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*The Structure of Human Rights: A
Philosophical Investigation*

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Doctor of Philosophy

July 2020

Melbourne Law School

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Submitted in fulfilment of the degree of *Doctor of Philosophy*

Abstract

There is a tendency for human rights bodies—at the international, regional, and national level—to take each human right to correspond to multiple duties. It has become almost a mantra of human rights institutions that human rights correlate with duties to ‘respect, protect, and fulfil’. This view of the structure of human rights—the *Multiple Duty View*—is echoed in much of the philosophical literature on human rights—and particularly the accounts of Henry Shue, John Tasioulas, and Rowan Cruft. These philosophers reject outright the claim that there is a one-to-one relationship between human rights and their duties. Instead—on their accounts—correlating to each human right are any and all of the duties that it takes to guarantee the substance of the right or to protect the interests or other features of the right-holder.

In this thesis, I present a challenge to the *Multiple Duty View*. I claim that it struggles to make sense of important cases of waiver of human rights because it does not match each human right with a single duty of identical content. On the *Multiple Duty View* each human right correlates with multiple duties. So, when a right-holder releases the duty-bearer from just one (or, at least, not all) of the duties correlative to a single human right the *Multiple Duty View* cannot explain what happens to that right. It can only say that that right is either waived or retained, and neither properly captures the situation.

I present an alternative picture of the structure of human rights that addresses this problem—the *Individuation View* of human rights. The *Individuation View* takes each human right to correspond to one duty only. As such, it registers that for every duty that a duty-bearer is released from a human right is also suppressed. I consider and address some objections to the *Individuation View*, including that it is inconsistent with human rights practice and leads to a proliferation of human rights by positing the existence of many more rights than the *Multiple Duty View*.

Declaration

This thesis comprises only original work undertaken toward the degree of Doctor of Philosophy.

Due acknowledgement has been made in the text to all other materials that have been used.

This thesis is less than the maximum word limit in length, exclusive of tables, maps, bibliographies and appendices.

William Giles Phillips

July 2020

Acknowledgements

I owe a great deal of gratitude to many people for supporting me in my completion of this project. My supervisors, Hilary Charlesworth and Dale Smith, have been the source of much support, understanding, and guidance throughout this whole process. They have seen many changes of direction, crises of confidence, and unannounced drop-ins for advice. Both Hilary and Dale have always been unfailingly generous with their time and ideas, and I feel very fortunate to have had such an inspiring and rigorous supervision team.

I have also benefitted greatly from discussions with Kirsty Gover and Margaret Young, both of whom acted at different stages as the chair of my supervisory committee during my doctoral studies. Kirsty and Margaret went beyond the call of duty in engaging with my thesis and giving me detailed feedback, as well as pushing me to hone and expand on my ideas.

John Tobin, who acted as my assessor during interim assessments, is in large part responsible for the direction which my thesis has taken and the shape in which it has ended up. During my Confirmation Seminar, John challenged me to question the division of human rights into positive and negative rights, which eventually led me to thinking about the structure of human rights. His thoughtful and detailed comments at my Completion Seminar provided me with insights which helped me resolve many of my lingering concerns about the project.

My thesis would also not be quite the same without the careful tuition of the late John Gardner. My conversations with John while he was my tutor in the Bachelor of Civil Law Jurisprudence and Political Theory course at the University of Oxford formed the first fragments of the ideas that I develop in this thesis, and the skills in philosophical and legal analysis that he taught me became the tools with which I was able to develop them.

I would also like to thank Tony Coady, Patrick Emerton, Nicole Roughan, and Henry Shue, each of whom read and provided detailed comments on a paper that formed the basis for the thesis itself.

Many friends helped me stay on track over the years, generously reading drafts and talking through problems with me. I want to thank in particular: Stergios Aidinlis, Sayomi Ariyawansa, Tobias Barkley, Luís Paulo Bogliolo, Minh Bui, Darshan Datar, Anna Dziejcz, Nick Evans, Valeria Vazquez Guevara, Harry Hobbs, Jemma Holt, Anjalee De Silva, Balawyn Jones, Jan Mihal, Sebastián Rioseco, Florence Seow, Cade Shadbolt, Elizabeth Sheargold, John Sebastian, David Tan, Jason Varuhas, Carlos Arturo Villagran Sandoval, Tess Whitton, Toerien van Wyk, Stephen Young, and Brandy York.

I owe my greatest debt to my family. My sister, Pippa Phillips, has frequently made herself available at short notice to counsel me through various trivial complaints about writing, and has been tireless in her gestures of care and compassion when the going has been tough. Her unshakable belief in my abilities has always been a great source of strength.

I am especially grateful for the love and support of my wife, Vinda Kong. Vinda has always challenged me to state my arguments clearly, encouraged me to have confidence in my ideas and abilities, and been there to weather storms with me. The last three and a half years have not been without tumult, and I could not have managed to have anywhere near the clarity of thought that I have had without Vinda's steady love and confidence.

I would never have started, let alone completed, a doctorate without the encouragement and support of my mother, the late Jane Phillips. Jane always taught me to aim higher, think deeper, and to believe in myself. She did not make it to see the final product, but hopefully what is in these pages is something she would have enjoyed reading.

Finally, work on this thesis was completed with the assistance of an Australian Government Research Training Scholarship.

Abbreviations

<i>ACHR</i>	American Convention on Human Rights (San Jose, Costa Rica, 22 Nov. 1969), 9 I.L.M. 673 (1970), <i>entered into force</i> 18 July 1978.
<i>African Charter</i>	African Charter on Human and Peoples' Rights [Banjul Charter] (Nairobi, Kenya, 27 June 1981), 21 I.L.M. 59 (1981), <i>entered into force</i> 21 Oct. 1986.
African Commission	African Commission on Human and Peoples' Rights
<i>ECHR</i>	European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 Nov. 1950), 312 E.T.S. 5, as amended by Protocol No. 3, E.T.S. 45; Protocol No. 5, E.T.S. 55; Protocol No. 8, E.T.S. 118; and Protocol No. 11, E.T.S. 155; <i>entered into force</i> 3 Sept. 1953 (Protocol No. 3 on 21 Sept. 1970, Protocol No. 5 on 20 Dec. 1971, Protocol No. 8 on 1 Jan 1990, Protocol 11 on 11 Jan 1998)
<i>ECHR Protocol 1</i>	Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Paris, 20 Mar. 1952), E.T.S. 9, <i>entered into force</i> 18 May 1954.
ECtHR	European Court of Human Rights
IACtHR	Inter-American Court of Human rights
<i>ICCPR</i>	International Covenant on Civil and Political Rights (New York, 16 Dec. 1966) 999 U.N.T.S. 171 and 1057 U.N.T.S. 407, <i>entered into force</i> 23 Mar. 1976

<i>ICESCR</i>	International Covenant on Economic, Social and Cultural Rights (New York, 16 Dec. 1966) 993 U.N.T.S. 3, <i>entered into force</i> 3 Jan. 1976
SACC	South African Constitutional Court
<i>South African Constitution</i>	Constitution of the Republic of South Africa, Act 108 of 1996
<i>UDHR</i>	Universal Declaration of Human Rights (10 Dec. 1948), U.N.G.A. Res. 217 A (III) (1948)
UN	United Nations
UNCESCR	United Nations Committee on Economic, Social and Cultural Rights
UNHRC	United Nations Human Rights Committee

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Introduction

‘THE HUMAN RIGHT not to be tortured correlates with a duty not to torture.’ Most people would agree with this proposition. It reflects three well-established beliefs about human rights. First, that each human right held by a particular person connects with a duty or obligation on someone else. Second, that the duty that connects with each human right requires the duty-bearer to behave in a particular way towards the right-holder. Third, that prohibiting torture is the kind of thing that is universally important enough to give rise to a human right.

Many people would also agree with a second proposition: ‘the right not to be tortured correlates with a duty not to torture, a duty to aid those who have been tortured, and a duty to investigate and prosecute instances of torture.’¹ This proposition reflects another well-established assumption about human rights, namely, that there are many different ways to secure the interests protected by human rights.

¹ This formulation of the right not to be tortured is somewhat simplified for the purposes of economy of expression. I acknowledge that both the moral right not to be tortured and the right found in international human rights law are slightly more complex than this. See eg Jeremy Waldron, ‘Rights in Conflict’ (1989) 99(3) *Ethics* 503, 510; Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases Materials, and Commentary* (3rd edn, OUP 2013) Ch 9; John Tobin and Harry Hobbs, ‘Article 37. Protection against Torture, Capital Punishment, and Arbitrary Deprivation of Liberty’ in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (OUP 2019) 1430-9.

While it is clear that the first proposition presents a single right-duty pair—the right not to be tortured and the duty not to torture—there are two interpretations of how rights feature in the second proposition. Is there:

One right and multiple duties: A right not to be tortured which correlates with a duty not to torture, a duty to aid those who have been tortured, and a duty to investigate and prosecute instances of torture; *or*

Multiple right-duty pairs: A right not to be tortured which correlates with a duty not to torture, a right to aid when one has been tortured which correlates with a duty to aid those who have been tortured, and a right to have incidences of torture investigated which correlates with a duty to investigate and prosecute instances of torture?

Each of these interpretations offers a different claim about the structure of the human right not to be tortured presented in the second proposition above. The first interpretation reflects what I call in this thesis the ‘*Multiple Duty View*’ of the structure of human rights. *The Multiple Duty View* holds that for each human right there are potentially many different, changing duties that are correlated with it. The second interpretation reflects what I call the ‘*Individuation View*’ of the structure of human rights. The *Individuation View* holds that for each human right there is just one duty that correlates with it.

Many human rights practitioners, activists, and academics argue that a true understanding of the concept of a human right—both the legal and moral concept—requires that each human right be taken to correlate with multiple duties—that is, they endorse the *Multiple Duty View*.

For example, Sandra Fredman claims:

Civil and political rights are thought to give rise to duties on the State not to interfere with individual liberty, whereas socio-economic rights are said to give rise to positive duties on the State to take action. ... However, a closer look reveals that even paradigmatic civil rights, such as the right not to be tortured, carry with them some element of positive duty on the part of the State. As well as refraining from torturing individuals directly, the State must protect individuals against interference by other, non-State actors. ...

