Grounding Rights

Research plan for SNF project

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1 Summary of the research plan

Both rights and well-being are essential parts of our public and private morality. But how are the two related? The aim of the project *Grounding Rights* is to study the dependence relations between these two central elements: First, are all rights grounded in aspects of well-being? And second, are certain aspects of well-being themselves grounded in having rights?

The first question neatly connects to the debate over the nature of rights. According to the popular *interest theory of rights*, facts about rights are grounded in aspects of the well-being of the respective right-holders. While the core idea that rights must be "good for something" appears quite plausible, the interest theory struggles with rights that are apparently *not* grounded in the right-holder's interests, such as the right to child benefit or the right of a judge to sentence a convict.

Against this background, we propose to pursue in the first sub-project the hypothesis (H1) that all rights are grounded in an aspect of the well-being of the right-holder *or* of some other party. On this "extended interest theory", third-party interests can directly, i.e. without detour via the right-holder's own interest, ground rights. Closer examination of this hypothesis will require not only replying to sceptical concerns about interest theories in general, but also specifying how the supposed grounding is meant to work.

Regarding the second question, it has been argued that violation of rights is necessarily disrespectful. But what explains the link between rights and respect? While standard interest theories can easily accommodate this connection, theories that don't ground rights in properties of the right-holder herself struggle to account for it. The puzzle could be resolved if we assume that rights *themselves* ground aspects of the well-being of their holder, independently of what they may be grounded in themselves. In order to defend this hypothesis (H2), however, a closer characterisation of these interests must be given, as well as an investigation of the circumstances under which rights ground interests. This will be done in the second sub-project.

Framing the debates in terms of grounding is a novel approach with the potential to profoundly reshape the discussion about the relations between rights and well-being. However, before utilizing this tool it will be necessary that it is first theoretically refined. Elaborating our conception of grounding will therefore be part of the conceptual groundwork, as will an analysis of the concepts of *a right*, in particular of the relations between different usages of the term, and of *an interest*. Better understanding the dependence relations between rights and well-being is also likely to have repercussions on other debates in moral and political philosophy.

2 Research plan

2.1 Current state of research in the field

What is a right? Answers to this question can be aimed either at the logical structure of (various types of) rights, or at the "nature" of rights (cf. Wenar 2015, § 2). However, what exact question is being addressed when different theories of rights are discussed is far from clear. In what follows, we set out three different ways of framing the debate: the "directed duties" approach, the functional approach, and the grounding approach. While the former two are well studied, the grounding approach has gone largely underexplored and might open up new vistas on the main contenders to the debate.

The logic of rights

Concerning the logical analysis, it has become standard to appeal to the Hohfeldian analysis as the "beginning of wisdom" (Steiner 1994, 59). Although American judge Wesley N. Hohfeld was not the first to distinguish between different categories of rights and to enquire into the way they are related (cf. Paton 1972, chs. 18–21), his analysis has proven particularly influential. In his seminal paper (Hohfeld 1913), Hohfeld distinguished between four so-called "incidents" or elementary types of rights. Using property rights as an example, there is first the right to do something, e.g. to repair or to destroy my car; this is what Hohfeld called a "privilege", nowadays mostly termed "liberty". Second, there are rights against others that come with a correlative duty on the part of others; these are called "claims" or "claim-rights". For instance, I have a claim against you that you safely return my car if you borrowed it, and you have a corresponding duty directed to me; you owe it to me to bring the car back safely. While liberties and claims are first-order rights, there are also rights with respect to other rights. Hohfeld distinguished between two of them: powers and immunities. A power is the capacity to change first-order rights, e.g. the right to sell a thing which makes me lose the liberty to destroy that thing. An immunity, on the other hand, is the status of a right-holder not to have his first-order rights changed by others. The Hohfeldian scheme is widely accepted and considered neutral between competing theories of rights (McBride 2017, xi).

The directed duties approach

Recently, various philosophers have cast the debate over the *nature* of rights as concerning the correct definition of the directedness of so-called "directed" duties (Sreenivasan 2005, 257, 258; Wenar 2015, § 2.2.2; Cruft 2013a). The directed duties account of the debate over rights is based on the plausible and common assumption that duties come in two varieties: directed and undirected duties. This distinction refers to the idea that the fulfilment of some duties is *owed to* some other

party, while others are not. For instance, if I promise you to clean the dishes before I go, my doing so is owed to you; while if I make the pledge to abstain from drinking alcohol, I may well have put myself under an obligation, without this obligation being owed to anyone. In Thompson's phrase, some judgements about duties express a "bipolar form of normativity" (Thompson 2004, 335). The difference between directed and undirected duties is significant for at least three reasons (Thompson 2004, 333–340; Cruft 2013a, 195–6; Cruft 2013b, 201–202). First, if a duty is directed at a person, then that person will be wronged if the duty is violated, while no-one in particular will have been wronged if I violate my pledge to abstain from drinking alcohol. Second, because violating a directed duty results in its counterparty being wronged, the counterparty will therefore be owed an apology and/or compensation, while "there is no such close link between apology or compensation and being harmed by a violation that did not wrong one" (Cruft 2013b, 201). Finally, there seems to be a special connection between directed duties and rights, known as the "equivalence thesis":

> [C/DD] x has a claim-right against y that y φ if and only if y has a duty to φ directed to x.

