distinguished from each other when they are offered. This also serves to obscure what is truly at stake in any apparent disagreement.

Let us begin with the criterion of satisfying ordinary language usage. Clearly this criterion cannot mean putting together a conjunction of all the ways people use ‘right’. It must offer an interpretation of those ways of talking, both in terms of the usages it selects to focus on and in terms of the kind of conditions that persons are taken to be invoking for the correct use of the term. As such the value of any particular usage as evidence is zero: one needs a further reason for why such a usage is or is not pertinent. So theorists of ordinary usage invoke the notion of analysis, which usually means compiling a clear set of necessary and sufficient conditions for use of the term. Whilst this in itself is a move away from ordinary language, it still invokes those sets of necessary and sufficient conditions

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8 Hart’s suggestions are linguistic, focusing on phrases and their place in practices, rather than on usage of individual words, ibid. and 33-4.; Leif Wenar ‘The Nature of Rights’, Philosophy and Public Affairs, 33(3), 2005, seeks to offer a “vernacular standard” for rights “as they are commonly understood” p. 224 and proceeds to recommend his view because it captures more usages of “right” than the alternatives put together, p. 248; Rowan Cruft, ‘Rights: Beyond Interest Theory and Will Theory’, Law and Philosophy, v. 23, 2004, p. 347-397 is explicit in that his ‘aims are to seek an analysis of the concept ‘a right’ that accords with the multifarious ways in which this term is used in everyday ethical and political debates…that fits with these varied ways in which we use the concept.”, p. 348.


10 Simmons ‘Rights at the Cutting Edge’ pp. 224-5

11 Wenar, op cit., for example, engages in some intuition swapping, e.g., p. 239, and Cruft too, op cit., appeals to intuitions from time to time, e.g., “it would not seem natural to describe this immunity as a ‘right’.” p 363, but this is on the same page elided with “actual usage.”
most in line with linguistic usage. But we lack a reason to take that to be anything more than a cleaned-up report on how people talk. It is unclear what bearing that has on our understanding of rights as a conceptual category.

Whatever the commitments and classifications of language, what connects these with conceptual truths? The only justification would be either an assumption that concepts reduce to language usage, or that language usage automatically tracks truth. Yet neither assumption seems tenable: what we make of language usage, how we interpret it, depends on decisions which must invoke reasons. Say we find two usages, united under one word, should we conclude we have two concepts but one word, or one, but indefinite, concept? Or consider a case where some people apply one usage as central, whilst others take a different usage as the paradigm. Or consider an innovative proposal to change our usage, suggesting the introduction of a new and different rule or convention. Over such disputes language practice itself cannot be a guide to propriety. Perhaps we can keep usage apart from words, moving away from ‘terminological’ disputes, and concentrating instead on the references of the uses themselves. But this just begs the further question regarding which of the existing or possible usages we should interpret as the one which picks out the reference we are concerned to analyse? Any selection here must appeal to reasons beyond existing practice.

Some theorists, motivated more by the lack of univocality of usage than the above questions, advise we consult our intuitions on what items should be captured by a term, where intuitions are reports on psychological states (such as how we ‘feel’ about the use of the term) which have relative strength and can be shared. But again this cannot mean that we compile a list according to intuitions. Rather, intuitions on cases are offered as evidence to support or disconfirm principles or sets of conditions. Firm intuitions, apparently, helping us to develop sets of conditions which can then be applied to settle less firm cases. But given that intuitions can run out, or our agreement on intuitions can run out, why should a theory built upon the firmer intuitions (or principles inferred from them) be taken to settle matters? It might equally be disconfirmed by the disagreements. Some further reason is needed for taking ‘central cases’ to legislate for disputed ones. And what is more, where people differ on what counts as a central case, as they do, some independent reason is required to explain which cases have the pedigree of being central and which do not.

Thus, in the judge Jones example intuitions might go in either direction, or the case may not warm up clear intuitions at all. It might even generate intuitions which agree on the status of the power (as indeed a right, say) whilst dividing at the level of the theory which explains why the example is a right:

12 Steiner, Op Cit, p. 236; Kramer ‘Rights Without Trimmings’, pp. 68, 70-74, 78
one saying it is so because the judge has an interest in her power, another because she controls the performance of some duty bearers. Appealing, in the face of this, to the most intuitions reconciled compounds the problems. Different views will reconcile different intuitions over cases, depending on what features of the case they take to be salient, that is, on how the cases are interpreted. What then legitimates the assumption that intuitions will naturally offer up the truly salient aspect of cases, such that numbers or strengths of intuitions gathered under a view imply greater support? The answer is nothing, unless we appeal to some independent reason for interpreting an intuitively firm case in any one particular way.

By themselves intuitions and their strengths are mere psychological dispositions. Consider monoglots’ intuitions on appropriate word order compared to those of polyglots. Without some independent check on their validity, we are always open to the possibility that the dispositions are wrong. That is, unless we take intuitions, or agreement on intuitions, to constitute truth when it comes to moral concepts. But, as the above interpretative problem shows, that would be self-defeating. It would simply mean there is no truth of the matter on such conceptual questions because intuitions do not reconcile different views.

Furthermore, taking intuitions to be definitive implies that intuitions track truth both regarding which cases are true instances of a concept and what features of those cases are relevant to them as instances of that concept. That is, why instance p is a true instance of concept C requires a knowledge of which features of p link it to other instances of C. But that further implies that we already know or have intuited the defining nature of C, which is where the intuition over the instance was meant to step in and help in the first place. Where the conviction that we can intuit either instances or the concepts themselves comes from is mysterious. Without some more exotic convictions regarding a special intuitive faculty ‘tuned-in’ to an independent moral reality, conceptual intuitions would seem to be as blind as linguistic practices. At best they seem simply to be beliefs in search of justifications, and what we need are the justifications.

An account which accommodates a greater amount of linguistic practices or a greater number of intuitions over instances, then, might for those very reasons, simply accumulate mistakes, or not accumulate anything decisive whatsoever.

14 Malgre Wenar’s self-recommendation, Op. Cit. p. 248, and Sumner’s (and Rainbolt’s) assertion that: “We might say, in general, that a conception of a concept is extensionally adequate when it includes every item which
Now occasionally theorists supplement these approaches with appeal to substantive moral arguments based on values, such as autonomy. This too is problematic in my view, but in this case because of the way values are traded on rather than the currency itself.