On the other hand, socio-economic rights do not necessarily impose positive duties. Examples of such rights are the rights to freedom of association, to strike, and to collective bargaining.²

The *Multiple Duty View* has gained widespread support in the practice of human rights. Both human rights institutions and philosophers of moral human rights take each legal and moral human right to correlate with multiple duties.³ But just because the *Multiple Duty View* has gained this acceptance does not mean that it is beyond reproach. As John Gardner observes, '[u]ncontroversial ideas need not less but more critical scrutiny, since they generally get such an easy ride.'⁴

It is not self-evident that human rights are structured in the way that the *Multiple Duty View* suggests. It is not obvious that each human right necessarily correlates with multiple duties. Why is it that something like the human right not to be tortured correlates with three duties rather than one? Can the duties that the *Multiple Duty View* says correlate with each human right instead each be correlated with separate human rights? Is there anything that the *Multiple Duty View* cannot explain that the *Individuation View* can explain? In this thesis I investigate these questions. I examine and present a challenge to the *Multiple Duty View* and put forward a case for adopting its competitor, the *Individuation View*.

A *Context and assumptions*

This thesis examines the structure of human rights, or the relationship between human rights and their correlative duties. It is not directly concerned with other questions in the philosophy of human rights, such as the nature of human rights or the grounds of human rights. That is, it does not try to work out whether human rights are in fact a subset of moral rights,⁵ or whether

² Sandra Fredman, *Comparative Human Rights* (OUP 2018) 63.

³ See Chapters One and Two.

⁴ John Gardner, *From Personal Life to Private Law* (OUP 2018) 189-90.

⁵ This is sometimes referred to as 'the moral conception of human rights'. For examples see James Griffin, *On Human Rights* (OUP 2008); John Tasioulas, 'On the nature of human rights' in Gerhardt Ernst and Jan-Christoph Heilinger (eds), *The Philosophy of Human Rights: Contemporary Controversies* (De Gruyter 2012).

they are better conceived as legal rights with a distinctive role or function in our world.⁶ Furthermore, it does not attempt to answer the question of how the existence of human rights can be justified.⁷ It does not present an argument for the existence or non-existence of any particular human right or set of human rights.⁸ What it is concerned to work out is the relationship between human rights and their correlative duties, and specifically whether each human right is correlated with one static duty or to multiple changing duties.

That being said, in examining the structure of human rights, I make several assumptions about these other questions. I assume that human rights have both a moral and a legal existence, and that human rights can be divided into moral human rights (which obtain independently of human recognition) and legal human rights (which obtain in virtue of institutional action). I chose to focus my claims on moral human rights. This is obviously a contentious position, being antithetical to the anti-positivist claim that law and legal rights are a subset of morality, and that both moral facts and social facts are among the determinants of the content of the law.⁹ However, I adopt this position for two reasons. First, the proponents of the *Multiple Duty View*

⁶ This is sometimes referred to as ‘the political conception of human rights’. For examples see John Rawls, *The Law of Peoples with “The Idea of Public Reason Revisited”* (HUP 1999); Charles Beitz, *The Idea of Human Rights* (OUP 2009); Joseph Raz, ‘Human Rights without Foundations’ in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010); Allen Buchanan, *The Heart of Human Rights* (OUP 2013); Joseph Raz, ‘Human Rights in the Emerging World Order’ in Rowan Cruft, S Matthew Liao, and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015).

⁷ For examples of practice-based justifications, see Rawls (n 6); Raz, ‘Human Rights without Foundations’ (n 6); Raz, ‘Human Rights in the Emerging World Order’ (n 6). For examples of instrumental justifications, see Griffin (n 5) Ch 2; John Tasioulas, ‘On the Foundations of Human Rights’ in Rowan Cruft, S Matthew Liao, and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015). For examples of non-instrumental justifications, see Thomas Nagel, ‘Personal Rights and Public Space’ (1995) 24(2) *Philosophy & Public Affairs* 83; Frances Kamm, *Intricate Ethics: Rights, Responsibilities, and Permissible Harm* (OUP 2006) Chs 7 and 8; Rowan Cruft, ‘On the Non-instrumental Value of Basic Rights’ (2010) 7(4) *Journal of Moral Philosophy* 441.

⁸ See eg Victor Tadros, ‘A Human Right to a Fair Criminal Law’ in James Chalmers et al (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh University Press 2010); Gopal Sreenivasan, ‘A Human Right to Health? Some Inconclusive Skepticism’ (2012) 86(1) *Aristotelian Society Supplementary Volume* 239; Charles Jones, ‘The Human Right to Subsistence’ (2013) 30(1) *Journal of Applied Philosophy* 57; Thomas Christiano, ‘Self-determination and the Human Right to Democracy’ in Rowan Cruft, S Matthew Liao, and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015); John Tasioulas and Effy Vayena, ‘The place of human rights and the common good in global health policy’ (2016) 37(4) *Theoretical Medicine and Bioethics* 365.

⁹ Ronald Dworkin, *Justice for Hedgehogs* (HUP 2011) 405–6; Mark Greenberg, ‘The Moral Impact Theory of Law’ (2014) 123(5) *Yale Law Journal* 1288; Nicos Stavropoulos, ‘Legal Interpretivism’, *The Stanford Encyclopedia of Philosophy* (Summer edn, 2014) <<https://plato.stanford.edu/entries/law-interpretivist/>> accessed 31 March 2020.

whose accounts with which this thesis engages—Henry Shue,¹⁰ John Tasioulas,¹¹ and Rowan Cruft¹²—each endorse the separation of human rights into moral human rights and legal human rights, and each of their accounts is an account of the structure of moral human rights.¹³ So, in order to provide an even plane on which to consider the *Individuation View* and the *Multiple Duty View*, I focus on moral human rights. Second, I choose to focus on moral human rights because the question of the structure of human rights is a technical one. Because of this technicality, there is no reason to believe that legal human rights necessarily reflect the true structure of human rights. As John Gardner notes, “[i]nstitutionalized rights, such as legal rights, come in strange shapes and sizes that sometimes defy justification. They are human creations and they therefore tend to bear the scars of human error.”¹⁴ With this in mind, an exclusive focus on legal doctrine carries the potential to mislead rather than illuminate. A focus on moral human rights—with some resort to human rights practice—instead, affords the opportunity to present a case for understanding their legal counterparts differently as well.

A second assumption made in this thesis is that human rights are grounded by important human interests or other important features of the right-holder. While the interest theory is not uncontroversial,¹⁵ in making this assumption my thesis works within a well-established and important philosophical tradition in both the theory of human rights and rights-theory-in-

¹⁰ Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton University Press 1980).

¹¹ John Tasioulas, ‘The Moral Reality of Human Rights’ in Thomas Pogge (ed), *Freedom from Poverty as a Human Right: Who owes what to the very poor?* (OUP 2007); John Tasioulas, ‘Taking Rights out of Human Rights’ (2010) 120(4) *Ethics* 647.

¹² Rowan Cruft, ‘Human rights as rights’ in Gerhardt Ernst and Jan-Christoph Heilinger (eds), *The Philosophy of Human Rights: Contemporary Controversies* (De Gruyter 2012).

¹³ See Chapter Two.

¹⁴ John Gardner, “‘Simply in Virtue of Being Human’: The Whos and Whys of Human Rights’ (2008) 2(2) *Journal of Ethics and Social Philosophy* 1, 7.

¹⁵ Much has been written on the debate between interest theorists and will theorists as to which theory of rights best captures the criteria for the existence of a right. See eg Matthew Kramer, Nigel Simmonds, and Hillel Steiner (eds), *A Debate Over Rights: Philosophical Inquiries* (OUP 1998); Mark McBride (ed), *New Essays on the Nature of Rights* (Hart 2017); David Frydrych, ‘The theories of rights debate’ (2018) 9(3) *Jurisprudence* 566; Leif Wenar, ‘Rights’, *The Stanford Encyclopedia of Philosophy* (Spring edn, 2020) <<https://plato.stanford.edu/entries/rights/>> accessed 23 June 2020.

general. Many rights theorists¹⁶ and theorists of human rights adopt the interest theory,¹⁷ including Shue,¹⁸ Tasioulas,¹⁹ and Cruft.²⁰ Adopting the interest theory also puts my theory of the structure of rights—the *Individuation View*—on a level playing field with the theory adopted by Shue, Tasioulas, and Cruft—the *Multiple Duty View*—and avoids the objection that my move to the *Individuation View* is motivated simply by a disagreement about the grounds of human rights.

B *A note on method*

The view of the structure of human rights that I present in this thesis—the *Individuation View*—is grounded primarily in rights theory. The *Individuation View* is built up through an examination of and an engagement with theories of human rights and rights-in-general. In particular, this thesis engages with the work of Shue, Tasioulas, Cruft, Matthew Kramer, George Rainbolt, Cécile Fabre, Thomas Pogge, and Frances Kamm.

In examining the *Multiple Duty View* and advancing my theory, the *Individuation View*, my discussion invokes various particular human rights—including the right not to be tortured, the right to life, the right to food, and the right to a fair trial. I do not provide an argument for the existence of these rights, or for their qualification as moral human rights. Instead, I take their existence and status as moral human rights from their recognition in canonical human rights instruments, such as the *Universal Declaration of Human Rights*

¹⁶ See eg Neil MacCormick, ‘Rights in Legislation’ in PMS Hacker and Joseph Raz (eds), *Law, Morality, and Society: Essays in Honour of H.L.A. Hart* (Clarendon 1977); Joseph Raz, *The Morality of Freedom* (OUP 1986) Ch 7; Matthew Kramer, ‘Rights Without Trimmings’ in Matthew Kramer, Nigel Simmonds, and Hillel Steiner (eds), *A Debate Over Rights: Philosophical Inquiries* (OUP 1998) 7; Visa Kurki, ‘Rights, Harming and Wronging: A Restatement of the Interest Theory’ (2018) 38(3) *Oxford Journal of Legal Studies* 430.

¹⁷ See eg Charles Beitz, ‘The Force of Subsistence Rights’ in Rowan Cruft, Matthew Liao, and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 540.

¹⁸ As I discuss in Chapter Two, it is unclear what Shue takes to ground human rights. However, based on some of his writings, he does appear to be committed to the view that human rights are grounded by fundamental human interests, or something similar. Shue (n 10).

¹⁹ Tasioulas, ‘On the Foundations of Human Rights’ (n 7).

²⁰ Cruft, ‘Human rights as rights’ (n 12).

