Rerum Causae, 7 (2015), 50-70

Is the Concept of Rights Independent of the Reasons for Them?

Franziska Poprawe*

Abstract

Wenar (2005) rejects both the will and the interest theory, as the correct theory of the function of rights, partly on the grounds that they are constructed to favour particular positions in normative theorising, and thus fail to do justice to the desirable demarcation between normative stipulation and descriptive conceptual analysis. As an alternative, he proposes the so called Several Function Theory. I argue that this theory, though superior to the will and the interest theory in some respects, does not provide us with the purely conceptual, non- normative account of rights that it purports to be. I argue that, though it does not *enforce* a particular normative theory in the way the will and the interest theories do, it nevertheless *relies* on normative theorising. My analysis suggests the speculation that a concept of rights is necessarily bound to normative commitments.

Introduction

There is substantial disagreement about rights. A significant part of moral and political philosophy is devoted to the idea that people have rights. Dis-

* I would like to thank Leif Wenar for the helpful comments and inspiring discussion on an earlier version of this paper.

agreement in this literature on rights concerns two major questions:

(I) What are rights?

(II) Who ought to have which rights?

On the one hand, rights theorists address the conceptual question (I) of *what rights are*. They seek to define the concept of rights. On the other hand, the normative question (II) of *what rights people have* or should have is heavily discussed in diverse contexts.

This article concerns the question of what rights are. It concerns the debate on the concept of rights. In this debate, Wesley Hohfeld's four-instances-framework is broadly accepted as the logical form of rights. It classifies rights into claims, privileges, immunities and powers. But beyond this agreement on the logical structure of rights, what makes something a right is highly disputed. Two theories have dominated the debate on the concept of rights for decades. Both point towards the function that rights have for the right-holder to define what makes something a right. Will theorists hold that rights make the right-holder 'a small scale sovereign'[1] They claim that rights are entitlements that give the right holder control over duties of others. In contrast, Interest theorists argue that the only function of a right is to advance the right-holders' interests.[2]

Leif Wenar rejects both the will and the interest theory on various grounds. Importantly, he reveals that the two theories are constructed to support the interpretations of rights entailed by moral theories, Kantianism and welfarism, respectively. The debate between will and interest theorists over the concept of rights, he argues, has become 'a proxy for the debate between Kantianism and welfarism.'[3] Thus, the will and the interest theory both fail to do justice to the desirable demarcation between normative stipulation and descriptive conceptual analysis. As an alternative, Wenar proposes the Several Function Theory according to which all those Hohfeldian incidents are rights which

[1] Hart, 'Essays on Bentham: Studies in Jurisprudence and Political Theory'.

[2] Wenar, 'Rights'.

[3] Wenar, 'The Nature of Rights' 224.

perform one of six specified functions. He argues that this theory fulfils the standards we demand of a conceptual analysis of rights that does touch on any normative dispute. The Several Function Theory, Wenar argues, solves the conflict between the will and the interest theories and is superior to them on the grounds that it captures best our ordinary understanding of what rights are.

In this article, I argue that the Several Function Theory proposed by Wenar, though indeed superior to the will and interest theories in some respects, does not provide us a purely conceptual analysis of rights. It does not give us a satisfactory account of what rights are that is entirely detachable of our normative reasoning. I argue that, though it does not *enforce* a particular normative theory in the way the will and the interest theories do, it nevertheless *relies* on normative presuppositions.

To do so, I first outline Wenar's argument for his Several Function Theory in section one. In section two, I investigate how this theory functions as a framework to explicate rights assertions by applying it to an example case. I conclude that the Several Function Theory does not allow us to determine what classifies as a right without presupposing and at least implying some commitments in normative theory. I elaborate on implications of this result in section three. Further, I explore the possibility of generalizing my conclusion of the analysis concerning Wenar's Several Function Theory to the broader thesis that the concept of rights is necessarily normatively charged. This in turn implies that there is no one unifying concept of rights. It implies that we cannot answer question I) without presupposing, or at least implying, an answer to question II). The two debates on rights are not separable, but intertwined.