If a theory appeals to a value to justify a definition, there is an outstanding question as to why that value in particular is relevant to defining that concept. This relevance question would only be redundant if one thought that all moral concepts served only one value or set of values, and served them in only one way. But the enterprise of seeking an account of a moral concept such as ‘a right’ is precisely the search for something distinctive. Reduction removes distinctiveness. If rights simply reduced to moral obligations which advance autonomy, say, then no contrast could be established between moral duties and what is distinctive to rights—simple duties can advance autonomy as much as complicated clusters of duties. Commitment to the distinctness of moral concepts, then, means the appeal to any value must be accompanied by a ‘distinctness justification’ showing the relevance of that value to the particular concept under examination. Nothing, of course, rules out the view that rights are indistinct as a moral concept, and that they reduce completely to some governing value or other. However, that is to give up the very enterprise rights theorists are engaged in, and to give up the concept of rights itself.

Now, rights theorists do not pursue the reductive strategy with values. Rather they appeal to values such as autonomy or wellbeing as a moral ‘add-on’. They invoke these values in addition to analyses of language usage or intuitions favouring their definitional accounts, and do so almost as an afterthought. Which, ironically, is a sign of their commitment to conceptual distinctness. Which still leaves the question unresolved as to what, in seeking the nature of this particular concept, licenses us to invoke any one particular value, of all the values available? Once again, we need a reason to invoke a particular value, and invoke it in one way rather than another.

As far as I am aware, other than these strategies of language tracking, intuition swapping, moral add-ons, and hybrids of the above, there has been no systematic work identifying what would amount to a seems pre-anitically to be an instance of the concept and excludes every item which does not. It would then count in favour of a conception of a right that it draws the boundary between rights and other things in more or less the right place (sic), and against a conception that it draws it in the wrong place.” L. W. Sumner, The Moral Foundation of Rights, 1987, pp 49-50, quoted approvingly in W. Rainbolt, op. cit. p. 229.

N. E. Simmons, op cit., 211-13, Raz , n. 111, p. 63 and pp. 15-16 “What we need is not a definition or mere conceptual clarity. Useful as these are they will not solve our problems. What we require are moral principles and arguments to support them.” p 15; MacCormick, ‘Children’s Rights as a Test Case.’ p. 161; Kramer, ‘Rights Without Trimmings’, pp. 101.

E.g., Kramer, Steiner, Raz, Simmons ibid, Wellman.
satisfying theory of rights as a concept. I see no virtue in theories or principles that capture more uses or intuitions than any other, or that seek to bolster these flawed supports by appeal to moral values. Instead I think it more intellectually profitable to ask what appeared to be the “outsider’s” question from the beginning of this paper: what is at stake in deciding an example one way rather than another?

II A Methodology for Moral Concepts

This translates into a methodology that takes conceptual distinctiveness, in the moral sphere, to mean distinctiveness in the point and purpose played by a particular moral concept (I call this the ‘distinctiveness approach’). The legitimacy of usage is not given by intuition-tracking or linguistic analysis, nor by adding moral ballast to these latter two, but rather by the distinct value the concept serves in a ‘non-redundant’ way. Value here means whether there are judgements which the concept allows us to make, and which we want to be able to make because they capture ideas, in the form of principles, that would otherwise be in need of expression. The contrast in terms of the specific role of a concept is a contrast with other moral concepts and their role, and its role itself is given in terms of the added (moral) value served by being able to employ it. Thus the point and purpose of employing a given concept or principle is itself to be understood morally: supported by justifications employing other moral notions.

Applying this to rights, we must ask quite literally what we can do with a right that we could not do without one? This means establishing the distinctive role the idea of a right plays, if any, in our moral repertoire: what things we could not say, what judgements we could not make, without the concept, that we find it important to say and valuable to make. That is, what important judgements of actions as morally problematic or recommended that would be unavailable to us without the concept. If nothing is added, conceptually; if everything we want to do morally speaking, can be done, using the notion of duties, say, then seeking another concept would seem a redundant enterprise. What we can say regarding the judge’s powers might be fully expressed in already available terms, why multiply concepts?

Let me illustrate this method with a different example. If the concepts of promising and contracting are indeed two distinct moral concepts (whether they are legal concepts or not) then there should be

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17 I should also add “theoretical adequacy” and analytical perspicuity, but as I have said these by themselves beg the question, see footnote 3 above.
18 Note: The methodology I introduce here is a form of interpretivism and there are alternative interpretivist methodologies, although not explicitly applied to this debate, such as those of Constructivism (the work of the
a point and purpose to using each that is distinctive, such that neither is made redundant by the
existence of the other. So, for example, it can be argued that promises allow for a way of undertaking
obligations which engages questions of integrity and personal moral character, whilst a contract is a
way of allowing distance, and moral impersonality, in creating some sort of reliance (principally
through the tool of remedy). If these ways of judging relationships are both distinctly valuable ways of
identifying commitment, then we have a good case for there being two separate concepts as
opposed to one. The point and purpose of each concept is the distinctive contribution it makes to our
moral repertoire, and that lies in the value of being able to make judgements in employing this
concept. Consequently, any account of promising or contract, will need to do justice to these
distinctly valuable roles, and do so by supplying principles which preserve the integrity of these aims.

In this way of proceeding, before one begins proposing theories of rights one needs to arrive at a
view about the distinctive point and purpose of having a concept of rights over and above other moral
concepts, and one needs to express that view as a set of criteria. Candidate theories of rights will
take the form of principles which can be assessed in terms of their success at satisfying these
criteria. That is, on whether they do justice to the distinctive value of having the concept.

Moral ideas or concepts in this case are to be understood as principles. And this approach starts from
the assumption that such moral principles/concepts are plural. The specific characteristics of each
one reside in its agent or subject (who or what must act on the principle); its object (towards whom or
what the actions are directed); the duties and duty types (perfect or imperfect) imposed on the
subject of the principle; and the benefits and burdens imposed by the principle. The distinctness of
a moral concept expressed as a principle, then, will lie in showing how these characteristics capture a

later Rawls, and of Thomas Scanlon) and the interpretivism of Ronald Dworkin. In a separate work in progress I
contrast the method I employ against those alternatives, and discuss moral methodology more generally.
2003, draws out some of these differences, though focuses on the ‘relation-building’ aspect of promise-making,
rather than personal integrity. He recommends the benefits of promising over contract, rather than seeing that
each occupies a well defined, and valuable space in our moral repertoire. There are of course other views on the
distinctive nature of contract versus promising, see Shifrin ref.xx.
20 There is an important nuance in types of moral concept which I should outline here. Some moral concepts are
basic in that their point and purpose can be understood independently of discussing a correct distribution of
relevant benefits and burdens. These include rights, duties, moral reasons themselves, promises, contracts,
moral harms and the like. Concepts like justice, equality, fairness, and liberty, imply a correct distribution of
some sort (in some cases from the basic concept list), which invokes considerations beyond the ‘strictly
conceptual’ question of point and purpose. In those cases theories of correct distribution would seem to operate
on a ‘better or worse’ continuum. R. Dworkin, ‘Interpretive Concepts’, *Law’s Empire*, ref.xx, and *Justice in Robes*,
pp. 155 ff., does not draw this important division in interpretive concepts, but seems to take all such concepts to
fit the latter model.
sketches this procedure for distinguishing justice from international justice.
key value, play a specific moral role, and furthermore do so non-redundantly: in a way not captured by any other concept so expressed.