(UDHR),²¹ the *International Covenant on Civil and Political Rights (ICCPR)*,²² the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*,²³ and the *European Convention on Human Rights (ECHR)*.²⁴

My discussion of principles of human rights law—particularly in Chapter One—is not meant to provide a comprehensive treatment of human rights law in any one jurisdiction—either international, regional, or national. I make no claim to have undertaken a complete and comprehensive survey of all of human rights practice. Despite this, the principles to which I refer are meant to be those common to human rights jurisdictions.

Much of the discussion in my thesis treats moral human rights as being held against both states and individuals—or, that both states and individuals can be the bearers of the duties correlative to human rights. Many of the scenarios I consider involve pairwise comparison between individuals, rather than the individual and the state. There are two reasons for this.

The first is that this is the approach Shue, Tasioulas, and Cruft take. Each take it that moral human rights are claims that can be held both against states and individuals. As I mention above, in order to allow for a fair assessment of the *Multiple Duty View* and the *Individuation View*, I try to minimise differences between the assumptions made by each account as much as possible.

Second, while it is true that much of human rights law treats human rights as being held only against states, I do not think that an account of moral human rights should be limited in

²¹ Universal Declaration of Human Rights (10 Dec. 1948), U.N.G.A. Res. 217 A (III) (1948).

²² International Covenant on Civil and Political Rights (New York, 16 Dec. 1966) 999 U.N.T.S. 171 and 1057 U.N.T.S. 407, *entered into force* 23 Mar. 1976.

²³ International Covenant on Economic, Social and Cultural Rights (New York, 16 Dec. 1966) 993 U.N.T.S. 3, *entered into force* 3 Jan. 1976.

²⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 Nov. 1950), 312 E.T.S. 5, as amended by Protocol No. 3, E.T.S. 45; Protocol No. 5, E.T.S. 55; Protocol No. 8, E.T.S. 118; and Protocol No. 11, E.T.S. 155; *entered into force* 3 Sept. 1953 (Protocol No. 3 on 21 Sept. 1970, Protocol No. 5 on 20 Dec. 1971, Protocol No. 8 on 1 Jan 1990, Protocol 11 on 11 Jan 1998).

this way. It makes little sense to say of Adele's human right not to be tortured (which correlates with a duty to not torture Adele) that it gives rise to a demand only against agents of the state of Utopia not to torture her, and not against Bernadette when she devises a plan to torture Adele on the basis of some racist impulse. Saying that someone only has a claim against their state or society not to be tortured—rather than a claim against private torturers and would-be torturers to not torture the right-holder—ignores the normative distinctiveness of human rights. The distinctiveness is not given by their enforceability²⁵ but by their role in our practical reasoning. The violation of a human right is a directed wrong against the affected right-holder. Being a right-holder gives us the standing or authority to claim or demand the taking of or refraining from action which the right calls for. This is not a claim that necessarily needs to be directed against societies or states but makes sense as claim against an individual. Aside from this, there is no conceptual reason why human rights should only be held against states. The state-centric nature of the modern world is contingent, and an account of human rights should be open to the possibility that this may change at some point in the future.

C *The thesis in overview*

This thesis is divided into six chapters. The first two chapters set up the *Multiple Duty View* and show how it has been endorsed in human rights practice and elaborated by philosophers of human rights. Chapter One shows that the *Multiple Duty View* of the structure of human rights has been influential both in authoritative human rights institutions and across a range of human rights jurisdictions. The discussion unfolds through an examination of the jurisprudence of a

²⁵ Some philosophers argue that human rights are just those claims that can be reliably and effectively enforced against others. See eg Raymond Geuss, *History and Illusion in Politics* (CUP 2001) 143–6; Susan James, 'Rights as Enforceable Claims' (2003) 103(1) *Proceedings of the Aristotelian Society* 133, 136–40; Susan James, 'Rights, Moral and Enforceable: A Reply to Saladin Meckled-Garcia' (2005) 105(1) *Proceedings of the Aristotelian Society* 149, 150; Susan James, 'Realizing Rights as Enforceable Claims' in Andrew Kuper (ed), *Global Responsibilities: Who Must Deliver on Human Rights?* (Taylor and Francis 2005). This claim is powerfully resisted by Tasioulas, 'The Moral Reality of Human Rights' (n 11) 86; WD Ross, *The Right and the Good* (Philip Stratton-Lake ed, OUP 2002) 51.

number of human rights bodies at the international, regional, and domestic levels. It aims to show that the *Multiple Duty View* has: (1) been influential in authoritative human rights bodies, across a wide range of jurisdictions; and (2) that the *Multiple Duty View* has been so influential in human rights practice because human rights bodies think that it is essential to the effectiveness of the human rights enshrined in key human rights instruments, and because it appears to make the best sense of the abstract framing of the rights and duties in those instruments.

In Chapter Two I present a sample of philosophical accounts of moral human rights that endorse the *Multiple Duty View*. I set out those accounts and explore how their proponents have developed and defended their particular versions of the *Multiple Duty View*. Various theorists accept the *Multiple Duty View* of the structure of rights,²⁶ but I focus on the accounts of Henry Shue, John Tasioulas, and Rowan Cruft, as they are best known for endorsing this view in the domain of human rights. To briefly summarise the three positions, in his account of basic rights, Shue claims that each basic right corresponds to three duties: a duty to not deprive, a duty to protect, and a duty to aid. Tasioulas and Cruft have a slightly different picture of the structure of human rights. Tasioulas claims that human rights are prior to their duties, and that for each right there is no closed list of duties—they generate multiple changing duties based on changes in circumstances. Cruft’s individualistic account of human rights follows a similar line of thought but it is more capacious. Cruft claims that correlative to each human right are various different ‘normative factors’, which normative factors change according to the circumstances. That is, rights not only correlate with multiple duties but also other normative positions, including undirected duties and strong reasons to adopt certain goals. Chapter Two ends by making some comments about the link between Chapter One and Chapter Two. I suggest that the fact that the *Multiple Duty View* finds support both in the philosophical literature and in

²⁶ See eg MacCormick (n 16) 206; Raz, *The Morality of Freedom* (n 16) 170-1; Waldron (n 1) 510-12; Carl Wellman, *Real Rights* (OUP 1995) 8.

the views expressed by authoritative human rights institutions makes it an influential view of the structure of human rights.

In Chapters Three and Four I turn to evaluate the *Multiple Duty View*. Chapter Three lays the groundwork for the concerns raised about the *Multiple Duty View* in Chapter Four. In Chapter Four, I suggest that *Multiple Duty View* encounters problems in accounting for cases of waiver of human rights.

When it comes to rights-in-general—and especially private law rights—it is relatively uncontroversial that waiver is possible and an ordinary part of right-holding. But that waiver of human rights is possible is more controversial. Accordingly, in Chapter Three I present a case for limited waiver of moral human rights—I argue for the possibility of waiving any human right.²⁷ The chapter begins with a discussion the concept of waiver and what it means to waive a right. In the second half of the chapter, I turn to focus on human rights. I outline five arguments for why human rights are typically thought to be inalienable or unwaivable: (1) that there is a strong intuitive case for unwaivable human rights; (2) that waiver of human rights would produce bad social consequences; (3) that waiver of human rights amounts to a failure to respect morality; (4) that as long as a right-holder is human they cannot lose their human rights; and (5) that human rights are framed as inalienable in positive international law. After advancing some responses to these arguments—which creates space for the possibility of waiver—I present an autonomy-based case for limited waiver of human rights.

In Chapter Four I discuss a problem for the *Multiple Duty View*. I start my discussion by noting that, while the *Multiple Duty View* has received significant support, some

²⁷ This claim is controversial and I defend it in Chapter Three. While the account of waiver that I develop in Chapter Three leaves it open that *any* human right may possibly be waived this is not to say that all human rights are always waivable, all the time. Whether a particular human right can be waived depends on the circumstances of the waiver, and it might turn out that there are very few circumstances in which some fundamental rights—like the right not to be tortured—can be waived.

philosophers have been more critical of the structure of human rights that it advances. I then discuss in detail one problem that confronts the *Multiple Duty View*—namely the inability to properly individuate human rights, or the Individuation Objection. Because the *Multiple Duty View* correlates each human right with multiple duties, it cannot individuate human rights according to the actions that their correlative duties make obligatory. Each human right must always be more general than the duties to which it correlates. This means that the *Multiple Duty View* can only individuate human rights according to their grounds or the subject matter of their duties, which in turn means that rights sharing the same ground or that correlate with duties with the same subject matter cannot be individuated from one another. I then outline Cruft’s response to this problem—that, while the *Multiple Duty View* appears to have difficulties in individuating human rights precisely, this does not have any serious practical implications. In the final part of the chapter I show that Cruft’s response misses the mark and argue that the possibility of waiver of human rights means that there are serious practical implications that flow from the *Multiple Duty View*’s individuation problem. Because the *Multiple Duty View* cannot individuate rights that share the same ground or that correlate with duties with the same subject matter, it leaves us unable to properly track rights that have been waived and rights that have been retained by the right-holder when they release a duty-bearer from only one duty (or, at least, not all of the duties) correlative to their human right. Because the *Multiple Duty View* recognises only one human right in such cases, it is forced to say either that the right-holder waives their right or that it is retained by the right-holder. Neither of these options reflects what is actually happening to the right-holder’s rights in cases of waiver.

In Chapters Five and Six I present an alternative view of the structure of human rights and consider some objections to it. In Chapter Five I explore in detail the features of the *Individuation View* of the structure of human rights and distinguish it from other superficially similar theories of rights. I show how, by taking each human right to correlate with one duty,

the *Individuation View* can individuate each human right according to the action that its correlative duty makes obligatory. I argue that the difference between the *Individuation View* and the *Multiple Duty View* is not just semantic. By individuating each human right according to the action that its correlative duty makes obligatory, the *Individuation View* has the resources to deal with the problem of waiver that I outline in Chapter Four..

Chapter Six deals with three key objections to the *Individuation View*.

