The Interest Theory of Rights and Rights Attached to Roles

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Abstract In this essay, I defend the interest theory of rights against the argument that because some agents hold rights grounded in a special role or office, rather than their own interests, the theory is false. I begin by explaining the interest theory and the argument from rights attached to roles against it. I then explore responses to this objection by Kramer and Raz, ultimately rejecting them and proposing a simpler solution of my own. My response stipulates that in cases where people seem to have rights grounded in a special role, it is actually the state or the society that holds those rights. Given that the interest theory can allow collective entities to have rights, this response manages to retain the full explanatory power of the original theory, without introducing additional theoretical conditions for agents holding rights. Based on this, I argue that the argument from rights attached to roles is not sufficient to refute the interest theory.

1 Introduction

The aim of this essay is to defend the interest theory of rights against the argument that, because some agents hold rights grounded in a special role or office, the theory is false. The essay has three sections. In the first section, I explain the interest theory and the argument from rights attached to roles against it. In the second section, I then explore, and ultimately reject, responses to this objection by prominent interest theorists Kramer and Raz. This is because Kramer's response limits the explanatory power of the interest theory too much, whereas Raz's solution contradicts the original interest theory and necessitates the addition of new problematic conditions for agents

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holding rights. In the final section, I propose a simpler solution of my own. This solution stipulates that in cases where people seem to have rights grounded in a special role, it is actually the state or the society that holds those rights. I argue that this response allows us to explain many cases of rights related to special roles that are often thought to be difficult for the interest theory to accommodate. Given that the interest theory can allow collective entities to have rights, this response manages to retain the full explanatory power of the original theory, without introducing additional theoretical layers. Finally, I argue that the idea that collective entities can have rights is not merely a peculiar feature of the interest theory, but present in many areas of our common language. Based on this, I conclude that the argument from rights attached to roles is not sufficient to refute the interest theory.

2 The Interest Theory and the Argument from Rights Attached to Roles

The interest theory is a theory about the normative foundation of rights. For the purposes of this essay, I am trying to avoid as many additional commitments related to the definition of rights as possible. Rather, I take "rights" as a basic moral concept which can be explicated in various ways by different first-order moral and political theories, similarly to terms like ''duty" or "good". Although different authors have presented slightly different formulations of the theory, a simplified version of Kramer's interest theory will be sufficient for the purposes of this essay. Paraphrasing Kramer[1] [2], the interest theory consists of two main propositions:

1. For X to hold a right, it is necessary, though not sufficient, that the right protects some aspect of X's situation that is typically beneficial for a being like X.

2. For X to hold a right, it is neither necessary, nor sufficient, that X is competent to demand or waive the enforcement of the right.

Proposition 1 states the basic idea of the interest theory, namely that rights exist to make right-holders better off. For example, because it is very much in our interest to not be physically assaulted, we have a right to bodily integrity. The point of proposition 2, on the other hand, is to make the claim that having a right does not depend on the right-holder having highly developed mental competencies. What is required is simply that the right-holder has interests, not that they are autonomous, for example. Therefore, the interest theory entails that the group of potential right-holders is not limited to

1. Kramer, M.H., "Some Doubts about Alternatives to the Interest Theory of Rights",'*Ethics*,vol. 123, no. 2, (2013): 246.

2. Kramer, M. H., Simmonds, N. E. & Steiner, H., *A debate over rights: philosophical enquiries* (Oxford: Oxford University Press, 1998): 62.

competent adult humans, but can include any entities that have interests, for example non-human animals or corporations.

It is important to note that the interest theory does not claim that all interests create rights: to give an obvious example, even if an aspiring politician has a strong interest in being elected, it does not follow that they should have a right to be elected regardless of their expertise and support among their constituents. This is why having an interest is a necessary, but not a sufficient condition for having a right. Indeed, the interest theory, as defined above, does not take a stance on what set of conditions would be *sufficient* for having a right, allowing the theory to be paired with a variety of moral views. For example, it seems plausible to say that for an interest to ground a right, the interest must not involve gratuitously harming others, meaning that the interest theorist need not be committed to claiming that, say, someone who gets pleasure from killing dogs must have a right to do so. However, discussing exactly what set of interests and possible other conditions would be sufficient for creating a right is beyond the scope of this essay. Instead, my aim is to defend a far more limited, but still an important claim about the source of rights, namely that for every right someone holds, there is a corresponding interest that the right protects. As we shall see, some philosophers think that there are obvious counterexamples against this claim, which I aim to refute.