Now it is important to understand what kind of redundancy I mean, and to do that one must understand what I mean by relevant difference. Does a community that has a different word for stealing on a Tuesday, “Tuesling”, than they have for stealing on any other day thereby have an additional moral concept? Their language usage is indeed different. But what we must ask is whether the usage marks a real moral difference. This means asking whether there is some different gravity, consequence or form of responsibility that Tuesdays imply, and whether that different moral upshot is not due to some separable value principle. If there is no such moral difference, then this community just happens, eccentrically to have a different word for the same moral concept applied on different days. However, consider a possible difference. Let us say Tuesday is a holy day. This reason does not mean that stealing on Tuesdays is subsumed under a different moral concept altogether than stealing on other days. For here we simply have two moral concepts engaging, and so compounding, the same event: stealing and sacredness. The point and purpose of the concept of stealing is not altered by the additional consideration of sacrilege, nor is the notion of sacrilege altered by the concept of stealing. It just happens to be the case that one form of sacrilege is stealing on a holy day. I’m assuming, for the sake of the example, that sacrilege, or rather the notion of sacredness it implies, is a real value which can take religious and non-religious forms (disrespecting that which is sacred). If it were not a real value then this practice would not mark any significant (moral) conceptual distinction. Either way, the notion of stealing on a Tuesday is not a moral concept, even if there is a word for it.

I should clarify that there is a role for intuitions in this methodology, but it is not that of arbiters of the adequacy of an account of a concept. Instead they may assist in the initial steps of locating the inquiry. A successful theory might explain or elucidate such intuitions in terms of values, but this is not a requirement. Any intuition can be jettisoned if it jars with a concept's point and purpose, and that point and purpose is not itself justified by intuitions over cases.

It might, at this point, be asked what this methodology has going for it over and above the procedures I have discounted. The answer is simpler than it might seem. What we are after is criteria for the distinctive moral role of rights as a concept, and consequently a theory that fits those criteria. An account of those criteria supported by moral arguments tells us both why we are after this concept and what we are after, in perfect fit: the moral point of having it given what we can, morally, do with it.
II Criteria for the Point and Purpose of Rights

In the case of the concept of a right, we must ask whether and what this concept might add to the rest of our moral language. For example, we have the concept of a reason to act and the concept of a duty. What can we say in the language of rights that we cannot, or could not with the language of reasons and duties alone? I will argue that the notion of a right adds a special and particularly valuable form of directionality to our moral repertoire.

Duties are not by nature directional. If I have a duty, whether moral or legal, it can simply be a duty to perform or refrain from a given action. However, there are some duties that are literally owed to others. They have a direction.

This needs some careful teasing out. Duties can take objects, and require actions with regard to those objects (which can include persons). So, I can have a duty to look after a given house, because of a promise, and I can have a duty to look after a given person because it is in my contract as a nurse. However, this is different from a case where my duty is linked to another person’s entitlement. In such a case what we need to say is that the duty is owed to that person.

To elucidate the idea of a duty being owed, or capable of being owed, to someone I need to introduce some analytical apparatus. In some past accounts there has been an elision of the idea of the object of a duty (with regard to whom one has a duty to act) and the person to whom a duty is owed. But this seems wrong. Hart, amongst others, realised that something needed to be explained in cases where plausibly one person was owed a duty and another was the object of the duty, as in my earlier example of a nurse’s contract. A nurse’s duty to specifically care for a particular group of patients is owed to the nursing home for which she works, rather than the patients themselves, (even if she owes them individual duties of care as she discharges this prior duty).

So what is it to owe a duty, and conversely to be owed a duty? I take this as the question on the nature of entitlement: to have title in the duties. Whilst others’ duties may direct their actions towards certain objects, their duties can have a different kind of direction, in terms of to whom they are owed or for whom they are performed. Two duties can direct an agent’s actions to exactly the same objects, yet one be owed to someone and the other not, and the question is what makes this distinction.

22 Where J’s being the object of a duty involves the duty bearer doing something that benefits J, it is known in the literature as a third-party beneficiary case. Not all cases where the person who is the object of a duty is distinct from the person to whom the duty is owed are cases where the object of the duty benefits from the duty’s performance.
My proposal is that it lies in being responsive to another for one’s performance of duty. That is, the idea that you not only have a duty, but actually have a duty to me, must be related to the idea that you in some way respond to me regarding your performance of the duty. Without this idea of responsiveness, a person only answers to herself, or her conscience, for performing a duty. A duty owed, on the other hand, is a duty over which someone other than oneself has some claim.

Of course, for any moral failing others may be able to point out my failure or rebuke me. Yet, there are actions for which, in addition, a specific other can justifiably demand some kind of account from me, which others may not demand. This is not true of all duties, for there is failure in some duties which others have no business in asking me to account for. There are duties of personal morality, for example, for which, whilst nevertheless being duties, I am only accountable to my conscience. Take the duty to do well by one’s friends, or to be the best parent one can be. Whilst these duties take specific people as their objects (friends, children) it stretches the value of this type of relationship to claim duties are owed (as opposed to disappointment and disillusion with failure).

The notion of responsiveness, or being owed an account is itself in need of some further elaboration. What it effectively means is that there is a further duty associated with the primary duty in question. That is to render an account to a specific person for my performance or for my failure to perform. We can put this schematically as follows:

Jane has a responsive duty to John, to do F, in so far as

a) Jane has a duty to do F

b) Jane has associated duties to be responsive to John for her performing F or failing to perform F (duties to mark her performance, or failure in performance in an appropriate way).

Thus a promisee can be owed a duty in that the promise maker is answerable to the promisee for performance. In addition to responsiveness, however, certain directional duties have another feature which is valuable for a separate reason. That is the value of a certain degree of publicity in responding for the duty. Between me and a promisee, there is a degree of responsiveness. However, in some cases my responsiveness has the additional feature of implying terms which can be assessed by third parties, including those acting on behalf of the person to whom the duty is owed. This contrasts with the simple promise case, for no one but a promisee can legitimately hold me to account, make me respond, for a broken promise. This coincides with the nature of promises as part of intimate, or personal relationships.
In this respect the duty to perform and to respond, where rights proper are involved, is accompanied by the further condition:

c) a duty to be responsive in publicly recognisable terms (including decisions in adjudication), and to appropriate third parties.