1. *Fidelity to practice*. I consider first the objection from fidelity to practice. It might be argued that the *Individuation View* cannot make sense of international human rights law and practice (which endorses the *Multiple Duty View*), and that this makes it a less attractive view of the structure of moral human rights than the *Multiple Duty View*. This objection brings the discussion back to Chapter One. I respond by suggesting that the *Individuation View*'s divergence from the view of human rights reflected in the practice is not fatal to the success of the *Individuation View* as an account of the structure of moral human rights. Fidelity to practice is only one matter to take into account when assessing the success of a theory of the structure of moral human rights. This is especially because the structure of human rights is a very technical matter about how human rights work as a concept. There is no reason to think that human rights practice is necessarily right on the issue.

2. *A proliferation of rights*. Next, I consider what I take to be the most serious objection to the *Individuation View*—that the *Individuation View* leads to an unintuitive proliferation of human rights because it links each directed duty with a separate human right and so generates more human rights than the *Multiple Duty View*. I explore what it means for there to be a proliferation of human rights before identifying four key ways in which the *Individuation View* might be said to be compromised by its generation of more human rights than the *Multiple Duty View*.

First, I consider the claim that the *Individuation View* is counter-intuitive because by pairing each human-rights-related duty with a separate human right it posits the existence of many more human rights than we take to presently exist. I claim that this kind of proliferation is not fatal to the success of the *Individuation View* as an account of the structure of human rights. That the *Individuation View* is contrary to our self-understanding of human rights because it posits the existence of more human rights than we think exist does not necessarily make it misconceived. Given the technical nature of the structure of human rights, we might expect that the self-understandings of human rights that lead us to view the *Individuation View* as counter-intuitive may just be wrong.

Second, I note that a proliferation of human rights might be thought to risk devaluing the currency of human rights by generating a number of trivial human rights that are mixed in with serious ones. I say that this worry is exaggerated because by individuating each human right into a single right-duty pair based on the act-type²⁸ that its correlative duty makes obligatory, the *Individuation View* allows each human right to be taken separately and assessed for its stringency and importance, which will preserve rather than diminish the currency of human rights.

Third, I consider the argument that the *Individuation View's* proliferation of human rights threatens to frustrate the action-guiding role of human rights by generating many more rights than the *Multiple Duty View*, all of which have to be appreciated and balanced in practical reasoning. I argue that under the *Individuation View*, while there will be more human rights, there will be just as many duties as under the *Multiple Duty View*. This is because, while the *Individuation View* individuates human rights differently from the *Multiple Duty View*—according to the action that the right's correlative duty makes obligatory—the *Individuation*

²⁸ For an explanation of what an 'act-type' is, see Chapter Four, Section B.1.

View individuates duties the same way as the *Multiple Duty View*—that is, according to the act-type that they make obligatory. As such, the *Individuation View* makes practical reasoning no more difficult than under the *Multiple Duty View*. In fact, by linking each human right with a single correlative duty, and finely individuating human rights according to the act-type that their correlative duties make obligatory, the *Individuation View* clarifies the process of practical reasoning. It can explain cases of waiver that the *Multiple Duty View*—with its correlation of multiple duties to each human right—cannot.

Finally, I consider the claim that the *Individuation View*'s proliferation of human rights deprives it of the theoretical virtues of simplicity or ontological parsimony and conservatism. By positing the existence of more human rights than the *Multiple Duty View*, the *Individuation View* paints a less simple picture of the structure of human rights than the *Multiple Duty View*. In addition, this positing of additional human rights sits uncomfortably with human rights practice. I argue that the mere fact that the *Individuation View* is less ontologically sparse than the *Multiple Duty View* does not mean that the latter is a better explanation of the structure of human rights. Furthermore, while the *Individuation View* is less conserving than the *Multiple Duty View*, its disruption of existing beliefs and theories is minimal, given that it is consistent with the same grounding claims and claims about the nature of human rights that proponents of the *Multiple Duty View* make, and it can explain much of what the *Multiple Duty View* explains about human rights. Furthermore, this reduction in ontological parsimony and conservatism is purchased at the price of greater consilience—the *Individuation View* can explain what the *Multiple Duty View* cannot, cases of waiver of human rights.

3. *An overlooked asymmetry between human rights and their duties.* I note that a proponent of the *Multiple Duty View* might argue that the *Individuation View* is wrong to pair human rights and duties strictly. Doing so misses an important asymmetry between human rights and their duties—namely that each human right (which is grounded in important human

interests or other features of the right-holder) also operates as a ground for its correlative duties. So, human rights and their correlative duties have different normative roles. If we accept that human rights ground duties then it becomes the case that each human right may correspond to multiple duties, since each right will generate whatever duties will protect the interest that underlies it and which are feasible in the circumstances. If this is the case, then it is wrong to strictly pair each human right with one duty, as the *Individuation View* requires. I respond to this objection by noting that there is an enduring problem with this kind of move. It is true that taking human rights to ground duties might make it the case that each human right correlates with multiple duties. But because each human right is itself grounded in important human interests (or other features of the right-holder) this move threatens to collapse the distinction between human rights and the interests (or other features) of the right-holder that ground them.

4. *A conservative approach to human rights instruments:* Finally, I consider the worry that adopting the *Individuation View* necessarily commits its holder to a conservative approach to the interpretation of human rights instruments. Given that the *Individuation View* denies that human rights generate changing waves of duties, and instead posits the existence of ascertained right-duty pairs, it might be thought that the *Individuation View* requires that the rights enshrined in human rights instruments be fixed at the time of drafting. I note that such a conservative approach does not necessarily fall from endorsing the *Individuation View*. The *Individuation View*, as I present it in this thesis, is a view about the structure of moral rights. It is an open and further question as to whether it should be adopted for the rights in human rights instruments.

D *Limitations*

This thesis provides an in-depth examination of the structure of moral human rights. However, it leaves more work to be done in this area. While I present the *Individuation View* as a view

of the structure of human rights that resolves some of the problems that the *Multiple Duty View* encounters—namely, the problem of accounting for what happens to a right-holder’s human rights when they release the duty-bearer from some but not all of its correlative duties—a complete account of the structure of human rights requires developing a theory of the individuation of act-types.²⁹ As I elaborate in Chapter Four, while the *Multiple Duty View* cannot account for some cases of waiver because it does not match each human right with a single correlative duty, all theories of the structure of human rights will face a similar problem if they do not finely individuate act-types. There is a subset of waiver cases in which undifferentiated broad act-types like ‘assaulting’ will leave it unclear as to what conduct the right-holder has consented to and what conduct remains prohibited by their human rights. That is, one may be assaulted in various different ways—by being punched, by being hit with a bat, by being stabbed, or by being kicked, etc—and in some cases if a right-holder waives their right not to be assaulted it will be unclear as to just what conduct they have consented to and, correspondingly, what rights and duties they have waived and what rights and duties they have retained. In such cases we need a theory of how to individuate broad act-types into their particular components, which can be paired with the *Individuation View*, potentially based on the means by which the act-type may be instantiated. Such a theory of the individuation of act-types can only be gestured at here as it would be a thesis in its own right. Accordingly, a fully worked out account of the individuation of act-types—and correspondingly, a fully worked out theory of the individuation of rights and duties—will have to await future work.

²⁹ This inquiry is distinct from the inquiry about the individuation of actions. Philosophers of action like Donald Davidson and Alvin Goldman who talk about the individuation of actions are interested in whether the action sentences ‘Uma pointed the rifle at Bruce’, ‘Uma pulled the trigger of the rifle’, ‘Uma shot Bruce’, and ‘Uma killed Bruce’ describe one action—the killing of Bruce—or four distinct actions—Uma’s pointing the rifle at Bruce, Uma’s pulling of the trigger of the rifle, Uma’s shooting Bruce, and Uma’s killing Bruce. See Donald Davidson, ‘Agency’ in *Essays on Actions and Events: Philosophical Essays* (OUP 2001); Alvin Goldman, *A Theory of Human Action* (Princeton University Press 1976). By contrast, when I talk about the individuation of act-types I am interested in the question of the basis on we might describe A’s beating up B as ‘A’s punching B’ rather than merely as ‘A’s assaulting B’.

1

The *Multiple Duty View* in practice

IN THIS CHAPTER I explore how human rights courts and institutions have understood the structure of human rights. My central claim is that a particular view of the conceptual structure of human rights has been influential both in authoritative human rights institutions and across a range of human rights jurisdictions—namely, what I call the *Multiple Duty View*. The *Multiple Duty View* holds that each and every human right corresponds to multiple duties—or at least has the potential to do so—rather than just one duty that matches the content of each human right. That this view has become influential in human rights practice is important because in later chapters I argue that there are reasons to think that the *Multiple Duty View* cannot properly account for certain uses of human rights.

The chapter unfolds as follows. In Part A I begin with some discussion of what it takes for a view about the structure of human rights to be influential in human rights practice. Equipped with this account I then provide some evidence for my claim that the *Multiple Duty View* of human rights has been influential in human rights practice. *First*, I show that the *Multiple Duty View* has been embraced by authoritative human rights institutions—namely, two of the United Nations human rights treaty bodies. *Second*, by looking at the case law of human rights bodies from a wide range of jurisdictions, I show how prevalent the *Multiple Duty*

View is in human rights practice. In Part B I provide some suggestions for why the *Multiple Duty View* has been as influential as it has been. I give some examples of cases where endorsing the view that human rights correspond to multiple duties has been thought to make a practical difference to the outcome of human rights cases. Finally, I point to how the *Multiple Duty View* appears to best explain the rights found in important human rights instruments.

A *The influence of the Multiple Duty View in human rights practice*

What exactly do I mean when I say that the *Multiple Duty View* has been influential in human rights practice? Turning first to that view's being *influential*. A particular view of the conceptual structure of human rights might be thought to be influential in a particular domain because: (1) it turns up in a significant proportion of the human rights rhetoric¹ used by actors in that domain; (2) it features in the reasoning of human rights bodies² in that domain; or (3) it appears in the outcomes of human rights decisions in that domain. Let me unpack each of these alternatives in turn.

1. The first sense of 'influential' is the most trivial. All it takes for a view to be influential in this sense is for it to appear frequently in human rights rhetoric in a particular domain. That the relevant view has some effect (or influence) on how human rights are understood by practitioners of human rights is then inferred from its frequent invocation. But that a view about the structure of human rights appears frequently in rhetoric does not necessarily say much about how human rights are understood by practitioners of human rights. Human rights rhetoric is often far less disciplined than we might hope, and regularly strategic, such that what is reflected

¹ By 'human rights rhetoric' what I mean is the mere use of the language of human rights in declarations by human rights activists and political statements.