The equivalence thesis is well-established (Hohfeld 1913; Thompson 2004, 334; Sreenivasan 2005, 257; Darwall 2012, 343–6; May 2015, 525–6), although it has recently been challenged (Hedahl 2013; Cruft 2013b; Nieswandt 2019). A number of authors take the equivalence claim as a clue to understanding the nature of rights (Wenar 2015, § 2.2.2). The basic idea is as follows: If C/DD holds, it seems natural to say that for x to have a claim against y is for y to have a duty directed to x, or, put another way, the "claim fact" that x has a claim against y will be the very same thing as the "duty fact" that y has a directed duty against x. If so, a definition of what it is to have a right will *ipso facto* be a definition of what it is to have a directed duty. This then allows us to shift attention away from the term "right" and to focus on directed duties instead. For instance, Stewart writes: "The key difference between the will theory and the interest theory concerns what might be called the 'directionality of duties' – that is, the method of identifying the person to whom *X*'s duty is owed" (Stewart 2012, 322; cf. Cruft 2017, 169; Stepanians 2005, 47–8; Sreenivasan 2005, 482; Wenar 2013, 202).

One approach to this question will be to look for a special normative power or capacity in the counterparty (which we may call the agency approach). Two versions of the agency approach are particularly noteworthy. In standard *will theory*, a duty will be owed to whoever has the power to waive or enforce it. For instance, your duty to pay back a loan is owed to me if, and only if, I have the power to release you from this duty. As Hart put it (1982, 171, 183–5, 188–9), "One who has a right has a choice respected by the law". In short, we may put the central claim of the will theory thus (cf. Cruft 2013b, 196):

[WT] A duty is owed to x if and only if x has the power to waive it.

As a general theory of what it is to have a directed duty (across the legal, moral, and possibly other domains), this theory runs into serious difficulties. First, the will theory implies that there can be no duties owed to beings who apparently lack the power to waive some duty with respect to them, such as newborn infants, comatose people, non-human animals, members of future generations, or the dead (MacCormick 1982; Kramer 1998, 69–70). Countering this objection by maintaining that the waiving power can be held by someone else on behalf of the incapable, such as the parents in the case of children (Wellman 1985, 192), runs into the objection that this will make it unclear why the duty would not be owed to the trustee herself (Cruft 2017, 169). Second, the will theory seems to be unable to account for inalienable rights such as, for instance, my right not to be enslaved or my right not to be humiliated in public (MacCormick 1977; Kramer 1998, 72–73; May 2015, 525–6). For the will theory, the very idea of an inalienable right amounts to a contradiction in terms. Finally, a third objection draws upon the intuition that the counterparty of a directed duty has "control over a duty in virtue of the prior and independent fact that the duty is owed to him", as May says (2015, 526). But if so, the fact that the duty is owed to her can't be the same as the fact that she has the power to waive it.

A second version of the agency approach refers us to the right-holder's power to demand compliance with the duty (*demand theory*). The basic idea is that "having a claim consists in being in a position to claim, that is, to make claim to or claim that" (Feinberg 1970, 253). Again, being the counterparty to a directed duty is identified with having a particular power or capacity; in this case, that of making claims or demands on the subject of the duty, including the power to hold the subject responsible (Darwall 2013, 31–2; cf. Skorupski 2010, 307–313). Put simply,

> [DT] A duty is owed to x if and only if x has the power to demand compliance with the duty.

This theory avoids the inalienability objection (cf. May 2015, 527), since the power to demand compliance with a given duty does not entail the power to waive it. However, the demand theory is confronted with four important other objections. First, it seems that even in its demand version, the agency approach does not escape the incompetence objection, since infants, non-human animals, etc. are just as incompetent to exact compliance with some duty as they are to waive it (Cruft 2017, 170). Second, sometimes a duty seems to be owed to us although we have lost the standing to demand compliance, for instance because it would be hypocritical to do so in light of our own former transgressions (May 2015, 528). Third, as Cruft has pointed out, the power to demand compliance may not only be not necessary for being the counterparty of a given duty, but also not sufficient (Cruft 2017, 170), as compliance officers and monopoly commissions

demonstrate. Finally, as May notes (May 2015, 528), the power to demand compliance seems again to be consequential upon, not identical to, being the counterparty of some duty.

The Interest Theory, on the other hand, doesn't make reference to particular agential capacities, but to certain *interests* (*aspects of the well-being*) of the right-holder. Raz' classical formulation of the interest theory can be taken to illustrate this point. He writes:

> [IT] "X has a right" if and only if […] an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty. (Raz 1986, 166)

This formulation has incurred quite some interpretations (cf. Simmonds 1998; Pallikkathayil 2016; Raz 2016; McBride 2018), but one way of understanding IT is to rephrase it as follows (Cruft 2013a, 197; cf. Sreenivasan 2005, 261; May 2015, 528):

> [IT'] A duty is owed to x if and only if x's interest is sufficient reason for it.

The interest theory avoids the problems that beset will and demand theories of rights (Nieswandt 2019, 317). And the intuitive core of IT seems likewise plausible: rights don't just hang around in the normative landscape; they are there for a purpose. It would be odd to say that we have rights that don't benefit anyone, anytime, not even the right-holder herself (cf. Nieswandt 2019, 316; Wenar 2015, § 2.2.2). However, the interest theory is haunted by its own problems.