Before moving on, however, it is useful for understanding the interest theory to briefly think about the positive reasons there are for endorsing it. To begin with, it seems very intuitive to think that many rights exist because they make us better off. In addition to the right to bodily integrity, rights such as right to life, right to subsistence and right to education seem so important namely because they are vital to our welfare. A related point is that the interest theory conceptually allows there to be unwaivable rights. For example, interest theorists can maintain that people have the unwaivable right to not be enslaved because this is always in their interest. On the other hand, the interest theory is not committed to the claim that our rights always make us better off in every instance: for example, as Wenar[3] points out, inheritances might sometimes cause us more trouble than benefit. This is why proposition 1 in our definition of the interest theory talks about things that are *typically* beneficial for beings like the right-holder in question. Finally, it seems very plausible that beings other than adult humans, such as infant human children, have at least some important rights. The interest theory has no difficulty in accommodating this intuition.

Having introduced the interest theory, I will now present the argument from rights attached to roles against it. The idea is simple: contrary to what the interest theory claims, there seems to be cases where people possess certain rights due to a special role or office that they hold. An oft-cited example is a judge who has the right to convict people to years in jail.[4] I will reconstruct the argument in standard form as follows:

3. Wenar, L., "The Nature of Rights", *Philosophy & Public Affairs*, vol. 33, no. 3 (2005): 241.
4. *Ibid.*, 242.

P1 The interest theory maintains that for X to hold a right, it is necessary that the right protects some aspect of X's situation that is typically beneficial for a being like X.

P2 The right of a judge to convict people does not protect any aspect of the judge's situation that is typically beneficial for humans (i.e. beings like the judge).

C1 It is not necessary for X to hold a right that the right protects some aspect of X's situation that is typically beneficial for a being like X.

C2 The interest theory is false.

The argument uses a counterexample to show that proposition 1 from our definition of the interest theory, as expressed in **P1** in the argument, is false. Because the right of the judge to convict criminals does not seem to be relevant for any important aspect of their welfare or other interests - unlike their right to bodily integrity typically is - it seems impossible that the interests of the judge could give them the right to alter the situations of other people so dramatically. Instead, the natural interpretation of the case is that the judge is exercising a right that is not based on their interests. Therefore, it seems that having an interest is not a necessary condition for holding a right.

3 Responding to the Argument

The argument from rights attached to roles has been discussed extensively in the literature. Since my aim in this essay is to defend the interest theory, I will now look at some responses that have been offered by prominent interest theorists to see if they can aid, or at least inform my project. To begin with, Kramer[5] responds to the argument from rights attached to roles by maintaining that, in fact, the right of the judge to convict criminals is not a right at all. According to Kramer, when we talk about the right of a judge to convict or a head of state to declare war, we are talking about powers or special capabilities that are simply not the same thing as rights. I find this solution somewhat intuitive, as I feel that although the same word is commonly used, the right of a judge to convict criminals is a very different case from ordinary rights that belong to everyone, such as the right to basic sustenance. Perhaps we should reserve the concept of right to specific usage and find more suitable terms for the "rights" of office-bearers.

Still, I think that accepting this response would strip away an important part of the interest theory's explanatory power. This is exactly because Kramer's response drastically limits the types of rights that the interest theory can accommodate, accepting only claims as actual rights and leaving out all other Hohfeldian incidents, namely

5. Kramer, M.H., Simmonds, N.E. & Steiner, H., *A debate over rights: philosophical enquiries*, 9-10.

privileges, powers and immunities.[6] I find that a better way to account for the sense of important difference between the judge and someone's right to bodily integrity is to say that the judge holds a power-right to convict, whereas we all hold claim-rights against bodily attacks. The difference here is, roughly, that the judge has a right to alter other people's (claim-)rights (in this case, the convicted person's right to liberty), whereas our right to bodily integrity just means that others have a duty not to attack us. While it is not the purpose of this essay to dwell deep into Hohfeld's terminology, it should nevertheless be clear that not being able to accommodate many of the common-sense ways we refer to rights in our language is a flaw for a theory seeking to explain them. Of course, this flaw could be rectified with a convincing positive argument for why we should understand rights exactly in the way Kramer suggests, but with no such argument in sight, I think it is best to keep refraining from additional normative assumptions regarding the exact nature of rights.