² By 'reasoning of human rights bodies' what I mean is the distinctive process by which human rights bodies with a law-making or dispute resolution function give reasons for the decisions they make about the controversies brought before them.

in it might not be truly expressive of how human rights are understood by human rights practitioners.

2. The second sense of ‘influential’ is less trivial. If a view of the conceptual structure of human rights is to be regarded as influential in this sense it must appear frequently in the reasoning of human rights bodies. This is not to say that for a view to be influential in this second sense it needs to be either necessary or sufficient for reaching any particular decision. It need not be either. It is enough that the view appears in the reasoning of human rights bodies, whether or not it contributes to the decisions ultimately reached by those bodies.

3. The third sense of ‘influential’ is the most substantive. It requires that the view frequently contribute to the reaching of particular decisions by human rights bodies. Again, this is not to say that the view must be necessary and sufficient to cause the judicial or quasi-judicial human rights body to decide one way rather than another. It is enough that the view form a step along the way to a decision or conclusion—that it contribute to the reaching of a decision or conclusion.

In this chapter I will only be concerned with identifying whether the *Multiple Duty View* has been influential in the second and third senses of ‘influential’—influential in the sense of appearing in the reasoning of human rights bodies and in contributing to the decisions of human rights bodies. This is because, while a view’s being influential in sense (1) *might* affect how the hearers of the rhetoric understand the structure of human rights, it is not necessary for a view to be influential in this sense that it do so. Neither does sense (1) require the speaker to have any kind of authority within the practice of human rights—human rights rhetoric can be engaged in by anyone. So, that a view of the structure of human rights is influential in sense (1) is an unreliable indicator of how those rights are understood in human rights practice—unless

of course our goal is specifically to chart the conception of human rights specifically in human rights rhetoric rather than human rights practice.

By contrast, for a view of the structure of human rights to be influential in senses (2) and (3) requires that that view form at least a step along the way in the reasoning of judicial and quasi-judicial human rights bodies to a particular kind of conclusion. This will generally mean that the human rights body justify its resort to that view, which in turn requires the human rights body to have a fairly strong (at least, institutional, if not personal) commitment to that view. The focus on adjudicatory human rights bodies also means that the actors involved in making claims about the structure of human rights have some authority within human rights practice, as not just anyone can adjudicate a human rights dispute. As such, a view's being influential in senses (2) and (3) is likely to be a better indicator of the self-understandings of human rights by human rights practitioners.

Second, when I say that I will argue that the *Multiple Duty View* has been influential in *human rights practice*, I mean primarily human rights law. While the term 'human rights practice' arguably covers a host of different things—ranging from ethical beliefs and attitudes, to scholarly work on human rights, to the practice of governments in legislating human rights³—there is some sense in which human rights law is pre-eminent in making up that practice. As Adam Etinson puts it, 'there is a noticeable semantic gravity here. The "practice" is most often understood in political and, in particular, *legal* terms.'⁴ So, I take human rights law—international, regional, and domestic—as the focus of my inquiry.

³ James Nickel, 'What Future for Human Rights?' (2014) 28(2) *Ethics & International Affairs* 213, 214–16.

⁴ Adam Etinson, 'On Being Faithful to the "Practice": A Response to Nickel' in Adam Etinson (ed), *Human Rights: Moral or Political?* (OUP 2018) 164. See also Samantha Besson, 'Legal Human Rights Theory' in Kasper Lippert-Rasmussen, Kimberley Brownlee, and David Coady (eds), *A Companion to Applied Philosophy* (John Wiley & Sons 2017) 331–3.

I make no claim to have undertaken a complete and comprehensive survey of *all* of human rights practice (understood in this way). This chapter has more modest aims. It argues that the *Multiple Duty View* has been endorsed by authoritative actors in the human rights enterprise and by a *wide range* of judicial and quasi-judicial human rights bodies in different jurisdictions—international, supra-national, and domestic. Much more work needs to be done to be able to identify everywhere that the *Multiple Duty View* is endorsed. But what follows should be enough to demonstrate that the *Multiple Duty View* is regarded as authoritative as to the structure of human rights and is widely endorsed.

Finally, when I claim that the *Multiple Duty View* has been influential *in the reasoning of human rights bodies and in determining the outcomes of human rights cases* across a wide range of jurisdictions, I mean to refer to the substantive appearance of that view in the reasoning of and outcomes arrived at by those bodies, rather than its mere formal expression. That is, I take the *Multiple Duty View* to have appeared in the reasoning of or outcomes arrived at by a human rights body where that human rights body in its reasoning or the outcomes it arrives at treats human rights as substantively correlating to more than one duty, rather than just where a human rights body expressly states that it takes each human right to correlate with more than one duty.

1 *Endorsement of the Multiple Duty View by authoritative actors*

While human rights are not just things found in international law—indeed, international human rights law is just one of several human rights law regimes, along with domestic and supranational human rights frameworks—international human rights practice is often taken to be authoritative as to what human rights are, even in other human rights regimes.⁵ That is, when we think of

⁵ For example, s 39(b), Constitution of the Republic of South Africa, Act 108 of 1996 contains an express direction that the South African Constitutional Court consider international law when interpreting the rights enshrined in the Constitution. Similarly, in *Loizidou v Turkey* (1997) 23 EHRR 513, 526 para 43, the European Court of Human Rights held that ‘the principles underlying the Convention cannot be interpreted and applied in a vacuum.

‘human rights’ we tend to think of the things found in the *Universal Declaration of Human Rights (UDHR)*,⁶ the *International Covenant on Civil and Political Rights (ICCPR)*,⁷ and the *International Covenant on Economic Social and Cultural Rights (ICESCR)*.⁸ This might be because of the almost-universal acceptance of these international instruments,⁹ or because the *UDHR* was the first clear statement of what human rights there are, or because such instruments have attained the status of customary international law.¹⁰ Whatever the reason for this view of the authority of international human rights law, in considering the structure of human rights it is useful to start with international human rights law before moving on to the other human rights regimes.

Turning first to the *ICCPR*. The provisions of the *ICCPR* have been the subject of authoritative interpretations issued by the United Nations Human Rights Committee (UNHRC)¹¹—which is tasked with monitoring states’ implementation of the *ICCPR*—

Mindful of the Convention’s special character as a human rights treaty, it must also take into account any relevant rules of international law’. The Court added in *National Union of Rail, Maritime and Transport Workers v United Kingdom* App No 31045/10 (ECtHR, 8 April 2014) that these rules of international law include ‘in particular the rules concerning the international protection of human rights’ (para 76). This led the Court to conclude in that case that ‘[i]t would be inconsistent with this method for the Court to adopt in relation to Article 11 an interpretation of the scope of freedom of association of trade unions that is much narrower than that which prevails in international law.’

⁶ Universal Declaration of Human Rights (10 Dec. 1948), U.N.G.A. Res. 217 A (III) (1948).

⁷ International Covenant on Civil and Political Rights (New York, 16 Dec. 1966) 999 U.N.T.S. 171 and 1057 U.N.T.S. 407, *entered into force* 23 Mar. 1976.

⁸ International Covenant on Economic, Social and Cultural Rights (New York, 16 Dec. 1966) 993 U.N.T.S. 3, *entered into force* 3 Jan. 1976.

⁹ As of writing, there were 173 states parties to the *ICCPR* and 171 states parties to the *ICESCR*: United Nations, ‘Depositary: Status of Treaties: International Covenant on Civil and Political Rights’ (*United Nations Treaty Collection*, 2 July 2020) <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&clang=_en> accessed 2 July 2020; United Nations, ‘Depositary: Status of Treaties: International Covenant on Economic, Social and Cultural Rights’ (*United Nations Treaty Collection*, 2 July 2020) <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en> accessed 2 July 2020.

¹⁰ *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain)*, Judgment, I.C.J. Rep. 1970 (Feb. 5), p. 3, para 34; Decision, *Barayagwiza* (ICTR-97-19-AR72), Appeals Chamber, 3 November 1999, para 40.

¹¹ The International Court of Justice has lent authority to statements of the UNHRC by declaring its commitment to giving ‘great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of the [*ICCPR*]’: *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, I.C.J. Rep. 2010 (Nov. 30) p. 639, para 66.

including as to the structure of the rights and duties enshrined in that instrument.¹² In the reasoning of many of those interpretations one can see the *Multiple Duty View* turning up in respect of key *ICCPR* rights.

For example, in its 2004 General Comment 31¹³ the UNHRC said of the duties imposed on states by the rights contained in the *ICCPR* that they have ‘both negative and positive’ elements. Here the Committee was referring to Art 2(1), *ICCPR*, which obligates states parties to respect and ensure the rights contained in the *ICCPR*. As the Committee explains, this provision makes it the case that *each of the rights contained in the Covenant* generates duties on states parties both to ‘refrain from violation of the rights recognized by the Covenant’—this is what it means to ‘respect’ the human rights in the *ICCPR*—and to protect the rights of right-holders, ‘not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities’—this is what it means to ‘ensure’ the rights contained in the Covenant.¹⁴ These duties, then, which attach to all Covenant rights, are respectively negative and positive in nature. The upshot of all this is that the UNHRC unequivocally endorsed the *Multiple Duty View* in 2004. It accepted that each human right corresponds to two duties—to respect and to ensure the fulfilment of each right—which are (respectively) negative and positive in nature—rather than just one duty which is *either* positive or negative in nature.

The UNHRC has been even more explicit about its endorsement of the *Multiple Duty View* in its general comments on specific *ICCPR* rights. For example, ten years later in General

¹² I do not necessarily endorse the division of human rights into civil and political rights and socio-economic rights (or liberty rights and welfare rights—as the distinction is otherwise drawn). I use these labels here simply because—despite their contested nature—they still very much have currency in human rights practice, particularly given the separation of human rights standards into the two Covenants.

¹³ Human Rights Committee, General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (Eightieth session, 2004), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) para 6.

¹⁴ *ibid* paras 6-8.