One preliminary comment: Wenar keeps his analysis general in scope, it is meant to apply to moral, legal and customary rights of conduct. I restrict my analysis to moral rights. The rights assertions I shall refer to concern moral rights, normative claims are to be understood as moral judgements and

normative theories as moral theories.[4]

I. Leif Weinar's Concept of Rights

In his article 'The Nature of Rights', Wenar[5] proposes a new conceptual analysis of what rights are, that he believes solves the conflict between the will and interest theory. His argument is based on the thesis that the concept of rights consists of two parts: the first parts concerns 'what kind of things rights are',[6] that is, what we mean by rights assertions. The second part specifies what rights do for the right-holder, that is, it specifies their function.

With regard to the first part of the concept of rights, Wenar[7] argues that all rights are a combination of one or more of the four Hohfeldian incidents: privilege, claim, power and immunity. He presents Hohfeld's logical structure of rights in a modified, enriched way: A privilege is a right of the logical form, 'A has a right to ϕ' and implies that 'A has no duty not to ϕ' and 'A has no duty to ϕ'. It can either be a single privilege, granting an *exemption* from a general duty, or a paired privilege in the sense of a permission, giving the right holder *discretion* over some action. Wenar gives the example of a sheriff's right to break down a door, which is an exemption from the duty not to break down doors. An example for a paired privilege is my right to move my body. I can choose to do so or not, it gives a discretion. Claim rights are rights of the logical form 'A has the right that B ϕs', and imply that 'B has a duty to A to ϕ'. They can have three different functions for their holders: *protection* against harm, *provision* of a need or the *performance* of a agreed upon action. Powers are rights to change the claims and privileges of other persons or oneself and thus gives the holder a certain *authority* to

[4] In the debate on the concept of rights, theorists often use examples that refer to moral rights. I shall do the same in my examples. I believe the analysis of this article can be extended or adopted to other classes of rights of conduct, but doing so would go beyond the scope of this paper.

[5] Wenar, 'The Nature of Rights'.

[6] Wenar, 'The Nature of Rights', 224.

[7] Wenar, 'The Nature of Rights', 224-237.

change the normative situation. These powers are limited to the extent that others have immunities: Immunities are rights that, like claims, protect the right-holder. From the examination of several exemplary rights assertions, Wenar inductively concludes that all rights are Hohfeldian incidents, whereby some rights are a combination of Hohfeldian incidents. Indeed, Hohfeld's framework is widely accepted as the internal structure of rights. I agree with this position. All rights are Hohfeldian incidents.

Besides this consensus, theorists disagree on whether or not all Hohfeldian incidents are rights. Will and interest theorists hold that only those Hohfeldian incidents are rights which perform some specific function, although they disagree on what that function is. Wenar agrees with the will and interest theorists in that we shall point towards the function of rights to elucidate which Hohfeldian incidents actually are rights. Yet, Wenar rejects the will and the interest theory as the correct account of what rights do for the right-holder. He does so in the following way.

First, Wenar rejects the will theory. According to Herbert Hart's version of that theory, the function of a right is to endow the holder with discretion over the duty of another; it makes the rightholder a 'small scale sovereign'.[8] Translated into the Hohfeldian framework, this means that will theorists recognise as rights only paired powers.[9] Wenar rejects this theory on the grounds that it is too narrow and has counter-intuitive implications. Some important rights, such as the right not to be tortured to death, would not count as rights under the theory, since the right-holder has no legal power to waive it. He argues further that the theory incorrectly limits the class of potential right-holders: Children or people otherwise incapable of exercising powers would be excluded.

Next, Wenar rejects the interest theory, which states that rights have the single function of promoting the holder's interest. Wenar argues that, though this theory overcomes some weaknesses of the will theory it is also at odds

[8] Hart, 'Essays on Bentham: Studies in Jurisprudence and Political Theory', 183.

[9] This interpretation of the Will theory as recognizing only those Hohfeldian incidents which are powers as rights is common.

with our ordinary understanding of rights. Many rights that we want to recognize as such are not in the interest of the holder, e.g. the right of a judge to sentence a criminal. Therefore, he rejects the interest theory as the correct account of what rights do for the right-holder.

One alternative to these two theories constitutes the *Any-Incident Theory* according to which all Hohfeldian incidents are rights. Wenar rejects it for being too inclusive: 'It counts as rights some Hohfeldian incidents that we ordinarily would not.'[10] He uses the following example: We have no duty to lie to people. Therefore, each of us has a single privilege not to lie to people according to the Hohfeldian framework. According to the Any-Incident Theory, we therefore each have a right not to lie to people. This seems odd. Wenar argues that the Any- Incident Theory fails to exclude such counterintuitive results because it recognizes as rights incidents that have no function. He therefore concludes that not all Hohfeldian incidents are rights, and the correct theory to specify which one are, has to be a theory of the function of rights. Having rejected both, the will and interest theory as candidates for such a theory, he proposes the *Several-Function Theory* (now: SFT).