I should also distinguish this notion of responsiveness for a duty from the idea of being responsive generally. A child, for example, should be responsive to its mother for the state of her bedroom or a lover responsive to her partner for some of her behaviour. The difference between these cases and those I am interested in is that here responsiveness is not based in duty, or rather that the duty is to be responsive simpliciter, as opposed to being responsive with regard to a different duty. It is rather based in the appropriate behaviour corresponding to the relationships in question. It is appropriate for a partner or friend to render accounts about some types of behaviour because the integrity of the relationship relies on transparency and mutual understanding. It is appropriate for a child to render accounts on some matters to a parent because functional family relationships dependent on it. Failure in each case would imply the relationship was not functioning properly. But to say there is a directional duty here would be to misunderstand the distinctive value of these types of relationship and their implied commitments.

For short hand we can refer to both features, responsiveness of duty and publicity in responsiveness, as ‘accountability’. Now, showing that we can mark a linguistic difference between some duties and others on the basis of the above two features does not show by itself that the difference matters for our moral concepts. That this is so, however, can be seen in that both aspects establish a special relationship of responsiveness, and in doing so, they change the status of the persons involved in the relationship.

For example, whilst the duty not to lie takes persons in general as its object (directs action towards them), no one under normal circumstances is required to be responsive for this, general, duty in a public way. One is wronged by being lied to (as the object of the duty, one’s interests or status can be under attack), and a wronged person can expose and rebuke a liar. However that is different from there being an additional duty to account for one’s truth telling duties. That is down to the individual’s conscience.23

23 Cf. Alan Gewirth who would have us believe that there is not only a right not to be lied to, but that it is furthermore a human right, A. Gewirth, Human Rights, Chicago: University of Chicago Press, 1982, pp. 56 & 61.
The additional part of the judgement is valuable in our moral language. Unlike non-responsive duties, responsive public duties are an empowering idea. To be owed a duty, rather than being the object of a duty, empowers me. It makes agents answerable to me. This implies a notion of respect which goes beyond doing one’s duty. To hold another as worthy of a public account of one’s actions is to publicly demonstrate a respect for the other’s personality as a subject of owed duties; to attribute to her a moral status of her own. That moral status goes beyond being an object of duty, such as duties of benevolence, assistance, or for that matter agreement to others. The status can be quite thin, as in accountability for expectations created by agreement (viz contracts) or quite thick, as in the inherent status of human persons in the face of political community. However, the minimal aspect of this status is accountability for duty, which links rights to the notion of recognition of others’ moral status.

It is this feature of rights that makes them an especially deontological notion. They characterise a relationship rather than aiming at outcomes. In observing a right, one is not merely seeking to supply a desirable state of affairs. Rather, one is exhibiting respect for the other in a way which reaches beyond the performance of the relevant duty. Of course, the content of a right need not have any positive moral effect, as where contracts serve morally neutral aims, and where rights, such as those of noble title, are mistakenly claimed on an elitist basis. But without the concept, certain forms of individualised respect could not be shown. Which makes rights particularly valuable in the individual-centred moral and political philosophy of liberalism. Even without that political philosophy, however, one can see how the relationship of a right empowers in a way that moral concepts do not.

I should underline that the value of rights does not lie in the value of having a right. The explanation does not lie in showing that rights are what any specific individual might want to have. That may be the case with some specific rights, but not with rights as such. Instead the value at work is in being able to characterise specific types of relationship that imply a special form of respect, what might be called ‘directed respect’.

Other theories have tried to capture the value in responsive public duties. Control theory, for example, tries to capture the directionality element. It does this through the idea that it is essential to a right that the holder is able to require or release the duty bearer from performance of the duty. This does create a relationship between individuals. Feinberg’s theory, which focuses on the notion of claiming, also tries to forge a moral link between individuals which has a direction and which gives a
status to makers of claims. Even some versions of interest theory try to incorporate a version of it (see next section). Below I show how these theories nevertheless fail to capture the important and distinctive features of responsiveness and publicity, and thereby do not do justice to the distinctive value of rights as a concept.

By identifying the value of rights with responsiveness it may seem that I have in advance ruled out certain types of rights claim that are particularly important, such as the rights of children or persons not in a position to hold duty bearers responsible. Yet, there is nothing in the account of the value of rights so far given that responsiveness to a right holder has to be demanded by the right holder in order to exist. The fact that there are duties to respond for the performance of duty, should it be demanded, is sufficient to understand the value. The publicity criterion also permits others, employing publicly assessable methods, to demand a response on behalf of those who cannot do it for themselves. What any theory of rights needs to explain is which publicly assessable duties can do this.

This underlines that responsiveness is not itself a theory of rights. I have not yet elucidated how, morally or legally, individuals can be said to be accountable to others. If holding a duty bearer to account in the relevant sense can mean that I ask her to pray for me, then there seems to be very little value to rights beyond the same value involved in the duties of personal morality in which one is only responsive to one’s conscience. I have merely established some criteria for a successful account of rights. Below I shall consider two key candidate theories of rights, and their motivations, in order to show how they fail to do justice to this distinctive role, before proposing a third theory.

An objection to my case at this stage, then, would need to show that these criteria do not capture what is distinctively (non-redundantly) valuable about rights. Failing that, accepting my account of the distinctiveness of the concept allows us to turn to a discussion whether competing theories do justice to that distinctiveness.

IV Theories of rights
Existing theories of rights do not fare well against these criteria. Wellbeing theories, for example, say nothing about the direction of duties as such. Rights, on such views, exists where there are sufficiently strong reasons based in the wellbeing of an entity to take others to be under a duty and

24 I take the key test as to whether a theory of rights is fully deontological to be whether the value purportedly justifying the conception lies in what justifies someone having the right, such as an interest, or in the relationship itself. As so far expressed, my account of the value of rights is in this sense relation-centred.
25 Feinberg describes this directionality as “holding against” pp. 154, op cit.
where that entity is of a special type (an entity of ultimate value, for example). Beyond reference to
elements of someone’s wellbeing, then, the view does not have resources for settling the direction of
duties (responsiveness) or for incorporating publicity as a feature of any relevant duties, and so of ‘accountability’.

Wellbeing theory’s only hope is to base the direction of duties on the seriousness of interests involved. Some patients’ interests in being cared for by a particular nurse may not be so great as to imply she has an independent duty. However, the hospital’s interests in having its contracts adhered to (stemming from the interests of its patients to be cared for) are sufficiently great as to justify a duty. In this way it might be said that direction is given by interest importance.27

This, however, does not capture the notion of responsiveness present in accountability. Where duties are owed, where there is responsiveness, they do not have to follow the direction of the importance of interests. Take Joe, inheriting his uncle’s estate, with all its crippling liabilities and maintenance costs. The executor of his uncle’s will owes certain duties to Joe, is responsive to him in this regard. Yet Joe’s interests are not in the executor handing over the farm. Jumping to a general interest in inheritance here won’t help, as inheritance is an interest or a liability precisely depending on each individual case (one can inherit debts just as much as assets). In fact, an interest-based justification can point in various directions (including the interests of those leaving possessions to decide to whom they should fall, or the interests of property regimes in reducing disputes over property ownership).28 None of these interests, which certainly play a role in the justification of the duty, nor their summation would point the duty definitively in the direction of Joe. That is to say, the responsiveness of duty can point in a different direction from the most plausible interest-based justification of the duties.