First, it has been pointed out that third-party beneficiaries can have a very strong interest in some action without that action being owed to them (cf. Lyons 1994, 37). The interest theorist may reply that in this case the third party's interest will simply not be sufficient to justify a duty, although the interest of a third-party beneficiary may be much stronger than that of the duty's counterparty. So everything seems to turn on the precise meaning of "sufficient" here. (For an overview of possible interpretations, see Cruft 2013b, 205–6.) But even assuming that "sufficient" can be given an adequately clear meaning, it may be questioned whether the right-hand side is sufficient for there being a *directed* duty. Interests of animals may be sufficiently strong to justify the claim that we're under a duty not to maltreat them, but it seems an open question whether the resulting duty has to be a "bipolar" duty directed *to* the animal itself rather than a mere "monadic" duty *with respect to* the animal (for a similar point, cf. Kamm 2002, 483).

Considering whether a justifying interest on the part of x is necessary for there being a duty directed to x, two forceful objections must be noted. First, it seems that a number of duties are justified not with reference to an interest of the duty's counterparty, but to that of some other party. Raz himself gives two influential examples, that of the rights of journalists to protect their sources (Raz 1986, 179) and that of parents to child benefits (Raz 1994, 35). Raz tries to accommodate the rights of journalists by reference to the "interest of journalists in being able to collect information" (Raz 1986, 179), saying that this interest is deemed worth protection because of the interests

of the public at large. However, many have found Raz's solution wanting (cf. Cruft 2013a, 197; Wenar 2013, 204). Kamm writes: "[I]f the satisfaction of interests of others is the reason why the journalist gets a right to have his interests protected, his interest is *not sufficient* to give rise to the duty of non-interference with his speech." (2002, 485)

Even more fundamentally, it has been questioned whether duties are necessarily justified with respect to interests *at all*, be it those of the duty's counterparty or those of some third party. The core idea of so-called *status theories* is that at least some directed duties are justified directly with reference to the moral status or the nature of the duty's counterparty, without any recourse to interests. Status theories of various kinds have been defended by Nozick (1974), Quinn (1993, 171), Nagel (1995, 85, 96), Kamm (2002, 483) and Schnüriger (2014). Kamm puts the point forcefully when she writes that "Persons might have a right to treatment as equals [...] without our duty to them being based on their interest. Rather, I would say, this right is based on their nature as persons and not necessarily related to any aspect of their well-being." (Kamm 2002, 485) Against status theories, however, it has been argued that the moral nature of individuals is insufficient for grounding egalitarian duties (May 2015, 530) and that the concept of moral status is logically redundant (Frankena 1986, 159; for discussion, cf. Schnüriger 2014, 190–194).

The functional approach

However, for several reasons it is doubtful whether the debate between will theory, interest theory, and status theory is best cast as a debate over the "directionality" of directed duties. First, this way of framing things relies on the above-mentioned equivalence thesis [C/DD] which has been challenged. Second, even if the equivalence thesis is true, it does not follow that an account of directed duties will *ipso facto* be an account of rights, nor does it follow that claim facts are identical with the duty facts that correspond to them. As a number of authors have pointed out, there appears to be an explanatory asymmetry between claim facts and duty facts; judgements about directed duties are often justified by reference to the corresponding right. To quote Joel Feinberg: "If Nip has a claim-right against Tuck, it is because of this fact that Tuck has a duty to Nip." (Feinberg 1970, 250). In the same vein, Raz expressly states: "A right of one person is not a duty on another. It is the ground of a duty, ground which, if not counteracted by conflicting considerations, justifies holding that other person to have the duty." (Raz 1986, 171. Cf. also Gewirth 1986, 330, 333, and Gewirth 1988, 441–2; for criticism, see Upton 2000, 246; Schnüriger 2014, 91–3). But, following Skorupski, a biconditional is a definition if it makes no sense to ask whether one side of the biconditional is made true by the other (Skorupski 2010, 455–6). Finally, even if improved versions of the theories may yield extensionally equivalent results, they will still give different explanations for rightholdership (Frydrych 2018, 579).

The established alternative is to think of the debate over rights as revolving around the ultimate

purpose, the "point", or function, of claim-rights or rights in general (for this approach to the debate, see Wenar 2005; Wenar 2015, § 2.2.1; Frydrych 2018; Frydrych forthcoming). Wenar, e.g., suggests that the point of the debate is to offer "a description of what rights do for those who hold them (their function)" (Wenar 2013, § 2.2.1). Similarly, for Frydrych the competing theories have "in part a teleological focus" in that they all hold that "rights serve some singular, *ultimate* purpose" (Frydrych 2018, 567).

This way of taking things fits very well with the interest theory, according to which the point of rights is to protect normatively some aspect of the right-holder's well-being. In MacCormick's words, "The essential feature of rules which confer rights is that they have as a specific aim the protection or advancement of individual interests or goods" (MacCormick 1977, 192). However, putting the debate in terms of the function of rights seems to sit considerably less well with the other main theories outlined above. For instance, what is the function of rights associated with the will theory? According to Wenar, "the will theory of rights asserts that the single function of a right is to give the rightholder discretion over the duties of another" (Wenar 2005, 238; cf. Frydrych 2018, 568); but a will theorist may well insist that this way of putting things already imposes on her a certain understanding of the debate that she rejects.