The SFT according to Wenar states: Rights are all those Hohfeldian incidents that perform one or more of six specific functions: exemption, protection, authority, provision, performance, discretion.[11] Wenar points out a number of, as I shall call them, 'attributes' of the SFT that he believes establish its merits and make it superior to both, the will theory and interest theory. First, the SFT captures rights recognised by the will theory and rights recognised by the interest theory. In this sense, it solves the conflict between the will and the interest theory. Second, the SFT excludes incidents that are intuitively not rights. For example, the privilege not to lie to people is not a right under the SFT, because it does not serve a function (it does not exempt you from a general duty because there is no such duty in to begin with). Third, the SFT acknowledges that all rights have some function, but does not restrict it to one single function. Wenar holds that 'there is no one thing that rights do for the

[10] Wenar, 'The Nature of Rights', 244.
[11] Wenar, 'The Nature of Rights', 235.

right-holder. Rights have no fundamental normative purpose in this sense.'[12] Fourth, he argues that the SFT best captures our ordinary understanding of rights. He argues that the 'standard for settling this dispute [on the concept of rights] is an ordinary understanding of what rights are and what roles they play in our lives.'[13] As opposed to the will and the interest theory, the SFT can supposedly not be accused of having many counterintuitive implications.

Furthermore, Wenar claims that the SFT does not support a particular normative theory, and constitutes a conceptual analysis that is detached from normative arguments. Why is this a good feature of a theory of rights? Wenar emphasises the difference between stipulating within a moral or legal theory what the word 'right' means on the one hand, and purely descriptive, conceptual analysis on the other. The latter should be free of the former. He points out that the will and interest theories fail to do justice to this demarcation between conceptual analysis and normative theorising.

> 'Will theorists and interest theorists have erred in adopting analyses framed to favour their commitments in normative theory. This has turned the debate between them into a proxy for the debate between Kantianism and welfarism.'[14]

In contrast, the SFT does not support any normative position but seeks only to establish conceptual clarity. The final attribute I would like to mention is related to the previous ones: Wenar argues that the SFT offers a standard against which we are to measure the interpretations of rights of diverse normative theories. The will and the interest theory, as theories that are set up to fit particular normative theories, cannot serve this purpose. He writes:

> 'An analysis that is faithful to an ordinary understanding of rights will not reduce the justificatory burden on any normative theory

[12] Wenar, 'The Nature of Rights', 248.
[13] Wenar, 'The Nature of Rights', 250.
[14] Wenar, 'The Nature of Rights' 224.

> of rights. Instead, such an analysis will partly determine the justificatory burden that a normative theory must discharge.'[15]

Concluding this section, I grant that the SFT is superior to the will and interest theories with regard to the first three of the above aspects. In the remainder of this paper I challenge primarily the last three of the mentioned merits Wenar ascribes to the SFT. Does the SFT really provide us with an adequate answer to the question 'what are rights?' that satisfies our ordinary understanding of rights, but does not rely on commitments to one or the other normative theory? I argue that it does.

II. The Several-Function Theory challenged

In this section, I argue that the SFT does not present us with a theory-neutral, purely descriptive conceptual analysis of what rights are. I argue that we cannot always determine whether or not a Hohfeldian incident classifies as a right under the SFT without presupposing or at least implying some normative claims about that incident. I show that there may be rights which would not be recognised by the SFT without the reasons for them. I do so by investigating how we can specify what classifies as a right according to the SFT by applying the theory to a rights assertion. Let us consider the following example from the context of enslavement:

(R) Person A has a claim against person B that B does not buy A.

Is *R* a right under the SFT? Firstly, we have to check whether it is a Hohfeldian incident. The rights assertion has the form: A has a claim against B that B ϕs. To say that a person A has a claim against B that B ϕs, translated into Hohfeldian terms implies that B has a duty to A to ϕ. Here, B has a duty to A not to buy A. Given the immorality of slavery, this seems a sensible thing to say, so the assertion *R* is a Hohfeldian claim right.