26 For different formulations see Raz, McKormick and Kramer.

27 Matt Kramer (Op. cit p. 81) appeals to ‘Bentham’s test’ as a solution for the direction problem. On that test, Jane, say, is a right holder under a justifying principle P (a contract or norm), where the duty bearer’s withholding of some benefit from, or imposing some harm on, Jane is sufficient to show that principle P (a contract or norm) has been violated. But this test is deeply question begging for a wellbeing theorist. If the basis of rights assignation is the securing of an element of wellbeing, then what possible independent role does a contract or a norm have in defining whose interests count as the right-conferring interests? The answer has to be none.

28 So MacCormick’s and Raz’s reposte that interests have to be understood as the interests of a class are beside the point here. The class of inheritors does not have a single interest, such as the interest in inheriting, either individually, or collectively. Neil MacCormick, ‘Children’s Rights: A Test-Case for Theories of Rights,’ Archiv für Rechtsund Sozialphilosophie, 62, 1976, p. 311; Joseph Raz, The Morality of Freedom, p. 180. If however the claim is that people ‘for the most part’ have an interest in inheriting (Kramer…), the only alternative reading of this is a majoritarian one: most people have an interest in inheritance. But now we have moved from rights as individual provisions to rights as welfare maximising. In which case, why, in deciding whether there is a right, we should only consider the wellbeing of those individuals for whom the right is posited, becomes mysterious.
That is as it should be. The types of duties that are justified by others’ interests are many and varied, but there seems no need for duties to be responsive, or where they are for the responsiveness to point in the direction of strongest interest, in all such cases. Reference to right holders’ interests is just one way (though not the only way) that duties on others can be justified. It is not an account of the duties being owed to anyone. At the same time, there are rights held by agents whose interests we would not want to bear any relevance in the direction of the corresponding duty. For example, the rights held by executors of a will, such as having the assets of an estate given over to them; the rights of guardians over problematic children; the rights of trade union representatives to be heard by employers; or for that matter the rights of state institutions to having certain directives obeyed. In these cases the objects of the duties are persons whose interests are central to the justification of the right (inheritors, members, citizens) whilst the rights themselves are held by others.

So the idea of directional duty at the heart of ‘accountability’ cannot be accounted for by wellbeing theory. Or rather, whilst a kind of directionality can be explained by wellbeing theory, accountability directionality cannot. If we value these ideas as morally possible ways of judging actions and relationships, and as distinctive aims of the apparatus of rights then interest theory is of no help. It tells us nothing about the distinctiveness of rights whatsoever.

This is not surprising, as wellbeing theory is not a deontological account of rights. It is what I call an ‘outcomes view’, in that it defines rights in terms of certain desired outcomes, states of affairs, that performing the relevant duties will. Outcomes views, unless they prioritise the very interest of being respected in this way (thereby presupposing responsive duties) do not have room for responsiveness. Whether someone should be responsive or not simply depends, on such views, on whether that would more likely produce the desired outcome. It is not something inherent to rights.

Wellbeing theories explain rights-associated duties as those necessary for the protection or securing of elements of someone’s wellbeing. The key idea, then, is not respect for the right holder through empowerment—by the duty bearer being accountable to them—but the outcome of having wellbeing secured or protected. As I have explained above, the notion of respect goes beyond protection or prevention. One needs an account of the morally justified and adequately public requirements

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29 Some interest theorists (see M. Kramer and H. Steiner, ‘Theories of Rights: Is there a Third Way?’ Oxford Journal of Legal Studies, 27(2), 2007, 281-310, p. 30) claim that the relevant interests in positional/role cases are those of being able to carry out one’s positional duties. But this argument is deeply question begging. A judge, for example, is someone who’s decisions, when made in a particular way, others have a duty to heed. To say she has a right in that she has an interest in others paying heed to her decisions is to get things the wrong way round. It would imply that her interest is independent of other’s duties, but she has no such interest until
accompanying either performance or failure in performance of duty. Without that one does not incorporate ‘accountability’, and so respect for the person. Wellbeing theories are in this regard consequentialist: they both justify duties, and define rights, in terms of the securing those interests (those states of affairs) of the types of entities mentioned in the claimed conditions for a right. Rights exist because they would so secure those interests. But, as the view says nothing about responding for one’s duty, it is perfectly compatible with wellbeing theory that rights are actions for which no specific accountability exists (given that accountability has at best a contingent relationship with securing outcomes). An agent need never render accounts as to her performance of duty, nor any account should she fail.

Control theory, on the other hand, seems at least to be in the right neighbourhood. It creates a link between specific individuals, giving a direction to duties and furthermore empowering one of the parties. The problem, however, is that it is an ex ante (before the fact) theory. It regards only powers over performance of a duty, or the determining of an outcome, and says nothing about the responding for the performance, or failure in it.

Cases where the power is present are perfectly compatible with there being no responsiveness or accountability of the duty bearer. Consider a duty borne by someone to perform an action by a given time, and a power possessed by another either to require performance or to release the duty bearer from the requirement to perform. But let us add that in this case there is no duty or requirement present which regards any other action during or after the performance deadline, even where there is a failure to perform. Thus there is no way to hold any individual to account for their actions and failures in this respect. This kind of duty is perfectly logically possible, yet whilst an individual might have deciding powers over performance, there is no necessary connection with accountability or responsiveness here.

In fact the only way control theory could incorporate accountability, or responsiveness, would be if somehow responsiveness is associated with control over a duty or an outcome. But there is no link between accountability for performance and control over it (except the contingent, non-moral, link that accountability can be a form of enforcement—see below). Control theory, then, has no necessary place for accountability as I have explained it.

others owe these duties to her. This response would nevertheless be besides the point, as what we are settling here is how duties can be responsive to a person even when that person’s relevant interests are not involved.
Perhaps directionality, if not responsiveness, is nevertheless preserved in control theory, as control over a duty points in the direction of a controller? Yet being owed a duty, in the sense that gives value to directionality, goes beyond being able to control performance (or there being duties that correspond to an advantage in a dispute)\textsuperscript{30}. For the mere ability to decide an outcome in some way does not capture the thought that it is something owed. Consider officers charged by an individual or institution to make decisions regarding duties or duty advantages, decisions which are somehow binding. Yet when it comes to performance or failure in performance, there are duties to render accounts directly to the individual or other officers of the institution, not the original ‘deciding officers’. Can we resolve the directionality question here by mere reference to control? That does not seem to engage at all with the value underlying directionality (directed respect). It is merely a technical indication of how, in some cases, we determine which duties we have (by reference to the controller’s decisions). It does not, for that, capture a distinct value, and so concept, to duty any more than any other way of determining what duties a person has.