The grounding approach

We might therefore do better to look for a characterisation of the debate in terms other than the definition of directed duties or functions. One promising way of doing so may be to take the different theories as accounts of *what makes it the case* that we have rights, or "why" we have them, or "in virtue of what" we can be said to own certain rights; in a somewhat more technical wording, of what grounds rights facts. In van Duffel's words, "the ambition of either theory is to describe what makes something into a right" (van Duffel 2012, 105). Like the functions approach to the debate, this avoids talking about rights only via directed duties, leaving it open whether rights facts can be identified with facts about directed duties. But unlike the functions approach, the grounding approach doesn't run the risk of forcing will and status theories into the Procrustean bed of identifying a particular function for rights, although it allows for functions to be a ground of rights. On this view, theories of rights aspire not so much to give a definition of rights (what rights *are*) but a constitutive explanation of them (what *makes it the case* that rights facts obtain; cf. Raven 2015, 326). Interest theories are then best taken as centred around the claim that all rights are grounded in the right-holder's interests, which seems to capture nicely the driving intuition that lends plausibility to those theories. Likewise, status theories articulate the idea that we have certain rights if and because they somehow reflect our human nature, while will and demand theories can be understood to explain the existence of rights by reference to certain agential capacities. To take the debate over the nature of rights as a debate over grounds finds some support, e.g., by

Cruft's reading of IT' (Cruft 2013b, 205; cf. Frydrych 2018, 578–9; Nieswandt 2019, 2). Note that grounding is different from *justification* by not essentially referring to *normative* reasons for the existence of rights. That is, while on this reading some theories explain the existence of rights with reference to normative facts such as interests or status, others refer to non-normative facts such as having certain agential capacities. Taking the debate in terms of the grounds of rights rather than definitions or functions may pave the way for a disentanglement of different concerns. In particular, we may fruitfully reconsider the question whether and, if so, how rights could be grounded in the interests of person(s) other than the right-holders themselves. However, the theories of rights debate has not yet been explicitly put in terms of grounding, and the recent rise of the concept of grounding in analytic metaphysics has so far not been adopted to its understanding. For the same reason, the consequences of reformulating the debate for the main contenders (interest theory, will theory, and status theory) remain unexplored.

Respect, rights, and interests

While the debate about whether rights are grounded in interests has thus a long and intricate history, the reverse question has only recently been put forward: Are there any interests that we have precisely *because* we have certain rights? For most of the goods on the objective lists of various philosophers (Finnis 1980, 86–90; Griffin 1986, 67–8; Scanlon 1998, 124–5; Nussbaum 2000, 78–80), this is clearly not the case: They may depend for their implementation on the provision of certain material conditions (rights among them), but the very fact that they *are* part of our well-being does not presuppose that we have rights. So why believe there are interests grounded in rights?

As Cruft has suggested, "violation of any duty owed to a person, animal or group is disrespectful to that person" (Cruft 2013b, 202), that is to say, unjustified violation of rights necessarily shows lack of respect for the right-holder. This seems to be true even if the right does not contribute to my well-being, because for instance I don't care about some property of mine (cf. Schaab 2018, 108). But what explains this apparent link between rights and respect? The simple solution to this puzzle is Feinberg's "intriguing idea" that "respect for persons […] simply [is] respect for their rights, so that there cannot be the one without the other" (Feinberg 1970, 252). On this account, a violation of a person's right is necessarily disrespectful to that person because disrespecting a person *means* to disrespect her rights. However, as has been pointed out, not every time a person is shown disrespect are the rights of that person violated; sometimes disrespect is morally permissible or even appropriate on account of the disrespected person's previous actions (Cruft 2013b, 203–4; cf. Raz 2001, 161). A second solution proceeds on the assumption that all rights are grounded individualistically, that is are grounded in some feature of the respective rightholder herself. Raz' original theory would be a case in point (rights are justified with reference to an aspect of the

rightholder's well-being), but the status theory would qualify as well (we have rights because this is in some way appropriate to our nature). It is easy to see how such theories can resolve the puzzle about the link between rights and respect: If some aspect of a being is sufficiently weighty to ground rights and with them the corresponding duties on the part of others (be it the interest, moral status, intrinsic value, or whatever), then violation of the grounded rights amounts *ipso facto* to a failure to respond to the underlying vital concern or characteristic of the right-holder (Cruft 2013b, 206). The problem with this solution is just that the idea that *all* rights are justified individualistically is probably mistaken. As for status theory, it is usually framed as a theory of basic *human* rights only (see Kamm 2007, 483–7; Schnüriger 2014, 14; Tasioulas 2015), that can plausibly be seen to have an individualistic grounding; but it is difficult to see how this could be extended to positive rights. On the other hand, as the examples of the right to child benefits and the journalist's right to protect her sources discussed above indicate, even if all rights are grounded in interests, it is doubtful whether they are all grounded in interests of the rightholder herself. But if the violation of a right is disrespectful even if that right is grounded in the interest of someone else, the link between rights and respect can't be explained by reference to their common ground in a normatively relevant feature of the rightholder (Cruft 2013b, 207). A third theory, proposed by Schaab (2018), is based on Wenar's kind-desire theory of rights. According to the kind-desire theory, x has a claim-right that y φ-s just in case x has a certain *kind-desire* that y φ to her – i.e., a desire *qua* bearer of a certain role or member of a certain kind (Wenar 2013b, 219). For example, even if I don't have a personal interest in child benefits, I may still be said to want *qua* parent whatever helps me fulfil my role as a parent (Wenar 2013b, 210). The plausibility of framing this idea in terms of kind *desires* rather than kind *interests* that we have *qua* role-bearers has been questioned, so that the theory should be counted as a version of the interest theory rather than as an alternative (Cruft 2017, 175–6; Frydrych 2018, 584). Nevertheless, Wenar's theory allows for rights that are not grounded in the genuinely *individual* interests of the right-holder and might thus be extensionally more adequate than Raz' interest theory (Cruft 2013b, 212; Schaab 2018, 101–2). It is precisely this feature, however, that makes it difficult for the kind-desire theory to account for the link between rights and respect (Cruft 2013b, 212–14). For example, it may be said that property rights are not justified by reference to some genuine interest of the individual right-holder, but indirectly via the social significance of the role of ownership (Wenar 2013b, 216–7). However, this leaves open why violation of property rights that don't serve the interests of their holders should be disrespectful. Building on Darwall (2006), Schaab proposes a contractualist solution to the problem by pointing out how respect should be taken to be a matter of someone's authority for legitimate complaint, where this authority is, in turn, conferred upon the right-holder by society's view of the kind-desires connected to certain roles (Schaab 2018, 107, 114). It is, however, doubtful, whether this solution escapes the objections to demand theories.