Further, we can say it is also an immunity: If B bought A, thereby enslaving A, that would change most of A's (and some of B's) claims and rights

[15] Wenar, 'The Nature of Rights', 251.

tremendously. Therefore, A has also has an immunity against B that B does not buy A. In the Hohfeldian language, this implies that B has no power to buy A. This seems also a sensible thing to say in light of the rights assertion R. Thus, we are dealing with a Hohfeldian claim right and a Hohfeldian immunity. According to the SFT, this is not yet enough to say that the Hohfeldian instances we identified actually refer to a right. It is not enough to say that if A has such a claim and immunity, A has a right. Before we may draw this conclusion, we have to ask: does R have a function? The function that an immunity and a claim have in common is *protection*. So we have to ask: Would the claim and the immunity protect person A, if A was entitled to them?

Many would probably with no hesitation respond in the affirmative. If a person A has a claim against another person not to be bought, this would protect person A. Also, if no one has the power to buy anyone and thus everyone has an immunity against being bought, this would be so to protect everyone from being bought. Therefore, the Hohfeldian incident expressed in the rights assertion *R* has a function, the function of protection. Thus, under the SFT, the rights assertion *R* refers to a right. If we say a person has a claim as in *R*, we could equally say that that person has a right, let's call it, a right against enslavement.

> **Several-Function Theory:** R $\leftrightarrow$ Person A has a *right* against enslavement.

There is more to say here. But before doing so, let me pause the analysis for a moment and consider the following example: the case of Mike and Sam. Suppose Sam wants to be Mike's slave. What makes him most happy in life is to serve Mike. Sam has absolutely no pleasure in choosing himself what to do, in fact, it makes him miserable. If he could not be Mike's slave, doing whatever Mike wants him to, he is going to be miserable for the rest of his life. (Even if Mike treated him – from a common sense perspective - badly, Sam would still prefer to be a slave, since he is, and has always been, masochistic. No doubt we can imagine such a case.) Also, Mike would like

be the master of a slave. It would make him truly happy to own Sam. What ought they to do? As it so happens, Mike and Sam are strong proponents of utilitarianism. Under a simple reading of utilitarianism, the morally right action is the one that increases happiness in the world. In the case of Sam and Mike, the morally right act for Sam would then be to sell himself to Mike. This brings about the greatest happiness in the world (other things being equal). Therefore, from a utilitarian point of view, Sam morally ought to enslave himself. If Sam wants to sell himself to Mike, and Mike wants to buy Sam, if that is what makes them both happy (all things being equal), then Sam should do exactly that. In their society, there is no reason not to, and every moral reason to follow this course of action. But what about the right against enslavement?

The SFT shall present us with a purely conceptual analysis of rights. It should tell us what rights are, without making normative claims about these rights. To put it in the words used in the outset of this paper, the SFT concerns only the descriptive question I) what classifies as a right, and not question II), whether or not the right is ascribed to people. That in turn means that, once we recognize a Hohfeldian incident as a right under the SFT, normative judgements can only inform our answer to whether or not we ascribe the identified right to person X in situation Y. Taking a normative stance with regard to the right should not alter our conception of it as a right.

In the case of Sam and Mike, the previously identified right against enslavement must therefore be at least conceptually conceivable as a right, even if, in fact, we were to take a normative position denying that it is held by anyone, including Sam. We arrived at the following claims:

> (1) If a person A has a claim against B that B does not buy A, A has *a right* against enslavement with the function of protection, *according to the SFT*.
>
> (2) The morally right act for Sam is to sell himself into slavery to Mike.

The first claim is the result of the analysis of the rights assertion *R* according to the SFT. The second claim arises from the case of Mike and Sam in their

utilitarian framework. These claims imply that:

> (3) If Sam had a claim against Mike that Mike does not buy him, he would have a right, called the right against enslavement, which protects him.
>
> (4) Because Sam morally ought to sell himself to Mike, if Sam had the right against enslavement, it would protect him from doing what he is morally required to do.

(3) follows from applying the general case of A and B to Sam and Mike. (4) is implied by (2) and (3). This claim seems odd. It is not sensible to say that someone is protected from doing what he morally ought to do. One can be hindered from doing what one morally ought to do, but that is a different thing to say. 'Protection from X' means that X can only be filled with something that, in whatever way and for whatever reason, ought not to be the case, e.g. harm. But here, it is filled with something that ought to be the case (because Sam wants to and is morally required to sell himself into slavery to Mike). Claim (4) is conceptually incoherent. How could we solve this incoherence? We can either reject claim (1) or claim (2).