Thus it is of great value that state officials deciding on whether certain duties are performed are not themselves owed anything by this power, rather the duties are owed to the state (or the community) itself through responsiveness for those duties to its institutions—the office of those officials, rather than the officials themselves. The only way to guarantee that duties are owed to those who control them would be by giving them a right to control these duties. Which implies control theorists have got things the wrong way round.

Classical control theory is therefore not capable of elucidating the idea of responsiveness as a value at the heart of rights. It cannot, then be a conceptual account of rights given these criteria for their role.

An account which comes closer to fulfilling the desiderata of the distinct point of rights is Joel Feinberg’s. That account tries to engage both the idea of the direction of duty (owing a duty) and the idea of rights as empowerments. It, however, does so by identifying the ‘practice of claiming’ as central to rights. Yet, how a practice or an activity such as asking or demanding can form a

\textsuperscript{30} I have focused on ‘option’ versions of control theory in my illustrations. But similar points can be raised against ‘advantage’ versions like Wellman’s. Given that having a normative advantage in a dispute, by virtue of clusters of associated duties, does not necessarily require responsiveness (in my sense) to the person with the advantage. For that matter nor does the existence of a “normative constraint” on another, imply responsiveness in this sense, especially when such a constraint is merely composed of duties which take the “right holder” as their object, Cf. G. W. Rainbolt, \textit{The Concept of Rights}, Dordrecht: Springer, 2006, p. 28.
conceptual component of the notion of a right is troubling. To be sure, rights mean that we can ask, or demand, something, but the question is what morally empowers that asking? Feinberg identifies valid claims in this role. That is, claims that are recognised as valid, within a system of rules or principles that constitute a right. But there is no indication as to what that recognition need be beyond someone else having a duty to act on the claim. It is possible that someone sees themselves as having a duty to respond to certain requests by others, say because they need to know when to supply them with a good that they understand themselves to have a duty to supply. In that case we have claims and duties responding to them. Yet the additional feature of recognition need not be present here.

Holding someone to account, responsiveness and publicity of duty, also explains the other feature of rights that Feinberg is concerned with, which is the idea of ‘owing someone a duty’.

V A distinctive account

The value at the heart of rights talk is the directionality of duties or responsiveness, and their publicity, which together I summarise as ‘accountability’. However, this is not by itself a theory of rights, only criteria for the success of a theory. What, then, constitutes a public (in the relevant sense) way of making someone responsive for a duty? The view I propose employs the notion of account and remedy. A person A has a right to X where there is an agent, B, such that

a) B has a corresponding duty to perform (or abstain) from a given action
b) she has a duty to account for (to detail) whether and how she has performed, either to A, or to proxies acting on A’s behalf, in a publicly assessable way
c) but failing to perform, she has a duty to supply A, or A’s proxies, with an appropriate remedy signalling her accountability to A

A corresponding duty is here understood as a duty or complex set of duties that if performed contribute to the securing the substance of the right, X, whatever that might be, for A. To act on A’s behalf means that someone is in a position to represent A’s interests. This can be done through an agreement, as in my contract with my lawyers, or through a conventional understanding that certain individuals can best represent the interests of currently non-competent persons, as in the parents or

31 “a right is a kind of claim, and a claim is “an assertion of right” (sic)” Joel Feinberg, ‘The Nature and Value of Rights’, in his Essays in Social Philosophy, p. 149. “it is claiming that gives rights their special moral significance.” p. 151 Rights are valid claims, pp. 153-4, which means they are claims that have “justification within a system of rules.” p. 154; “A man has a moral right when he has a claim the recognition of which is called for—not (necessarily) by legal rules—but by moral principles, or the principles of an enlightened conscience.” p. 154.
guardians of a child, or relatives of an incapacitated person. Thus even after my death, a relative can pursue a claim regarding an infringed right to life as the duty bearer still has duties to show she is accountable. Note that remedy here can mean publicly recognisable actions that signal the responsiveness of the duty bearer. These can include (but are not exhausted by): i. a public recognition, acceptance or communication by the duty bearer that she has failed in her duty, ii. Performance: recognition of failure in duty to act in a certain way and undertaking to perform that action, iii. Some supply of resources publicly recognisable as in some way proportional or equivalent to losses caused by the failure in duty (damages, restitution), iv. Restitution proper: the restoring of states of affairs to the state prior to the failure in duty, v. Institution, as in the establishment of an institutional order that responds to or prevents these types of failure in duty, and vi. Symbolic remedy: where some symbolic act is taken as an adequate form of respect (apology, atonement, public ritual). Each of these notions of remedy implying a publicly assessable form of respect on the part of the duty bearer towards the right holder. As I say, I do not claim this list is exhaustive, for reasons I shall explain.

Whilst the account may appear similar to some existing accounts, in terms of incorporating remedy, the similarity is only at the surface. The account is distinctive even from those forms of control theory that identify remedy after violation as a feature of holding a right. On those accounts remedy is merely incidental, it marks a form of control, as enforcement, and only those forms of remedy that contribute to control, by contributing to the enforcement of future action, over the focal duty can be relevant to the account. On the present account, remedy is not related to control, but to accountability (and via that to responsiveness). So whereas some symbolic or recognitional remedy might not play any role in enforcing an agent’s control, it can represent accountability (depending on its appropriateness). An adjudicating body only needs to assure itself that it enforces the remedy, rather than the control. This exhibits the non-consequentialist nature of the account, with the emphasis on the relationship rather than some aimed-at effect. Furthermore, whilst there is a rationale for remedy on this account, the demonstrating of respect, there is no rationale for remedy as enforcement, given this is a moral theory of rights. The relevant guide to action for the duty bearer is her duty, not some further burden. Enforcement would only be conceptually relevant to rights if we assumed a positivist standpoint, in which rights require the positive component of enforcement to exist.

33 Some have described this as the “vindication” of the right, but they separate remedy as recompense from vindication, whereas in my view recompense is just one type of vindication. Cf. D. Pearce and R. Halson, ‘Damages fro Breach of Contract: Compensation, Restitution and Vindication’, 28(1), Oxford Journal of Legal Studies, 2008, p. 73.

held against one agent, a state say, to secure the right holder against other agents. But in that case
enforcement is part of what is owed, not an explanation of the owing.