An alternative solution would be to follow Cruft's suggestion that what explains the link between rights and respect is a further "interest in having one's morally justified rights respected" (Cruft 2013b, 219). On this proposal, this interest grounds for each morally justified first-order right an additional second-order right to have it respected (Cruft 2013b, 220). For example, my interest in having my morally justified rights respected grounds for my right to child benefits a further right to have my right to child benefits respected. This would explain why arbitrarily withholding the benefit is disrespectful *to me*: it is not just a violation of one of my rights, but a violation of a right that is grounded in a genuine feature of mine. However, as Cruft rightly points out, "this raises more questions than it answers" (Cruft 2013b, 219). First, do we really have such an interest, and, if so, is it fundamental or grounded in more basic interests, such as an interest in recognition? Second, why does the general right to have one's rights respected extend to those rights that are grounded in the interests of others? Finally, how do rights and the interest cooperate to create higher-order rights? Cruft (2017, 9–10) takes first steps in the direction of answering these questions, suggesting that rights themselves may ground interests in their own fulfilment.

2.2 Detailed research plan

The main objective of the project is to re-examine the grounding relations between rights (broadly understood) and well-being. This aim will be pursued in two sub-projects. The first, entitled "Extending the Interest Theory of Rights", is focused on the question whether rights are generally grounded in interests (= Q1); our hypothesis is that they are (H1). The second sub-project ("Rights-Based Interests") addresses the question whether there are, conversely, aspects of our well-being that are themselves (partially) grounded in rights (= Q2). Again, we hypothesize that there are in fact interests that depend on our having certain rights (H2). While both sub-projects contribute independently to the project's overarching aim, the first aspires to a comprehensive account of the grounds of rights, whereas the second focuses on one specific aspect of well-being (based on the assumption that it would be implausible to take *all* interests to be based on rights). Accordingly, it seems appropriate to entrust a post-doc with the first sub-project and a doctoral student with the second. Before turning to a detailed description of the two sub-projects, however, we must set out the common conceptual framework of both projects.

Conceptual foundations

The conceptual framework is formed by the notions of "a right", that of "an interest", and that of "grounding". While the exact meaning we assign to these concepts will be in part a matter of stipulation, there are also good reasons for understanding them one way rather than the other. This conceptual framework will be spelled out in cooperation between the post-doc and the doctoral

student. In particular, the following preliminary questions need to be addressed before work on the sub-projects can proceed:

Q 0.1 What do we mean by "a right"? It has often been observed that "rights" can be taken to denote any of the four Hohfeldian incidents: claims (the right that someone else do or refrain from doing something), privileges or liberties (the right to do something), powers (the right or capacity to change claims or liberties), and immunities (the right not to have one's claims and liberties changed) (Hohfeld 1913). We shall argue that immunities are in fact best understood as a particular sub-category of second-order claims, which also encompass positive claims to have one's claims changed (e.g., a president-elect's claim to be introduced to office). We then go on to argue that "claim" is in fact the central and philosophically most problematic use of "right", since other uses can either be reduced to that of a claim (like immunities), or dispensed with entirely (thus, the concept of a liberty can be reduced to that of a non-duty not to refrain from doing something). Failure of the argument for the reducibility of other uses of "a right" would not threaten, however, the overall project: in this case we would simply restrict the analysis to claim-rights.

Q 0.2 What kind of rights is the project meant to address – legal, moral, others? Rights can be claimed both within a given legal system (e.g., unemployment benefits), and independent of the existence of a legal system (e.g., animal rights). Thus, it is plausible to assume that there is a common conceptual core that pertains to rights *qua* rights, rights in general, and it is rights *tout court*, irrespective of their legal enforceability, that the project is meant to address. This requires scrutiny of what unifies the use of "rights" across different domains. Our suggestion is that rights *qua* rights are characterized by a specific normative force. This is also why this is not just a project in legal philosophy.

Q 0.3 What do we mean by "an interest"? In line with common practice in the debate over the nature of rights, by "an interest" we shall understand "an aspect of well-being". It may be asked, though, whether grounding rights in interests presupposes a particular theory of well-being. In particular, is an interest theory of rights compatible with the idea that what well-being consists in or depends on an individual's take on it (subjectivism, cf. Murphy 2001), or does it presuppose an objective conception of well-being? Assuming rights to be sufficiently robust normative entities, making demands independently of the views of either the right-holder or the duty-subject, seems to call for a sufficiently stable understanding of well-being that could only be provided by an objectivist position (Cruft 2017, 10). This requires further research into the kind and degree of objectivism about well-being implied by an interest theory of rights. We will, however, neither argue for some particular version of objectivism, nor will we adduce independent evidence for the

truth of objectivism about well-being. Note, however, that a convincing argument in favour of the interest theory of rights may itself be a substantial argument for objectivism about well-being.