To reject claim (2) would be to reject utilitarianism. But we are engaging in a conceptual analysis of rights and want to refrain from taking a position on the correctness of a moral theory. The application of the SFT in our conceptual analysis of the rights assertion R should not require us to reject a normative theory on the whole to retain coherence. What rights are according to the SFT is no fundamentally normative question (cf. attribute five of the SFT as listed above). It is important to note that, in the above example, there is no claim that Sam *should be entitled the right R*. Though claim (2) is based on utilitarian grounds and certainly normative, the argument does not assume that Sam should be ascribed the right not to be enslaved. In fact, because the conception of R as a right under utilitarianism is incoherent, to say that Sam should be ascribed the right not to be enslaved would not be sensible.

Thus, claim (1) has to be false: The above analysis has yielded this result: the incident of the assertion R is a right under the SFT. Rejecting (1) would

mean that something has gone wrong in the analysis of the rights assertion using the SFT. And that is indeed so: After identifying that we are dealing with a Hohfeldian incident, I stipulated the answer to the question concerning the function of the right, jumping to the conclusion that if person A had the claim that B does not buy A, then A would have a right that protects A. That seemed very intuitive and little objectionable and I do not doubt its correctness. However, pursuing a purely conceptual analysis of rights here, we may not argue this way. In particular, we have to be careful not to presuppose normative judgements that, if altered, would change the conceptual analysis of the rights assertion by altering the answer to whether or not the Hohfeldian incident has a function. Bearing this in mind, let us ask again: Would the claim and the immunity protect person A, if ascribed to A? In the case of Sam and Mike, we ask: Would the claim and the immunity protect Sam, if Sam was entitled to them?

In the case as it is described above, the answer would certainly be 'no'. Ascribing Sam a claim against Mike that the latter does not buy him could not be understood as protecting Sam, it would rather hinder him to do what he desires and what is morally required, that is, to sell himself into slavery to Mike. Therefore, here, the identified Hohfeldian incident (R) has no function,[16] and is therefore, according to the SFT, not a right. Again, this result does not rely on the claim that under Utilitarianism, Sam is not ascribed the

[16] One might object that under utilitarianism, the function of the incident *R* is not protection, but something else, and that the SFT does recognize it as a right. Fortunately for my argument, this route is not successful. The SFT attributes to claims three possible functions: it entitles the right-holder to protection, provision of a need and/or the 'specific performance of some agreed-upon, compensatory or legally or conventionally specified action' (Wenar 2005, p. 229). In the case of Mike and Sam, the claim that Mike does not buy Sam does not provide Sam with some need. Quite the opposite, it hinders him from doing what he needs! Also, if *R* was a right and Sam was entitled to it, Sam would not be entitled to some performance of the kind Wenar discusses. If any action was agreed upon or conventionally specified, in the case at hand, it would be the contrary action (Mike buys Sam). Therefore, the argument withstands this objection.

right against enslavement, though it is arguable consistent with it. In the utilitarian context of Sam and Mike, the Hohfeldian incident *R is conceptually not* a right, which means it cannot be ascribed to anyone.[17]

One might think that the initial stipulation that the right against enslavement is a right that protects the right-holder had great intuitive appeal. I agree that the stipulation was not all wrong. Indeed, we could easily modify the case of Mike and Sam so that we account for this intuition. Let us assume now another version of the case of Mike and Sam, in which, instead of being proponents of utilitarianism, let us now assume Sam and Mike are Kantians. Kantianism, among other theories, ascribes inherent moral value to a person's dignity, autonomy and freedom. Selling oneself into slavery would mean to disregard ones dignity. From this Kantian perspective, Sam ought not to sell himself to Mike. The enslavement of Sam would infringe Kant's Humanity principle,[18] at least. Because Sam would treat himself not as an end in itself, but a means to do what he desires. There is no need to elaborate further to conclude that, from a Kantian perspective it is therefore morally impermissible (even impossible) for Sam to sell himself into slavery (Kant, 1870).[19] Sam ought morally not to sell himself, and Mike ought not to buy Sam. Let's ask one last time: Would the claim and the immunity protect Sam, if Sam was entitled to them? Now, the answer seem inevitably 'yes'. If Sam had the claim against Mike that the latter does not buy, this would protect him. Would Mike buy Sam, this would be morally wrong because it would infringe Sam's autonomy (amongst others). So in this modified case, the Hohfeldian incident *R* we are dealing with has a function, the function of protection at least. Thus we may conclude that it is *conceptually a right* under the SFT.