Similarly, on some linguistic accounts the idea of ‘recompense’ is appealed to, which would seem to
imply remedy of some kind.\textsuperscript{35} On such accounts, because remedy is not associated with
accountability, there is no explanation of why remedy matters to an account, how it matters, and
certainly not which ‘remedies’ matter. Recompense and ‘making amends’, imply some kind of ‘making
up for’ duty failure—making good or ameliorating what one has harmed by failure in duty. Which may
be just one way that an agent is held to account, but it is not identical with accountability. In some
cases public recognition of a duty failure will be sufficient for an agent being held to account, in which
case recompense is not in play, but remedy in my extended sense is. In other cases, recompense, in
the form of an apology say, may account for responsiveness but not sufficiently public
responsiveness (in the sense identified in section xx above) to constitute accountability. In any case,
the idea of fixing that which got broken does not play an inherent role in accountability, the role of
which is explained by the wider notion of directed respect. The recompense idea also implies that the
direction of the duty must be towards those who can be harmed by failure in performance (for there to
be something that is ameliorated), which implies an interest account of direction. I have already given
arguments against this above (IV).

So, consider my contractual right to have a garden supplied by a given company. The contracting
party has a primary duty to provide the garden and to give information on request regarding her
supply of the garden. Should she fail to supply, she has a duty to supply a remedy which is public
enough to be accounted for and enforced by a court. Alternatively, consider an infringement of the
right to life, even where the individual dies as a result of a state action, her proxies (such as her
relatives) are morally justified in seeking that state institutions acknowledge the infringement, and
take measures appropriate to its compensation, and to instituting circumstances where no such
infringement can re-occur.\textsuperscript{36} The latter has no relationship to control, but is a form of accountability.

I should point out here that whilst the existence of a right implies the above three categories of duty
are present—duty to perform, duty to inform and duty to remedy for failure—the infringement or
violation of a right does not require failure in all three categories. Nor is it sufficient for violation that
the second two duties are failed in.

\textsuperscript{35} Cruft, p. 361, also associates remedy with “making amends”, p. 359.
So, to return to the original example of judge Jones and her power to sentence. On this view that is indeed a power, and if justified, a moral power. However, it is not a right belonging to the judge. For, those who have the duties which constitute the power do not have duties to render accounts of their performance to this judge in particular. She is acting as a representative of another type of agent. And as such she need not be the one who holds the duty bearers to account. Their duties to respond for their actions might be to different judges and different officers of the legal system. The accountability is, then, to the system, or better said the institution of the state, as a whole. It is the institutions of the political community, in this case the legal institutions, that have the right to sentence.

This account of rights also directs our attention in terms of understanding the consequences of duty. There are different kinds of right, and one primary way of differentiating them is in terms of the implications of failure in primary duties. In some cases, accountability will place great emphasis on remedy, to the extent that failure in primary duty is of great cost. In others remedy will not be of an insurmountable consequence. Thus, human rights can be understood as so important that they cannot possibly imply meagre remedies in cases of failure (violation). Yet sometimes no substantive remedy could be said to correspond to the loss suffered by duty failure, but respect can certainly be demonstrated through symbolic public actions. Appropriate remedy might seem an unexplained aspect of the account here, but given the point it serves includes respect, then true accountability implies remedies sufficient to show that respect.

This also tells us what we must do if we wish to create a positive right in a given context. In that context there must be a provision for accountability, which means provisions for how the relevant duty bearer can be accountable, either by reporting on her performance or by remedial provisions for failure in performance. The emphasis here, however, is on ‘provision’. That means the existence of a legal principle according to which someone can legitimately obtain a report or a remedy. Which makes this view distinct from a positivist equivalent, where having a right implies actually being able to get the remedy.

The account fulfils the criteria or desiderata for success of a theory of rights (in the ‘honorific’ sense) by accounting for the values of responsiveness and publicity. I now need to defend it against a number of pressing objections.

36 The notion of violation I am using here, for the purpose of this chapter, is simply where there is a failure in the primary duty. I offer a more narrow account of violation, versus infringement, in chapter xx, on responsibilities.
VI Some Objections

In order to show the strengths of the view, in what follows I will consider a number of objections that the view might provoke.

The view I present identifies rights with individual empowerment, but the form of empowerment I propose is underspecified. Control theory empowers the choices of persons; interest theory the most important requirements of their wellbeing. For example, when it comes to young children or persons not in a position of competence to make some choices, control theory might imply these individuals do not truly have rights, although there are duties for others to act on their interests. Interest theory might say that competence is not relevant because rights protect interests, not choices alone. Thus by empowering different aspects of personality, these views decide cases differently. So, what aspect of personality is empowered on the view I propose? If it is choices, then it would seem that my view is really a version of control theory. If it is interests, independently of choices, that are empowered then it would seem to really be a version of interest theory.

The view I have proposed consciously does not empower anything in particular. What ever the type of agent, a right gives them a particular status: one with respect to whom a duty bearer should answer for the performance of her duty. That is a positive feature of this view. It does not define what is valuable about rights in terms of a distinct feature that is valuable in individuals, such as a autonomy. This enables us, for example, to attribute rights to agents other than autonomous individuals, such as communities and groups, and office holders in virtue of their office. That is, this understanding enables us to see how the status of such entities can be changed through directional duties, so understood.

Yet the objection might be pressed that unless some aspect of personality, or interest is specified, the idea of a proxy holding a duty bearer to account on behalf of the right holder will not make sense. This is because for a proxy to act on behalf of another individual implies an account of what acting on behalf of someone means. Without that account, any proxy becomes the right holder, as it is to them that the account is to be given. This is compounded by the fact that on my view the only possible interest in play seems to be the justified claim to an accounting for the performance of a duty.

This is not as great a problem as it might seem. We need only say that accountability is to engage the duty to respond. Those that can engage the duty are those identified in the secondary duties of the duty bearer. That identification is explicit: to answer to a given person. Where the given person is not present, it simply means answering as if that person were present: to make information available
in a publicly assessable way as to performance or to make recognisable remedies available. Some people may be empowered by convention or justification to receive and hold the information and the remedies, in such a way that were the person present these would be available to them. Thus respect for the person is still publicly expressed.

If there is a moral justification in any particular case for assigning proxy status then this may make reference to interests involved, as with human rights and children’s rights, but it may not, as where people can freely name who they wish as representatives in a legal action, even imprudently. The link will be a case by case matter, depending on the nature of the specific right in question.

Another objection might argue that I have too quickly discarded, and ignored, types of legal right. Especially as I have studiously avoided the general trend to begin an discussion like this with Hohfeld’s categories. Each of Hohfeld’s categories might, for all I’ve shown, have its own distinctive value, say in empowering right holders in a particular way. My account may capture one of these values, then, but not all of them.