Q 0.4 What do we mean by "grounding"? Grounding denotes a non-causal explanatory relation between two entities, reflecting a certain usage of "because" (Fine 2001; Schaffer 2009; Rosen 2010; Berker 2018). For instance, when we say that an action is wrong because it hurts me, we are saying something different and further than when an action hurts, it is wrong: that it hurts is what *makes* it wrong. This is precisely what is meant to be captured by talk of "grounding". In asking whether we have rights *because* they contribute to our well-being, or whether a certain aspect of our well-being depends on our having rights, we are essentially asking for grounding relations. However, we need to flag certain assumptions concerning our use of the term. First, it is common to distinguish full grounds from partial grounds, where partial grounds are only part of a non-causal explanation (Berker 2018). Second, we should position ourselves vis-à-vis the question whether the relata of grounding are *facts* (such as the fact that x has a certain right) or entities such as *rights* themselves, and what metaphysical load is carried by either option (Clark and Liggins 2012). Third, we have to decide whether the relation is one of metaphysical or of normative grounding (Fine 2012).

Sub-Project 1: Extending the Interest Theory of Rights

As seen above, the interest theory rests on the highly intuitive idea that claim-rights must have a "point", that there is something they are "good for"; it would be odd to think that there might be rights that would not make someone in some way better off than they would be without them. On the other hand, there are a number of cases where rights don't seem to be grounded in the well-being of their holder, in particular cases of third-party beneficiaries and of office-holders. We therefore propose to investigate the hypothesis that although all rights must be based upon aspects of well-being, they can be based upon the well-being of third parties directly.

> [H1] x has a claim-right *only if*, and because, an aspect of x's well-being or of that of some other person justifies holding some other person(s) to be under a directed duty to x.

Q 1.1 What is the theories of rights debate all about? As outlined in § 2.1, the debate is mostly framed in terms of the direction of directed duties or the function of rights. Although the connection has not yet been explicitly drawn (but see Raz 1986; Cruft 2013b; Frydrych 2018; Nieswandt 2019), it seems promising to try and capture the debate as one about the *grounds* of rights.

Employing the terminology of grounding has the advantage of bringing out the differences between attempted *definitions* and *constitutive explanations* of rights. While the logical implications

of grounding have only been studied in recent years, Raz, for one, freely employs grounding language in his exposition of the problem. "To assert that an individual has a right", he claims, "is to indicate a ground for a requirement for action of a certain kind, i.e. that an aspect of his well-being is a ground for a duty on another person." (Raz 1986, 180) We therefore propose to reconstruct the theories of rights debate so that it centres upon the grounds of rights.

A related point concerns the question of whether we are looking for partial or full grounds (on the standard view, full grounding, unlike partial grounding, carries metaphysical necessity). However, if the analysis is meant to apply to all legal rights, too, it seems that a general account of full grounds of rights will be beyond reach. For the legal rights a person has clearly depends on the contingencies of the particular legal order that applies to her; for instance, fathers in Germany have a claim to one year of parental leave, while Swiss fathers have a claim to only 1–2 days. But no general principle will suffice to necessitate legal rights. As it stands, the argument needs further defence, but what has been said should justify hypothesizing that

> [H 1.1] The theories of rights debate is centrally a debate about the necessary partial grounds of rights.

If reconstructing the whole debate as a debate about the grounds of rights fails, it would still be open to understand what motivates part of the theories in terms of grounding (Nieswandt 2019).

Q 1.2 Does an interest theory of rights make rights redundant? Grounding rights in interests might reinforce a worry that was first raised by H.L.A. Hart: the redundancy argument. Although there are different versions of the argument (Frydrych 2018, 586), it can be summarised as follows: If rights are identified via the grounds of the directed duties that correspond to them, it seems as though everything that can be said in terms of rights could just as well, or even better, be expressed in terms of duties. There are at least two ways in which a defender of the interest theory might respond to this problem. First, even if we are to say that the fact that x has a claim-right against y is the very same fact as that y has a directed duty to x, we might wonder why this should lead us to the conclusion that we can dispense with the concept of rights rather than with the concept of a directed duty. The alternative possibility would be to refer to the fact that it sounds perfectly fine to say that y owes a certain duty to x *because* x has a right to it, while the reverse has a rather odd ring to it. We might therefore want to conclude that directed duties are directly grounded in claim-rights which are themselves directly grounded in aspects of well-being (Feinberg 1970, Raz 1986, Gewirth 1986). The hypothesis, then, is that

> [H 1.2] Rights play an indispensable role by being grounds for, rather than alternative formulations of, duties.

Should this hypothesis fail, we may still fall back on the former response.

Q 1.3 (How) could rights be grounded in third-party interests? Standard interest theory has it that rights are grounded in interests of the respective right-holder herself. As we have seen, though, this theory runs into difficulties when it comes to explaining the rights of office-holders and those rights that are apparently based on the interests of others. So while it sounds natural to say that in the ordinary case a right does something for its holder this turns out to not always be the case. But even in non-standard cases we can usually point to some interest that is promoted or protected by the right. Moreover, the rights seem to exist *for* the interest. We therefore hypothesize what we call the *extended interest theory of rights*:

> [H 1.3] That it's good for someone explains why there is a right, or, more technically, all rights are grounded in aspects of well-being.