[17] The argument could also be run assuming left-libertarianism instead of utilitarianism.

[18] Rawls, 'Kant'. Rawls quotes the Metaphysic of Morals, trans. M.Gregor as The Doctrine of Virtue (New York: Harper and Row.), indicated my Mds.

[19] In fact, for Kant Sam even cannot sell himself to Mike, because in doing so, he would lose his autonomy and thus his status a moral agent who can be bound by contracts. Thus, by selling himself to Mike, he simultaneously cannot be bound by that contract any more.

Summarising the last paragraphs, the analysis of the rights assertion *R* under the SFT has exhibited the following: In the first version of the case of Mike and Sam which assumes utilitarianism, *R* is not a right, but merely a Hohfeldian incident without a function. In the second version of the case, assuming Kantianism, the incident can be assigned the function of protection and thus classifies as a right under the SFT.[20]

This means that whether a Hohfeldian incident classifies conceptually as a right according to the SFT is contingent on normative presuppositions. These disturb the conceptual analyses. In particular, they induce whether or not a Hohfeldian incident has a function or not. We have to be very careful that we do not implicitly assume commitments to normative theories, without which the analysis would yield a different result. In the beginning of the section, I stipulated that 'it is a sensible thing to say that the claim against enslavement would protect the right- holder'. This stipulation leads to the odd result of the conceptual analysis, demonstrating the necessity of maintaining diligence with respect to the clarification of ones normative presuppositions. Only by setting the analysis of the rights assertion R into the contexts of the case of Mike and Sam in its two versions, I made general underlying normative presuppositions explicit. This approach exposed how our normative theories bear upon the conception of rights assertions. They determine whether and explain why we ascribe (or do not ascribe) a function to a Hohfeldian incident. They therefore also determine what rights are according to the SFT. Kramer and Steiner (2007) have accused Wenar's SFT of being inaccurate in the assignment of functions to rights. I add that the reason for this lack of determination of the SFT consists of the contingency of it on our fundamental judgmental assumptions running in the background of the analysis. Thereby, I merely

[20] For the reader stumbling at the idea of rights within utilitarianism, a brief clarificatory note: One might object that taking a utilitarian standpoint to approach rights obviously leads to trouble, because utilitarianism does not, per se, account for rights. Yet this is not the point here. According to Wenar (and others), 'what rights are' is a conceptual question unrelated to the question whether or not anyone should be entitled to them (what rights *there* are).

say that the assignment of functions bears *some* normative charge, without limiting it to a particular position.

I conclude that the SFT cannot lead to a concept of rights that is fully detached from our normative commitments. It cannot be a theory-neutral standard of what rights are, because it does not allow us to explain why an identified Hohfeldian incident is a right or not without making or implying normative claims. Were we to explicitly refrain from any normative position and ask 'does the rights assertion XY refer to a right', the SFT may happen to leave us with the unsatisfactory answer 'it depends'. I have shown this without making any statements about the entitlement of specific rights. It may be our general normative basis that determines whether or not something classifies as a right according to the SFT. The result of my analysis does not rely on whether or not we hold that the particular putative right in question should be held by anyone.

III. On the *One* Concept of Rights

In this final section, I will elaborate on implications of the conclusion drawn in the previous section. I will also explore the possibility of generalising the thesis I established there to the wider thesis the concept of rights is necessarily bound to normative theorising.

In the outset of this article I mentioned the division of the philosophical discourse on rights into two main terrains: one is on the concept of rights (I), and the other on the normative question of who is entitled to what rights (II). I started my analysis of the SFT from the same starting point that Wenar takes when establishing the SFT, focusing on question I) and disregarding question II). However, the result I obtained from my analysis overrides the demarcation between the two questions. Consider the following: Question II) asks for a normative answer. Under the plausible assumption that we aim for consistency among our normative claims, this normative answer, whatever it may be, should be directly implied by or at least derivable from our general commitments in normative theory. According to the analysis just given, the

SFT relies on our general normative presuppositions in the background of our reasoning. Thus, it follows that, if we accept the SFT as the concept of rights, we cannot answer question I) without presupposing or at least implying an answer to question II).