Comment 35, the Committee recognised at least three duties (on states) that attach to the Art 9 right to liberty and security of person:

- *first*, a duty not to deprive right-holders of their liberty and security;¹⁵
- *second*, a ‘duty to take appropriate measures to protect the right to liberty [and security] of person against deprivation by third parties’;¹⁶ and
- *third*, a duty to ‘take retrospective measures ... in response to past injury’.¹⁷

The first duty listed above—the duty not to deprive right-holders of their liberty and security of person—is the negative duty that is standardly taken to attach to the right to liberty and security of person.¹⁸ It requires duty-bearers (states) to refrain from interfering with the liberty and security of right-holders. The other two are positive duties. Rather than negative non-interference, the duties of protection and remedy require respectively the positive provision of resources (for the setting up of police forces, courts, and other institutions) to prevent rights violations by others and the positive provision of resources to redress violations once they occur. What this should make clear is that the UNHRC takes the view that the right to liberty and security of person does not impose only a single duty. It considers that that right generates (at least) three duties—thereby endorsing the *Multiple Duty View*.

The *Multiple Duty View* turns up again in the UNHRC’s General Comment 36. There, the Committee states in respect of the Art 6 right to life:

- [4] Paragraph 1 of article 6 of the Covenant provides that no one shall be arbitrarily deprived of his life and that the right shall be protected by law. It lays the foundation for the obligation of States parties to respect and to ensure the right to life, to give effect to it through legislative and other

¹⁵ Human Rights Committee, General Comment 35, Art. 9 (One hundred and twelfth session, 2014), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. CCPR/C/GC/35 (2014) para 9.

¹⁶ *ibid* para 7.

¹⁷ *ibid* para 9.

¹⁸ Liora Lazarus, ‘Mapping the Right to Security’ in Liora Lazarus and Benjamin Goold (eds), *Security and Human Rights* (Hart 2006) 333.

measures, and to provide effective remedies and reparation to all victims of violations of the right to life. ...¹⁹

Here the Committee endorses the position (also set out above in respect of the right to liberty and security of person—though in slightly different language) that the right to life generates three duties²⁰—to respect the right, to ensure that it is not violated by others,²¹ and to remedy violations of it when they occur. As above in respect of the right to liberty and security of person, only the first of these duties—the duty to respect the right to life, which is commonly taken as its only correlative duty²²—is a negative duty of non-interference. The other two—to ensure the right to life and to remedy violations of it—impose positive obligations of provision.

As the Committee explains in respect of the right to life, the duty to ensure (or to protect) requires states ‘to undertake reasonable positive measures, which do not impose on them disproportionate burdens, in response to reasonably foreseeable threats to life originating from private persons and entities, whose conduct is not attributable to the State.’²³ In addition to this duty, the Committee states that the right to life generates another positive ‘obligation on the States parties, where they know or should have known of potentially unlawful deprivations of life, to investigate and, where appropriate, prosecute such incidents including allegations of excessive use of force with lethal consequences.’²⁴ This obligation also requires that states parties

¹⁹ Human Rights Committee, General Comment 36, Art. 6 (One hundred and twenty-fourth session, 2018), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. CCPR/C/GC/36 (2018) para 4.

²⁰ Here the UNHRC breaks step with its previous view of the right to life as correlating to only two duties: not to arbitrarily deprive right-holders of life and to adopt measures that ‘are conducive to allowing one to live’. See Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd edn, OUP 2013) 167 para 8.01.

²¹ This duty is also expressly recognised by the Committee in its Views in Human Rights Committee, *Peiris v. Sri Lanka* (Communication no. 1862/2009) para 7.2: ‘Regarding the author’s claim under article 6, the Committee recalls that the right to life is the supreme right, from which no derogation is permitted. It further recalls that States parties have a positive obligation to ensure the protection of individuals against violations of Covenant rights, which may be committed not only by its agents, but also by private persons or entities.’

²² James Griffin, *On Human Rights* (OUP 2008) 212.

²³ Human Rights Committee, General Comment 36 (n 19) para 21 (footnotes omitted).

²⁴ *ibid* para 27.

provide ‘adequate measures of compensation, rehabilitation and satisfaction’²⁵ where a violation of Art 6 is found to have taken place.²⁶

What this should make clear is that the Committee does not think that the right to life generates only a duty on states to refrain from (arbitrarily) taking life. It firmly endorses the view that the right to life also imposes duties of protection and remedy—and therefore that it correlates with multiple duties.

Accordingly, as part of its reasoning about interpretations of civil and political rights, the UNHRC endorses the *Multiple Duty View*. The Committee considers that *each right* in the *ICCPR* imposes not just negative duties but also some positive duties. Support for this conclusion can also be found in the observation of Manfred Nowak that ‘[t]he practice of the Human Rights Committee ... clearly demonstrates that these rights can be effectively guaranteed only by a combination of negative and positive State obligations.’²⁷

So much for civil and political rights. But these types of rights do not exhaust even the legal domain of human rights. What about socio-economic rights? For those we have to turn to the *ICESCR* and the interpretations of it issued by the Committee on Economic, Social and Cultural Rights (UNCESCR). The UNCESCR occupies the same role in relation to the *ICESCR* as the UNHRC occupies in relation to the *ICCPR*. The UNCESCR has provided a number of authoritative interpretations of the rights enshrined in the *ICESCR*. Just as with the UNHRC and the *ICCPR*, the *Multiple Duty View* appears in much of the UNCESCR’s reasoning about its interpretations of *ICESCR* rights.

²⁵ *ibid* para 28.

²⁶ While the UNHRC did not identify these positive requirements as forming part of the (third) duty to remedy violations of the right to life, it is difficult to see where else these requirements might be located, as they are hardly obligations of non-interference or part of the duty to protect.

²⁷ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev edn, NP Engel 2005) XXI para 3.

Take the UNCESCR's 1999 General Comment 12. There the UNCESCR states:

[15] The right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to *respect, to protect and to fulfil*. ...²⁸

The Committee—though commenting on the right to food in Art 11—explicitly adopts the view that each and every socio-economic right (and even all other human rights) generates three distinct duties on states—a duty to respect, a duty to protect, and a duty to fulfil. These duties roughly correspond with those gestured at by the UNHRC in respect of civil and political rights.²⁹ As the Committee goes on to explain with respect to the right to food, the duty to respect is negative in nature and requires that states not take any measures that would unduly interrupt or interfere with right-holders' access to food. The duty to protect requires states to take positive action to prevent others (including private individuals and enterprises) from depriving right-holders of their food. Finally, the duty to fulfil imposes a positive obligation on states to provide food to right-holders who—for reasons beyond their control—do not have access to adequate food—a duty of remedy or redress.³⁰ The key point to note here is that the UNCESCR is unequivocal in endorsing the position that for every socio-economic right there are three duties. It thereby commits itself firmly to the *Multiple Duty View*—this view turns up in its reasoning about its interpretation of the right to food, just as it turns up in the reasoning of the UNHRC several years later.

This view of the structure of the right to food has been adopted in respect of other socio-economic rights—as the UNCESCR alludes to in General Comment 12. For example, in its 2016 General Comment 23, the UNCESCR states that, '[t]he right to just and favourable

²⁸ Committee on Economic, Social and Cultural Rights, General Comment 12, Art. 11 (Twentieth session, 1999), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. E/C.12/1999/5 (1999) para 15 (emphasis in original).

²⁹ The view of the structure of human rights set out here by the UNCESCR is most strongly reflected in the UNHRC's General Comment 36.

³⁰ Committee on Economic, Social and Cultural Rights, General Comment 12 (n 28) para 15.

conditions of work imposes three levels of obligations on States parties. ...³¹ These obligations consist of a duty to:

- ‘respect the right by refraining from interfering directly or indirectly with its enjoyment’;³²
- protect the right by taking ‘measures to ensure that third parties, such as private sector employers and enterprises, do not interfere with the enjoyment of the right’;³³ and
- fulfil the right by taking the ‘measures necessary to ensure the full realization of the right’.³⁴

The UNCESCR reiterated its commitment to the *Multiple Duty View* in its 2017 General Comment 24. There it states that, ‘[t]he Covenant establishes specific obligations of States parties at three levels — to respect, to protect and to fulfil.’³⁵

What the above should make clear—and what Sandra Fredman³⁶ and Manfred Nowak³⁷ also note—is that the UNCESCR in its general comments has taken the view that each and every right in the *ICESCR* imposes three duties—to respect, protect, and fulfil. Thus, the *Multiple Duty View* turns up in its reasoning about key *ICESCR* rights.

Having observed that both the UNHRC and the UNCESCR take human rights to correlate with multiple duties, we can conclude that authoritative human rights institutions have

³¹ Committee on Economic, Social and Cultural Rights, General Comment 23, Art. 7 (Fifty-seventh session, 2016), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. E/C.12/GC/23 (2016) para 58.

³² *ibid.*

³³ *ibid* para 59.

³⁴ *ibid* para 60.

³⁵ Committee on Economic, Social and Cultural Rights, General Comment 24, State obligations in the context of business activities (Sixty-first session, 2017), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. E/C.12/GC/24 (2017) para 10.

³⁶ Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 69–70.

³⁷ Nowak (n 27) XXI para 3.

endorsed the *Multiple Duty View* as part of their reasoning about how the *ICCPR* and *ICESCR* rights should be interpreted. The wide range of general comments in which the *Multiple Duty View* appears shows that it has become influential in the reasoning of the UN human rights treaty bodies about the interpretation of key international human rights.³⁸

2 *The Multiple Duty View across jurisdictions*

So far, I have sought to show that the *Multiple Duty View* has been influential in the reasoning of authoritative human rights actors—the UNHRC and the UNCESCR—about the interpretation of key human rights. In this section I extend that claim, examining how the *Multiple Duty View* has also been influential across a wide range of human rights regimes, being accepted by the European Court of Human Rights, the Inter-American Court of Human Rights, the African Commission on Human and Peoples’ Rights, and the South African Constitutional Court.

(a) *European Court of Human Rights*

The European Court of Human Rights (ECtHR) has for several decades now accepted the *Multiple Duty View* of the structure of human rights in respect of the rights enshrined in the *European Convention on Human Rights (ECHR)*³⁹ and *Protocol No 1 to the European*

³⁸ You might have noticed that there is an inconsistency in the statements of the UN treaty bodies that I set out above. While each of the general comments that I set out endorse the *Multiple Duty View* of human rights, these general comments are inconsistent as to the exact number of duties that are taken to attach to each right. This inconsistency exists as between statements of the UNHRC and the UNCESCR—with the UNCESCR clearly endorsing the respect, protect, fulfil formula and the UNHRC being more equivocal as to what duties (in addition to the duty of non-interference) attach to each right—and as between different general comments issued by the UNHRC. This inconsistency is both internal and external to the general comments of the treaty bodies. This inconsistency does not matter so much for my purposes—both kinds of view are versions of the *Multiple Duty View*.