Still, the question remains *how* an interest could ground rights in others. In particular, it must be shown how a right could serve a third-party interest in a way that would not just as well, or even better, be served by acting on behalf of the third party. Several reactions to this are possible. One line of thought is that having rights has certain implications that mere deputizing lacks (Raz 2016). Taking up a hypothesis from the second sub-project, having a right may be thought to generate a second-order interest in its fulfilment insofar as violation of the right will amount to disrespect. This could then be thought to provide more effective motivation for acting.

Q 1.4 What are the conditions for grounding rights in others? If interests of a third party can ground rights of mine, why don't they do so all the time? What is needed, it seems, are general principles explaining under what circumstances third-party interests are suited to ground rights, even if for them to effectively do so requires further conditions (that would have to be spelled out in more detail). One such principle seems to be that whenever a subject is generally capable of enforcing the right on her own behalf, her interest grounds rights only in herself; in other words, it is a necessary condition for an interest's grounding rights in others that the interest-subject is not so capable (which might turn out to be an interesting link to demand theories). Second, interests will not ground rights in just *any* other person; the public interest in effective prosecution grounds a right to sentence only in those who have been appointed to this office. We hypothesize that there must be some special relationship between the right-holder and the interest subject at least in the respect that the right-holder has agent-relative reasons to care for the well-being of the third party. This may be the case if the well-being of the interest-subject has become part of the well-being of the right-holder herself (as the child's well-being is part of the well-being of its parents), or if a kind of agreement has placed special obligations on one of the parties (as in the journalist case). Thirdly, interests will not ground arbitrary rights. There must be some meaningful connection between the right and the interest that grounds it. But it is not evident from the outset what that relation

has to be. For instance, while child benefits are grounded in the child's well-being, it doesn't have to be the case that they are meant to directly promote the child's welfare. It would also be possible to understand them as contributions to the family's well-being, of which the child's is only part (and *vice versa*), or as being made to the parents in recognition of their educational work. These considerations may be suited to take up Raz's responses to the problem of third-party beneficiaries (Raz 1994, 2016) although it remains the third-party interest that does the grounding work (cf. Pallikkathayil 2016).

Q 1.5 Are all rights grounded in interests? Even if an extended version of the interest theory can be made to be extensionally adequate, uncertainty may remain whether it properly captures the correct grounds of rights. In particular, it may be contended that the correlation between rights and interests is explained by a third factor (Pallikkathayil 2016). On the status theory, for instance, rights are directly grounded not in well-being, but in human nature. Against this, the interest theory may argue that the status theory has plausibility for moral rights only, and will therefore have to resort to other grounds for legal rights, which results in an unattractively disjunctive theory of the grounds of rights. Another option is to say that even in the case of moral rights, it is still natural to talk of some protective purpose that rights fulfil and that it is this purpose that explains the rights. A third possibility is to try to reconcile status and interest theory, e.g. by thinking that the fact that interests ground rights is itself grounded in human status (for this kind of approach, see Tasioulas 2015), or by making status and interests co-operating partial grounds.

A related question concerns the different ways in which moral and legal rights are grounded in well-being. In the case of moral rights, it may be said either that certain interests are on their own sufficient to fully ground rights, or that they need the co-operation of status considerations. On the other hand, what is the way in which legal rights are grounded in interests? One possible answer is that all legal rights are *aimed at* promoting or protecting some interest, though not necessarily that of the right-holder; but they may fail in what they identify as aspects of well-being without ceasing to be rights. For instance, as Wenar points out, even if a Marxist analysis according to which no genuine interest is served by property rights was correct, they would still be rights (Wenar 2013, 205). But there may be limits to what can be taken to be a genuine interest; if no meaningful purpose is recognisable, the right may become pointless and void to the point where its character as a right becomes doubtful.

Q 1.6 Are third-party interests ever sufficient for grounding rights in others? Although the extended interest theory is a theory of necessary partial grounds of rights, or of necessary parts of full grounds of rights, the question may be raised whether interests are ever in themselves sufficient to ground rights, or can themselves fully ground them. It seems plausible to assume that some interests (call them *vital* interests) are such as to ground rights and the corresponding

duties irrespective of any right-conferring acts such as promises or legislation, and these are most naturally called *natural* rights. For instance, we might say that my interest in self-respect (as a vital part of my well-being) gives me a natural right not to be humiliated. But can there be any natural claim-rights grounded in the well-being of others?

While there is no principled reason to think that there couldn't be, it is surprisingly hard to come up with convincing examples. The beneficial effects of effective prosecution, for instance, will not by themselves be enough to give a person the right to sentence a convict; the right must have been conferred to her by some lawful authority. Likewise, the claim to child benefits will depend for its existence on certain legal arrangements. Even a parent's right to defend her child against wanton attack may be seen as a liberty rather than a claim-right, or else be an exercise of the child's rights on its behalf. So what is the reason why third-party interests are unable to ground natural rights in others?

Sub-Project 2: Rights-Based Interests

While the first sub-project examines the grounding relations between interests and rights from left to right, the second project addresses the reverse direction: Are there any aspects of our well-being that are themselves grounded in (our having) rights, i.e. that we have *because* we have certain rights? And if there are, how exactly do rights ground interests? Are rights full or partial grounds of (a particular kind of) interests?