This result might strike some as odd. After all, the division of the discourse on rights has a reason. In light of the significance and controversy of the debates about what rights people (should) have, a conceptual analysis of what rights are seems essential to avoid that the normative debate collapses in misunderstandings. In other words, we want to establish conceptual clarity of the subject that we talk about, *rights*, before we talk about it, that is, before engage in a normative debate on who should have which rights. Driven by this laudable aspiration, theorists concluded that what sets the stage for the normative discourse on what rights people have is an understanding of what rights conceptually are. The debate on the nature of rights (question I) emerged. Within it, the contest of establishing *the* concept of rights is based on the assumption that there *is* a concept of rights that is unrelated to the normative question of what rights people (should) have (question II). The long debate between the many rights theorists assumes *monism* relative to the concept of rights and its units, i.e. rights.[21] In the same way, Wenar's endeavour of reconciling the conflict between the interest theory and will theory by constructing a new theory of the nature of rights that captures the advantages of both, namely the SFT, is based on the assumption that we can truthfully contribute oneness to the concept of rights[22] and that there is a non-normative notion of rights. I acknowledge that, for any theorist, the notion of a non-normative concept of rights has great intuitive appeal. Again, we want to establish conceptual precision of any subject of interest, before we make normative claims about it. But to take this intuition as sufficient for believing that such a purely conceptual account is possible on the subject of rights would

[21] I am borrowing here from Van Duffer (2012), who points out that the debate between the interest and will theories is 'based on the assumption that it is possible to provide a monist analysis of the direction of duties'. I generalise this thesis here.

[22] Cf. Schaffer (2014).

be wishful thinking. It is also not sufficient to deem the result of my analysis of the SFT implausible. Instead, the result of my analysis should be seen as a reason to question the assumption that there is a non-normative concept of what rights are. Now the question arises: How plausible is the assumption that there is one non-normative concept of rights? Taking into consideration the consensus that all rights are Hohfeldian incidents, but that not all Hohfeldian incidents are rights, we can ask: Is it possible to formulate a theory that (i) determines which Hohfeldian incidents constitute a right, but that (ii) does not rest on normative grounds?

Such a theory should also exclude rights which we would intuitively not consider rights, solve the conflict between the will and the interest theorists at least (in some sense) and should not narrow the normative purpose of rights. As noted by Wenar, the SFT theory fulfils these requirements we demand of the concept of rights. I acknowledged this in section 1. I can add now that the SFT fulfils these demands of the concept of rights because it does *not directly enforce* any particular normative position. It thereby overcomes one weakness of the will and the interest theory. And yet, my analysis has shown that the SFT *requires some* normative position to determine which Hohfeldian incidents are rights. These considerations raise the doubt that there *is* a theory of what rights are which does not rely on normative theorizing, and has the merits of the SFT. If all analyses of rights rest on general normative dispositions, either in the way the SFT does or in the way the will and interest theories do, then the concept of rights must be inherently normatively charged, and an explanation of what rights are is necessarily dependent on normative claims.

I believe this result should be taken seriously. That is, I believe the conclusion from the analysis of the SFT is generalizable to the following thesis: whether or not a Hohfeldian incident is a right depends on the normative load that we carry when conducting the analysis. A full concept of rights is necessarily bound to normative theorising. This is to say that we have to reject the assumption that there is *one* concept of rights, and to acknowledge that a pure, non-normative conceptual analysis of rights stops at the level of the

consensus that all rights are Hohfeldian incidents. The Hohfeldian framework as the logical structure of rights remains unrefuted. It should be used to explain what we mean by rights that are otherwise justified. But beyond that, we cannot explain what rights are, without at least implicitly relying on the reasons for them. A full proof of this generalised, speculative thesis would go beyond the scope of this essay. It is worth noting, however, that Kramer and Steiner[23] reach a conclusion which I take to be consistent with my speculation: they advise rights theorists of developing further the will and interest theories, while denying that there can be 'a third way'.

Whether we stick to the original conclusion of section 2, namely that what rights are according to the SFT depends on normative commitments, or whether we accepts its generalisation, namely that the concept of rights is necessarily bound to normative theorising, the analysis of this paper suggests the following insights which, if proven true, would require us to alter significantly the way we approach the debates on rights.