This is not a very strong objection. To begin with, nothing in Hohfeld’s account really explains how duties get owed to persons (directionality). And each of his categories of claims, liberties, powers, and immunities, are paired: defined in terms of each other. So there could only be two extra values at play if there were any. Now, taking his account of liberty: there seems nothing distinctively valuable to that cluster of duties that permits a certain outcome, such as my fishing in a given lake, other than whatever justifies the duties. Nothing in the form of a valuable relationship is established in addition to there being duties to do, or not do, certain things. Which means that Hohfeld’s categories, whilst perhaps convenient shorthand for certain kinds of duty clusters, from the moral point of view do not represent distinct values.

A stronger objection might be that my account presupposes the notion of a right. A duty bearer, on this account, must have accountability duties regarding their performance of the primary duty. However, if that latter duty is also owed, then there must also be a duty to respond for that duty too, and so forth ad infinitum. The objection however presumes that the second duty is owed, just as the primary duty is, and so directional. Another way of putting this is to say that I have a right to the primary duty, and a right to the secondary duties regarding responsiveness (I have primary and
secondary rights). If so, then there is an infinite regress of rights, each one with remedies attached to failure.

But actually the formulation is misleading here. The second duty need not be owed in the sense that the first duty is owed. It is merely a duty which constitutes the right. The only instance in which a question of a further duty, a further remedy, might come into play would be in a failure to enforce a remedy by a positive legal body. In such an instance it could be said that a person has recourse to appeal mechanisms. But there the question is not of seeking remedy for the failure to perform the first duty to remedy, but rather of seeking the enforcement of that first duty. As I have said above, enforcement is a distinct question from remedy. Sometimes, in seeking to enforce a legal body will impose a different (more burdensome) remedy on an agent who has failed to supply the remedy associated with the right. However, such cases are either a re-emphasising of the right or enforcement of the remedy.

A still stronger objection is that the account I give can be spelled out in terms of duties, as I appear to do (one to perform and others to report and remedy). Does this show that rights are not a truly distinct category but actually reducible to concatenations of duties? That would apparently violate my methodological claim about distinctiveness. But, whilst it can be articulated in terms of duties, accountability is not a simple addition of duty: the primary duty has priority over the responsiveness duties, to inform or remedy, which regard its performance or failure to perform. That particular concatenation of duties has a value that just any concatenation does not have: it can articulate or express directed respect, as I have explained it. Duties could be clustered as one likes, without necessarily articulating a particular value, as opposed to serving some end. So consider the duty to supply food resources, versus this duty plus the responsiveness duties. Both can achieve the same end: the supply of the resources. The latter case, however, articulates a value that goes beyond that aim, a value that cannot be articulated by the former duty alone. Furthermore that value, directed respect, also guides interpretations as to the choice of means for information or remedy. What counts as an appropriate way of responding will vary from case to case. Merely handing over a few coins for damaging someone’s life is a response but is not sufficient to say the agent has been accountable.

The last objection to the view I’ll consider is that it is not a formal account of rights. That is, instead of trying to formally account for the features of a right, whatever it might be a right to, I have given an

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37 This terminology is often used in the legal literature on remedy, for example R. Zakrzewski, *Remedies Reclassified*, Oxford: Oxford University Press, 2005, p. 2, distinguishes a substantive right (the duty to be performed) from rights arising from court orders (remedies). This is, of course, a legal definition, and does not tell us about rights as such.
account that is functional. A right is rendered as serving a specific value aim: making some agents accountable to others, and thereby according the latter a status which mere duty cannot accord. This implies that anything which does not serve this aim is not actually a right. But this is to confuse the aims to which rights can be put with the way they work, and the latter must come first.

Yet, whilst I do not think that there is a firm distinction between formal and substantive accounts of rights (I think all accounts are substantive in the sense of referring us to value), there are, so to speak, degrees of formality. The account I have presented is not functional or aim driven by defining what rights should be rights to (in this sense interest theory is more functional than my account). The question of what rights there actually are, in the sense of what duties can be justifiable, is in the main a separate question on my view. It is only functional in a limited, moral, sense of requiring a distinctive moral function of moral concepts, in the way that moral duty plays such a distinctive function.

VII Two notions of publicity

All rights are public in the sense I identified at the end of section II above: that they imply responsiveness which goes beyond the conscience of the agent of the duty, and beyond the private understandings of duty bearers and those to whom the duties are owed. However, some rights are accountable in another way. They incorporate not only the duty of an agent to act in a given way, but also the duties of other, third parties, to intervene with regard to the primary duty bearer’s responsiveness. This is what I wish to call rights proper.

In the basic account of rights I have given, there is an element of publicity at the level of supplying accounts of duty performance in a form that is publicly recognisable and assessable. This makes it possible for third parties to intervene and have a say with respect to performance (including the proxies of the right holder), for example in terms of adjudication and enforcement. However, whether third parties should intervene or have a say is another matter altogether. There are questions of responsibility and competency involved here. A contract right, for example, typically requires third party adjudication because the parties involved cannot be assumed to be disinterested in the interpretation of the duties involved. Furthermore, rights held against particular organs of the state, that they should protect private citizens from other private citizens for example, can imply a duty to be involved by particular adjudicative and enforcing bodies, such as the judiciary. The responsiveness of executives and judiciaries themselves might imply duties by other bodies (including other states or supra-state bodies) to intervene.
In the absence of an adjudicating body some rights may not be acquirable, given that to acquire relevantly public duties implies a set of background institutions (such as with contract) however with other rights, the pre-existence of adjudicating and enforcing institutions makes no different to the possibility of the right existing in the first place.38

In conclusion, as I have said above, the account of rights I have given is substantive to the extent that it cites a value that rights express, that gives them their distinctive point and purpose. It is not substantive in the sense of determining absolutely what rights there are, or explaining what might justify a particular right. That question divides into two areas of discussion. Firstly, whether it is possible that non-moral versions of this relationship exist (which is not a question I tackle here) and secondly, which moral versions of this relationship exist.

For the latter question I propose the following answer. There are distinctive relationships for which standards of accountability in the form of rights can be morally justified. Each of these relationships has its own distinctively valuable role, and for each one a distinctive notion of their conceptual point and purpose must be given. Such a justification must make reference to the value of rights as such in characterising standards of treatment in a specific type of relationship, but it must go beyond that, giving them content in terms of justifying specific distributions of rights. Potentially, human rights, civil rights, rights associated with claims to distribute justice, each characterise distinctive standards, because they focus on different types of relationship. For each type, a separate justification must be given of the rights that are distribution, no only the form of those rights. That is work which I have begun elsewhere.

38 See S. Meckled-Garcia, ‘Neo-Positivism About Rights’.