The puzzle about the connection between rights and respect, outlined in § 2.1, could be resolved if we follow Cruft's (Cruft 2017, 9–10; cf. Ripstein 2013, 180) suggestion that rights *themselves* ground of necessity an interest on the part of the right-holder, so that whenever we have a claim against someone fulfilment of that claim will automatically be part of our well-being. Violation of the right that does the grounding will then be disrespectful to the right-holder because it means at the same time diminishing her well-being. The working hypothesis for this sub-project is thus:

> [H2] There are aspects of well-being that are grounded in rights.

This holds independently of whether or not the grounding rights are themselves grounded in interests of the right-holder, and indeed in interests at all. In this respect the second sub-project is independent of the main hypothesis of the first sub-project. The idea that all rights are grounded in interests (H1) while some aspects of well-being are themselves grounded in rights (H2) might be thought to create a tension, given that the grounding relation is generally held to be asymmetric (Berker 2018, 736). But the interests that are, on our hypothesis H2, grounded in rights are not the same as those that, on H1, ground those rights in the first place. Therefore, no problematic circularity arises. Assessing the hypothesis H2, however, requires further work.

Q 2.1 Why believe that rights ground interests? Apart from accounting for the link between rights and respect, what positive reasons can be given for thinking that having certain rights adds further aspects to our well-being? Taking a stock example such as the claim that others not stand on my feet in the tube, it may be thought that the only interest involved here is that in freedom from pain, and this is precisely not grounded in the right not to be hurt, but rather the reverse way. However, there are cases that may demonstrate that the violation of a right will contribute to a reduction of well-being even if the interest that grounds the right is not affected. For instance, assume that I had just decided to donate a certain amount of money anonymously to charity. If, prior to donating the funds, my money was taken from me only for the repentant thief to later turn it over to charity, I'm still in a way worse off than had I given the money away freely. This claim requires defence against two objections. First, it may be said that in such cases, although an interest of mine is affected, it is not grounded in my having a certain right. Second, it may be argued that although I have been wronged, I have not been harmed, since violation of my rights is not detrimental to my well-being (cf. Owens 2012, ch. 2). Against this concern, an objectivist conception of well-being may help accommodate the intuitions behind this strict dichotomy between wronging and harming, and in particular lend support to the claim that we can be harmed even though we fail to take notice of this.

Q 2.2 What interests are grounded by rights? Taking this and other examples as a basis, we will discuss the ways in which rights can ground interests. In particular, we may wonder whether the interest can be described without referring to the right itself. For instance, is the interest grounded by the right not to be hurt just the *interest that my right not to be hurt be fulfilled*, or is there some independent description of this interest? This is important for the question whether the grounded interests are partially constituted by rights. Relatedly, we may want to distinguish (with Cruft 2017) between *necessary* and *contingent* generation of interests by rights, where necessary generation refers to the "automatic" creation of a new interest with the acquisition of a new right, while contingent generation refers to the causal mechanisms of developing interests in their fulfilment.

Q 2.3 Are all rights capable of grounding interests? Even if we come to the conclusion that some rights generate an independent interest in their fulfilment, it can be asked whether this extends to *all* rights. Thus, we may think that only some rights are important enough to hold having them respected to automatically be part of our well-being, while rather trivial rights lack the weight to become part of our well-being. While, for instance, not to be tortured is a strong right based on the vital interest in bodily and mental integrity, the right to be returned a small favour could be thought to be too weak for its infringement to have any negative affect on my well-being. Several possible reactions need to be explored. One approach would be to say that

although all rights generate interests, trivial rights add only infinitely small aspects to our well-being, and that the interest-grounding power of a right is in fact a function of its own grounds. Another approach would be to say that only certain rights are significant for our well-being. In this case, one would have to point to further factors that distinguish interest-grounding rights from non-interest-grounding rights.

Q 2.4 Full or partial grounding? As a related point, it can be asked whether rights are full or only partial grounds of interests. Some entity is partial ground of some other entity if it is a member of the set of entities that fully ground the grounded entity. So the question becomes whether a right is in itself sufficient to ground a certain interest, or whether further grounding factors must be present. In particular, it seems that some further underlying general interest in having one's rights respected is needed to explain why we have an interest in their fulfilment. Thus, we may point to the idea that a violation of my rights tends to undermine my self-respect, or may be a way of expressing a lack of respect for me, as part of the explanation why we have an interest in having our rights not violated. However, this could be spelled out in two ways. The first would be to say that rights and the interest in respect are on a par when it comes to explaining why we have an interest in having a certain right fulfilled. The other would be to see some fundamental aspect of our well-being (such as, say, respect and self-respect) as itself providing the basis why rights ground interests. The differences between these two options need careful analysis, as does the question what other factors may be part of the full explanation of rights-based interests.

Research environment and implementation

The Ethics Centre at the University of Zurich provides excellent conditions for the implementation of the project. Home to three chairs in ethics and political philosophy and one SNSF professor, it hosts a vibrant community of senior and junior philosophers, with highly renowned experts visiting every year. The post-doc and the PhD candidate will take up work by August 2020. After a first phase of close collaboration on the conceptual foundations of the project, they will be working independently under close supervision from Christoph Halbig, with the opportunity to present their work to his working group on a regular basis. What is more, the number of colleagues specialising in rights or neighbouring fields will give them numerous motivated and highly qualified partners for discussion.

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