First, the result suggests that the standard to judge any concept of rights is not an ordinary understanding of what rights are. Wenar seems to derive this from the fact that 'the final accusation of will and interest theorists against each other has always been that the other side's theory yields counterintuitive results.'[24] However, if the concept of rights is subordinated to normative theories in the sense that what rights are relies on normative commitments, then, necessarily, the standard by which the will and interest theories (and any other theory of the concept of rights) judge each other cannot be an ordinary understanding of rights. Kramer and Steiner have also objected to Wenar's 'extremely heavily reliance on ordinary usage'[25] on the grounds that there is not one unique ordinary understanding of rights,[26] but rather a number of conflicting understandings of what rights are. I agree with this and believe this is so precisely because whatever our 'ordinary' understandings of rights are,

[23] Kramer and Steiner, 'Theories of Rights: Is there a Third Way?'
[24] Wenar, 'The Nature or Rights', 250.
[25] Kramer and Steiner, 'Theories of Rights: Is there a Third Way?', 295.
[26] Wenar, 'The Nature of Rights'.

they are inflicted with potentially conflicting normative commitments. Therefore, the standard to judge a concept of rights against is not congruence with ordinary usage, but coherence of the concept with one's respective normative theory.

Second, the analysis suggests that, contrary to Wenar opinion, the concept of rights does not 'determine the justificatory burden that a normative theory must discharge' (Wenar 2005, p. 251). The SFT, though maybe on first sight roughly in line with what many believe rights are, relies on the normative charge that we carry when investigating which rights assertions actually refer to rights. The SFT only has analytic power with respect to a particular normative system. It puts the justificatory burden of what rights are on the normative theories themselves. Therefore, contrary to Wenar's assertion, the SFT cannot serve as a standard against which we are to measure the interpretations of rights of diverse normative theories.[27] Put bluntly, the last two paragraphs say: The standard for the concept of rights is not ordinary understanding, but the moral theories themselves and the concept of rights is not the ground for the conflict between normative theories.

In light of these considerations, it becomes apparent that the starting point for the normative debate of what rights people should have is not a non-normative the concept of rights, but due diligence in making underlying normative claims explicit. Philosophical usage of the term 'rights' needs to be refined and the reasoning behind its ascribed meaning revealed. If the concept of rights is secondary to normative theorising (even if not immediately and always obviously so), this approach allows establishing as much conceptual clarity as possible in the normative discussion on what rights people ought to have.

Conclusion

Wenar proposes the Several Function Theory as a theory of the function of rights in order to solve the conflict between the will and the interest theory.

[27] Wenar, 'The Nature of Rights', 250f.

In this article, I argue that Wenar's proposal does not provide us with the analytic framework it purports to be. Though the Several Function Theory does not directly support any particular normative position, and thereby overcomes serious conceptual shortcomings of both, the will and the interest theory, it *requires some* normative position to explain what rights are. In particular, I have shown that whether or not a Hohfeldian incident classifies conceptually as a right according to this theory is contingent on our fundamental normative presuppositions running in the background of the analysis. The Several Function Theory, therefore, cannot lead to a purely descriptive non-normative concept of rights.

I explored the possibility of generalising this result to the thesis that the concept of rights is necessarily bound to normative commitments in one way or the other. My speculation reads: what we mean my rights assertions can be analysed using the purely descriptive Hohfeldian framework. But what we believe rights *are*, i.e. a complete concept of rights, cannot be fully detached from normative theorising.

References

[1] Hart, H. 'Essays on Bentham: Studies in Jurisprudence and Political Theory'. Oxford: Clarendon Press, 1982.

[2] Kramer, M.H. and Steiner, H. 'Theories of rights – is there a third way?' *Oxford Journal of Legal Studies* 2007; 27(2): 281-310.

[3] Rawls, J. 'Kant'. *Lecture on the History of Moral Philosophy*|, ed. Barbara Hermann. Cambridge, Massachusetts: Harvard University Press, 2007: 143-322.

[4] Van Duffel, S. 'The Nature of rights debate rests on a mistake'. *Pacific Philosophical Quarterly* 2012; 93 (1):102-123.

[5] Wenar, L. 'Rights'. *Standord Encyclopedia of Philosophy*, 2011.

[6] Wenar, L. 'The Nature of Rights'. *Philosophy and Public Affair* 2005; 33(3): 223-252.

Franziska Poprawe is a MA student of Philosophy and Economics at the University of Bayreuth, Germany. Her main fields of interest are on rights and normativity. She hopes to continue research in the future. You can contact her at [franziska.poprawe@gmail.com].