³⁹ European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 Nov. 1950), 312 E.T.S. 5, as amended by Protocol No. 3, E.T.S. 45; Protocol No. 5, E.T.S. 55; Protocol No. 8, E.T.S. 118; and Protocol No. 11, E.T.S. 155; *entered into force* 3 Sept. 1953 (Protocol No. 3 on 21 Sept. 1970, Protocol No. 5 on 20 Dec. 1971, Protocol No. 8 on 1 Jan 1990, Protocol 11 on 11 Jan 1998).

Convention on Human Rights (ECHR Protocol 1).⁴⁰ Possibly the earliest instance of the ECtHR's endorsement of this view is the *Belgian Linguistic Case (No 2)*.⁴¹

The *Belgian Linguistic Case (No 2)* concerned Belgian legislation that divided Belgium into linguistic regions for the purpose of regulating the language of instruction for public schools. The legislative scheme established two classifications for regions in Belgium: unilingual and bilingual. In the bilingual regions, the language of instruction was to be that of the child's maternal or usual language. In the unilingual regions the language of instruction was to be the putative language of the region—Dutch in the Dutch-speaking (Flemish) area, French in the French-speaking (Walloon) region, and German in the German-speaking region. Those schools that did not comply with the provisions of the legislation faced having public support and official recognition withdrawn by the Belgian government.

The applicants lived in an area classified as Dutch-speaking. As such, their children—who went to school in the region—were educated in Dutch. However, the applicants were French-speaking, or (at least) expressed themselves most frequently in French, and so wanted their children to be educated in French. The applicants considered that their children being forced to be educated in Dutch was a breach of their and their children's rights under the *ECHR*. They brought an action against the Belgian government in the ECtHR. Most notably, the applicants complained that the Belgian linguistic legislation violated their Art 2 right to education set out in the *ECHR Protocol 1*. Article 2 provides that 'No person shall be denied the right to education'—a plainly negative obligation. The Belgian government fixed on the negative nature of the right in Art 2 and argued that it had not violated the applicants' rights, as it had not obstructed the exercise of any person's right to education. What the applicants were

⁴⁰ Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Paris, 20 Mar. 1952), E.T.S. 9, *entered into force* 18 May 1954.

⁴¹ *Belgian Linguistic Case (No 2)* (1979-80) 1 EHRR 252.

claiming were ‘positive benefits and favors, which the State may, of course, grant in order to facilitate the exercise of that right and freedom’, but which it was not duty-bound to provide.⁴²

Though the ECtHR ultimately dismissed many of the complaints of the applicants—including their claims that their Art 2 rights had been violated—it expressly rejected the Belgian government’s claims about the solely negative duty that attaches to the right enshrined in Art 2.

As the Court noted:

[3] ... The negative formulation indicates, as is confirmed by the preparatory work, that the Contracting Parties do not recognise such a right to education as would require them to establish at their own expense, or to subsidise, education of any particular type or at any particular level. However, it cannot be concluded from this that the State has no positive obligation to ensure respect for such a right as is protected by Article 2 of the Protocol. As a ‘right’ does exist, it is secured, by virtue of Article 1 of the Convention, to everyone within the jurisdiction of a Contracting State.⁴³

As such, the Court rejected the claim that the Art 2 right corresponds solely to a negative obligation on the state to abstain from interfering with the education of right-holders. The Court held that, in addition to this negative duty, the right to education also corresponds to a positive duty on the state to ensure respect for the right to education. In taking this position, the Court endorsed the *Multiple Duty View* of the structure of human rights, accepting that there are at least two duties attached to the right to education: a negative duty not to deprive right-holders of education, and a positive duty to ensure that each right-holder’s right to education is respected.

This view was again echoed in the ECtHR’s reasoning and outcome reached in *X and Y v The Netherlands*.⁴⁴ In that case, X’s daughter Y—who suffered from a mental disability—lived in a privately-run group home for children with mental disabilities. During December 1977, on the day after Y’s sixteenth birthday, Y was raped by the son-in-law (B) of the director of the home. X later became aware of what had happened to Y and took her to the local police

⁴² *ibid* 262.

⁴³ *ibid* 280-1 para 3.

⁴⁴ *X and Y v The Netherlands* (1986) 8 EHRR 235.

station to report the rape. At the time, Dutch criminal law required that, for a charge of rape to be laid against an accused person in respect of a complainant between the ages of 12 and 16, the complainant must personally file a complaint against the accused. Because of Y's condition, X considered her to be unable to sign the complaint herself. Accordingly, he did so on her behalf. This led to the public prosecutor declining to commence proceedings against B, because of non-compliance with the reporting requirement. X challenged the public prosecutor's decision in the Arnhem Court of Appeal but it was ultimately upheld.

X commenced an action before the ECtHR, complaining that the Art 8 rights of X and his daughter to respect for their private lives had been violated. Specifically, he claimed that Art 8 required that the government of The Netherlands ensure the availability of remedies to parents of children subjected to sexual abuse, and that the provisions of The Netherlands Criminal Code that made the prosecution of B impossible meant that the government had breached this duty. The Dutch government argued that there had been no breach of Art 8. It claimed that X could still use Dutch civil law to claim damages from B. The government took the position that Art 8 imposed no duty on it to take positive measures to ensure that rape could be prosecuted as a criminal offence in all cases—it was, in the opinion of the government, enough that there was *some* recourse available, either through the criminal law or the civil system.

In finding for X and Y, the ECtHR held that, in addition to a negative obligation of non-interference in the private lives of right-holders, the Art 8 right to respect for private life corresponds to some positive obligations. As the Court stated:

[23] The Court recalls that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.⁴⁵

⁴⁵ *ibid* 239-40 para 23 (footnotes omitted).

Thus, the ECtHR endorsed the *Multiple Duty View* in reaching the outcome it did in *X and Y v The Netherlands*. It accepted that the right to respect for private life imposes *at least* two obligations on the state: a negative duty of non-interference, and a positive duty to adopt measures for the protection of the right to private life. And it was the existence of this latter positive duty that led the Court to find that The Netherlands had violated the Art 8 rights of X and Y by failing to provide an avenue for the criminal prosecution of B—despite the fact that the government had taken no action to interfere in the private lives of either X or Y.⁴⁶

In *Osman v United Kingdom*⁴⁷ the ECtHR took a similar view of the duties that attach to the right to life in Art 2, *ECHR*. The applicants (Mulkiye Osman and Ahmed Osman) in that case brought a complaint against the United Kingdom claiming that it had not done enough to prevent the murder of Ali Osman—the husband and father, respectively, of the applicants. In 1986 the headmaster at the second applicant’s school noticed that one of the teachers (Paget-Lewis) had developed a concerning level of attachment to the second applicant. The headmaster investigated the situation, and conducted several interviews with Paget-Lewis, before alerting the Osmans to his concerns. In March 1987 the headmaster decided to involve the police, and passed on details of Paget-Lewis’s conduct in respect of the second applicant to them. The police declined to get involved in the situation, deciding instead to leave it to the school to manage. The tension between the Osmans and Paget-Lewis continued to escalate over the following year, culminating on 7 March 1988 with Paget-Lewis going to the home of the Osmans where he shot and killed Ali Osman and wounded the second applicant.

While the ECtHR concluded that there had been no violation of the Art 2 right to life by the United Kingdom government, as part of its reasoning it noted that the right to life

⁴⁶ This view of the Art 8 right to respect of family life was reiterated in *Jovanovic v Serbia* (2015) 61 EHRR 3, 43-4 para 69: ‘The essential object of Article 8 is to protect the individual against arbitrary interference by public authorities. There may, however, be additional positive obligations inherent in this provision extending to, inter alia, the effectiveness of any investigating procedures relating to one’s family life ...’

⁴⁷ *Osman v United Kingdom* (2000) 29 EHRR 245.

corresponds to more than just a negative obligation to abstain from arbitrarily depriving right-holders of their lives:

[115] The Court notes that the first sentence of Article 2(1) enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.⁴⁸

The extract above evinces an endorsement of the *Multiple Duty View* of human rights by the ECtHR. The Court in *Osman* considered the right to life to impose not only a negative duty not to arbitrarily deprive right-holders of their lives but also a positive duty to take measures to protect right-holders from third parties who may deprive them of their lives.

These cases make clear that the ECtHR—like the UNHRC and the UNCESCR—has institutionally endorsed the *Multiple Duty View* of human rights. This is also noted by William Schabas.⁴⁹ In each of the cases set out above the *Multiple Duty View* appeared in the Court's reasoning and was integral to its conclusion in *X and Y v The Netherlands*.

(b) Inter-American Court of Human Rights

Not only has the *Multiple Duty View* of the structure of human rights gained traction in Europe, but it has also been endorsed by the Inter-American Court of Human Rights (IACtHR). From its judgment in *Velásquez Rodríguez v Honduras*⁵⁰—the first contentious case to come before the Court—the IACtHR has endorsed the *Multiple Duty View* in relation to the rights enshrined in the *American Convention on Human Rights (ACHR)*.⁵¹

⁴⁸ *ibid* 305 para 115.

⁴⁹ William Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2016) 91.

⁵⁰ I/A Court H.R., *Velásquez Rodríguez case*, Judgment of July 29, 1986, Series C, No. 4.

⁵¹ American Convention on Human Rights (San Jose, Costa Rica, 22 Nov. 1969), 9 I.L.M. 673 (1970), *entered into force* 18 July 1978.

That case concerned the detention of a student, Manfredo Velásquez Rodríguez, who was allegedly taken and held in custody by members of the Honduran Armed Forces on 12 September 1981 without an arrest warrant. While in custody Velásquez Rodríguez was interrogated and tortured for having engaged in acts considered dangerous to Honduras's national security.

A petition was submitted to the IACtHR by family member representatives of Velásquez Rodríguez, claiming violations of his Art 4 right to life, Art 5 right to humane treatment, and Art 7 right to personal liberty. The Honduran police and security forces denied that they had been involved in any detention and disappearance of Velásquez Rodríguez.