At first glance, I find that Raz[7] offers a more promising solution. He holds that rights are not always fundamentally grounded on the personal interest of the right-holder. Sometimes an interest can be instrumentally valuable because it promotes the welfare of others. For example, while it is true that the right of a judge to convict criminals cannot be grounded on the judge's personal interests, this right can be justified by appealing to the interests of the population in general. Here, the judge has an interest in being able to do their work, but this interest is sufficient to create rights only because it promotes safety, and as such is instrumentally valuable to other moral agents living in the society. Raz' own example is a journalist, whose right to protect the identity of their sources is ultimately justified because of its value to the public.[8]

However, Kamm[9] has pointed out that Raz' argument contradicts the interest theory as it is commonly defined. From our point of view, it is fairly clear why this is: if it is not the interests of the judge, but those of someone else, that give the judge their power-rights, then proposition 1 in our definition of the interest theory is false. This is because it is no longer necessary for X to have a right that this right protects some aspect of namely X's own situation. To make the interest theory compatible with Raz' solution, our definition would have to be modified like this:

1.* For X to hold a right, it is necessary, though not sufficient, that the right protects some aspect of X's situation that is either **a)** typically beneficial for a being like X or **b)** benefits a large enough group of other morally significant beings.

It is important to unpack this definition carefully. What is proposed here is that while it is still X that holds the right, this right need not be grounded in X's interests.

6. Hohfeld, W.N., "Fundamental Legal Conceptions as Applied in Judicial Reasoning", *Yale Law Journal*,vol. 23, no. 1 (1913): 28-58.

7. Raz, J., The morality of freedom (Oxford: Oxford University Press, 1988): 178-190.

8. *Ibid*., 179.

9. Kamm , F., "Rights" in *The Oxford handbook of jurisprudence and philosophy of law*, ed. Coleman, J.L. & Shapiro, S. (Oxford: Oxford University Press, 2004): 485.

Instead, X can hold a right that protects the interests of [Y, Z... N]. For example, the journalist's right to protect the identity of their sources in Raz' example is still a right that the journalist holds personally, but the moral grounding of this right is in the interests of other people. This represents a major change compared to the original interest theory, where agents can only hold rights grounded on interests that they hold themselves.

The fact that this modification changes the interest theory substantially leads to some issues. Firstly, it seems that the added part b) of the proposition effectively allows consequentialist considerations to create rights. If one believes that consequentialist calculations are an inappropriate or even impermissible way of arriving at moral judgements, then this might be a fatal flaw in itself. However, even if we allow our moral theory to assign some value to consequences, this formulation of the interest theory clashes with many people's intuitions of rights, as rights are usually considered in some sense unalterable, meaning that they cannot be erased whenever an individual's rights clash with the interests of the majority. Secondly, it is also not clear which of the two functions that rights can serve in the revised interest theory should take priority if they contradict each other. For example, it can definitely be in a rich person's interests to have strong property rights, whereas the public benefit might require that the state has the right to tax its citizens. These kinds of evaluative problems are of course present in the original interest theory but adding multiple functions that rights can fulfil makes them even more difficult. Finally, even if we managed to solve these problems, this solution adds theoretical layers into the interest theory, making it less parsimonious. Therefore, it seems that this solution is, after all, only a minor improvement to Kramer's response.

4 Collective Entities as Right-Bearers

Despite these problems, I find that there is something correct about the idea that the public interest can ground rights. Therefore, I will now try to develop this idea. To tackle the objection from rights related to office, while avoiding the problems described in the preceding section, I think a supporter of the interest theory should go back to the fundamental properties of their theory. Here, I believe that the interest theorist can make use of the fact that the interest theory does not limit the group of potential right-holders to adult humans, but can also include entities like corporations or states. In cases like the judge example, the interest theorist could simply say that it is the state that holds the right to convict criminals, rather than the judge. The judge is merely a tool that follows carefully defined rules, allowing the state to exercise its right to punish people who harm it. This simple solution can still accommodate all Hohfeldian incidents and, unlike Raz' idea, it does not require that we change proposition 1 of our definition of the interest theory. This is because unlike in Raz' solution, we do not

claim that the judge holds any power-rights at all, meaning that we need not justify the rights of one agent by the interests of someone else. Instead, both the right-holder and the interest-holder, in this particular case, is the state. It is not the case that X can hold rights grounded in the interests of [Y, Z. . . N] but, instead, X simply *is* [Y, Z. . . N].

To see whether my suggestion seems plausible, we can try to apply it to some other cases. To begin with, I think we can say something along my line of thought about the journalist protecting their sources. It seems plausible to me that, in fact, the journalist does not have a right to protect their sources, but a duty to do that. Consequently, we can analyse the case as an instance of the civil society as a whole having a claim-right that creates this duty. If the journalist would harm the civil society by naming their sources, then it is conceivable that the civil society has a right against this kind of harming. In this vein, it seems like most arguments that at first seem to make references to multiple other people's interests as a way to justify someone's rights could be phrased in terms of collective entities, by simply identifying the collective that the interest-holders form. Nevertheless, there still remains some difficult cases where it seems like someone holding a special role has the right to act against the interests of the relevant collective. For example, consider a head of state who has a constitutional right to order a nuclear attack, and consequently could do this because of a personal whim, even if it was against the national interest. However, I think it is clear that even if this head of state would have the legal right to order the attack, they would not have the moral right to do so. In fact, in this case, I hold that the nation would have a moral right against the head of state ordering nuclear attack. There is nothing peculiar here: since the interest theory is a theory of moral rights, there will be cases where the legal rights of certain office-bearers clash with the moral rights of both individuals and collectives. Making this distinction allows us to explain why it can sometimes seem as if certain office-bearers have the "right" to act in ways that are against everyone else's interests, even though this is not the case in so far as we are concerned with morality rather than the letter of the law.

Having established that my proposal can make sense of many situations that are usually considered difficult for the interest theory to accommodate, I wish to address one more possible objection to my view. I believe one could make various metaphysical arguments aimed at establishing that the kind of collective entities that I refer to do not really exist, and therefore, my view is not sound. As a pre-emptive, though imperfect, rejoinder to this class of objections, I would like to point out that we already seem to accept, in many areas of life and our common language, that many kinds of collective entities can hold rights. A paradigm example of this is a corporation with copyright to intellectual property. Moreover, in international law, there are references to rights of states,[10] and in the age of climate change, more and more references are made to rights

10. See e.g. Brown, P.M., "The Rights of States under International Law", Yale Law Journal, vol. 26, no. 2 (1916).

of future generations.[11] Of course, this does not *prove* that collective rights exist, in the same way that the fact that we can talk about dragons does not mean that dragons exist. However, given the intelligibility and common occurrence of the idea that collective entities can have rights, I hold that even my dialectic opponent should grant that this idea seems initially plausible. Therefore, the burden would be on them to explain what goes wrong when we talk about collective rights and why these rights do not really exist. It is also true that deciding exactly what kind of rights, if any, a certain group should have and how these rights should weigh against rights of others is a difficult question, but this does not undermine the general idea that collective entities can hold rights.

5 Conclusion

In this essay, I have defended the interest theory from the argument from rights attached to roles. I began by introducing the interest theory and the argument against it, before reviewing two responses by prominent interest theorists Kramer and Raz. Instead of endorsing either of them, however, I argued that we can better respond to the argument by stating that it is actually the state or the society that holds the rights we often erroneously attribute to office-bearers. This response has the benefit of retaining the interest theory's explanatory power across all Hohfeldian incidents and avoiding a collapse to utilitarianism, without having to introduce additional theoretical conditions in it. After all, it is a central feature of the interest theory that the group of potential right-holders is not limited to individuals, but can include collective entities. We also saw that my solution can successfully explain many cases where agents seem to have rights grounded in holding certain roles, as well as allowing us to say what is wrong with cases where office-bearers seem to have a right to act against everyone else's interests. Finally, I pointed out that the idea that collective entities can hold rights is not confined to the literature regarding the interest theory, but instead, can be found in our common language from many areas of life. This observation lends further support for the plausibility of my view against those who are sceptical of the existence of the collective entities I refer to. Therefore, I conclude that the argument from rights attached to roles is not sufficient to refute the interest theory.

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11. For some suggestions, see Gosseries, A., "On Future Generations' Future Rights", *Journal of Political Philosophy*, vol. 16, no. 4 (2008).

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