The Court found for the applicants and decided that the government of Honduras should pay fair compensation to the family members of Velásquez Rodríguez. The Court rejected the government's protestations that it had not had a role in Velásquez Rodríguez's disappearance. The IACtHR held that there was sufficient evidence to conclude that Honduras had been directly involved Velásquez Rodríguez's disappearance, torture, and murder, and so that it had violated the negative duties of non-interference connected with his Art 7 right to personal liberty, Art 5 right to humane treatment, and Art 4 right to life. However, the Court went on to hold that, even if this were not the case, the government would still have violated Velásquez Rodríguez's human rights and breached its duties to him and his family.

The IACtHR held that the government had a duty to protect against disappearances (such as the abduction of Velásquez Rodríguez), to investigate them when they occur, and to provide compensation to the family members of victims and to punish the offenders.⁵² That is, the IACtHR held that the rights under the *ACHR* do not just correspond to a duty of non-

⁵² *Velásquez Rodríguez* (n 50) paras 178-182. 'The Court is convinced, and has so found, that the disappearance of Manfredo Velásquez [Rodríguez] was carried out by agents who acted under cover of public authority. However, even had that fact not been proven, the failure of the State apparatus to act, which is clearly proven, is a failure on the part of Honduras to fulfil the duties it assumed under Article 1(1)' (para 182).

interference. It declared that the rights enshrined in the *ACHR* impose several levels of obligations on states. First, all rights carry an obligation of respect—states have a duty not to restrict the rights and freedoms contained in the Convention ‘through the exercise of government power’.⁵³ Second, states have a duty to ‘ensure’ the rights enshrined in the *ACHR*, by preventing violations of *ACHR* rights. Third, states are obligated to investigate and punish violations when they occur, and to restore the rights violated and provide compensation—a duty of remedy.⁵⁴ While the first duty is plainly negative in character, the second and third are positive in nature.

The view that the rights enshrined in the *ACHR* correlate with multiple positive and negative duties—or the *Multiple Duty View*—played a key role in the IACtHR’s reasoning in its judgment in *Velásquez Rodríguez v Honduras*, even though it was not determinative of the outcome reached by the Court. By recognising that the *ACHR* rights impose positive duties of protection and remedy, as well as negative duties of non-interference, the Court was able to hold that Honduras was in breach of its obligations to Velásquez Rodríguez, even if it had not had a hand in his disappearance, since it had failed to provide for the protection of his rights and had not investigated his disappearance or provided compensation for the violation of his rights. Thus, in its reasoning and conclusion in *Velásquez Rodríguez v Honduras*, the IACtHR committed itself to the *Multiple Duty View* of human rights.

The IACtHR took a similar approach in *Juridical Condition and Human Rights of the Child (Advisory Opinion)*.⁵⁵ The Court was asked to issue guidance on the interpretation of Arts 8 and 25 of the *ACHR*—which deal with, respectively, the right to a fair trial and the right

⁵³ *ibid* para 164.

⁵⁴ *ibid* para 166. I note here that the IACtHR bundles up these latter two duties into one duty—a duty to ensure. I separate them out here as they are substantively two different duties, and are treated as such by other human rights bodies.

⁵⁵ I/A Court H.R., *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/02 of August 28, 2002, Series A, No. 17.

to judicial protection—in the context of their interaction with Art 19—which sets out the rights of children. What motivated this request was uncertainty as to the extent to which states parties can compromise the fair trial and judicial protection rights of children in their best interests.

In issuing its Advisory Opinion, the Court reiterated its endorsement of the *Multiple Duty View*, holding that the Convention rights correlate with (at least) two distinct duties on states: to respect the *ACHR* rights and to ensure them:

[87] This Court has repeatedly established ... the State is under the obligation to respect the rights and liberties recognized therein and to organize public authorities to ensure persons under its jurisdiction free and full exercise of human rights. ... This general obligation requires the States Parties to guarantee the exercise and enjoyment of rights by individuals with respect to the power of the State, and also with respect to actions by private third parties. By the same token, and for the purposes of this Advisory Opinion, the States Party to the American Convention are under the obligation, pursuant to Articles 19 (Rights of the Child) and 17 (Rights of the Family), in combination with Article 1(1) of this Convention, to adopt all positive measures required to ensure protection of children against mistreatment, whether in their relations with public authorities, or in relations among individuals or with non-governmental entities.⁵⁶

It bears emphasising that the Court here again accepted that the *ACHR* rights correlate not only to negative duties of non-interference but also to positive duties to take measures to protect right-holders (including children) from violations of their Convention rights. This shows the Court's commitment to the *Multiple Duty View* of the structure of human rights.

(c) *African Commission on Human and Peoples' Rights*

Turning now to the African continent, the African Commission on Human and Peoples' Rights (African Commission) has taken a similar approach to the rights enshrined in the *African Charter on Human and Peoples' Rights (African Charter)*.⁵⁷ This comes through most clearly in its

⁵⁶ *ibid* para 87.

⁵⁷ African Charter on Human and Peoples' Rights [Banjul Charter] (Nairobi, Kenya, 27 June 1981), 21 I.L.M. 59 (1981), *entered into force* 21 Oct. 1986.

seminal decision in *Social and Economic Rights Action Centre/Centre for Economic and Social Rights v Nigeria (SERAC v Nigeria)*.⁵⁸

For many decades, the Shell Petroleum Development Corporation (Shell)—and its predecessor, The Royal Dutch Shell Group—was involved in the exploitation of oil resources in the Nigeria Delta. In the 1970s the Nigerian government also became involved in Shell’s venture through the state-owned oil company, the Nigerian National Petroleum Company, which was the majority shareholder in a consortium with Shell. The oil extraction activities of Shell caused significant environmental degradation and pollution in the Nigeria Delta—both from avoidable spills and the deliberate release of toxic waste into local waterways. In the 1980s and 1990s it became apparent that many residents of Ogoniland were suffering from serious health conditions caused by the contamination of the water, soil, and air by Shell’s activities. In 1990 the Movement for the Survival of the Ogoni People (MOSOP) launched a campaign against Shell and the Nigerian government calling for compensation for the environmental damage. The protests of MOSOP culminated in the Nigerian government occupying Ogoniland in 1993 and executing nine leaders of MOSOP in 1995, including Ken Saro-Wiwa.

The Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) filed a Communication against the Nigerian government before the African Commission. The complainants claimed that the Nigerian government had been directly involved in both Shell’s oil production activities and the attendant environmental destruction of Ogoniland, which had violated the rights of the people of Ogoniland—including their rights to natural resources, housing, and health. It was argued by SERAC and CESR that the Nigerian government had acquiesced in these violations by placing the legal and military

⁵⁸ Decision Regarding Communication 155/96 (Social and Economic Rights Action Centre/Centre for Economic and Social Rights v. Nigeria), Case No. ACHPR/COMM/A044/1 (Afr. Comm’n Hum. & Peoples’ Rts. May 27, 2002).

powers of the state at the disposal of Shell, and had failed to properly monitor the operations of Shell. The Communication also alleged that the Nigerian government had violated the rights to life and integrity of the person of the Ogoni people through its brutal suppression of MOSOP's protests.

The African Commission found for the complainants, holding that the government of Nigeria had violated the rights of the Ogoni people. In its reasons, the African Commission set out its understanding of the structure of the rights enshrined in the *African Charter*:

[44] Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights—both civil and political rights and social and economic—generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights. These obligations universally apply to all rights and entail a combination of negative and positive duties. ...⁵⁹

The Commission explains that the duty to respect is the primary duty that attaches to each right, and consists in an obligation on the state to abstain from interfering with the relevant rights.⁶⁰ The duty to protect—which consists in an obligation to protect right-holders from the acts of third-parties—is taken to be secondary by the Commission.⁶¹ According to the Commission, each right also generates a tertiary duty to promote and a quaternary duty to fulfil. The former requires the state to make sure that each right-holder can exercise their rights by 'promoting tolerance, raising awareness, and even building infrastructures.'⁶² The latter consists in an obligation on the states 'to move its machinery towards the actual realisation of the rights.'⁶³

This view of the *African Charter* rights—the view that each right generates four duties, which are a mix of negative and positive obligations, or the *Multiple Duty View*—formed a key part of the African Commission's reasons for holding that the government had violated its duties correlative to the human rights of the Ogoni people. Although the *Multiple Duty View* was

⁵⁹ *ibid* para 44.

⁶⁰ *ibid* para 45.

⁶¹ *ibid* para 46.

⁶² *ibid*.

⁶³ *Ibid* para 47.

not determinative of the Commission's conclusion that the government had violated the rights of the Ogonis, endorsing it allowed the Commission to hold the Nigerian government accountable for both its actions and omissions to act. That is, by accepting that each *African Charter* right generates negative duties of non-interference *and* positive duties of protection, promotion, and fulfilment, the African Commission was able to hold that the government had violated the rights of the Ogoni people by breaching its negative duties of non-interference (by attacking and destroying several Ogoni villages) and also by failing to take positive action to protect the rights of the Ogonis (for example, against Shell's degradation of the environment of the Nigeria Delta).

What this demonstrates is that, like the ECtHR and the IACtHR, the African Commission has committed itself to the *Multiple Duty View* of the rights under the *African Charter*.

(d) South African Constitutional Court

What I have set out above all comes from the directives of supranational human rights institutions. But what about domestic courts? Do they endorse the *Multiple Duty View* of human rights?

As I indicated at the beginning of this chapter, I do not purport to provide a comprehensive and complete study of where the *Multiple Duty View* has been influential. Given this—and that I only aim to show here that the *Multiple Duty View* has been influential in human rights practice *in general*, rather than in *all domestic jurisdictions*—a comprehensive and complete review of the domestic jurisdictions that accept this view of the structure of human rights is beyond the scope of this chapter.

I will focus here on the case law of the South African Constitutional Court (SACC). Of those domestic jurisdictions that have an express constitutional human rights framework, the

Constitution of the Republic of South Africa, Act 108 of 1996 (*South African Constitution*) is regarded as ‘pioneering’.⁶⁴ Section 39(b) of the Constitution specifically directs the SACC to consider international law when interpreting the rights enshrined in the constitution. These factors make the South African human rights framework—as interpreted by the SACC—particularly valuable in an assessment of the influence of the *Multiple Duty View* in human rights practice.

The SACC has been particularly clear in its adoption of the *Multiple Duty View*, and *Richter v The Minister for Home Affairs (Richter)*⁶⁵ provides a good example of such a case. *Richter* concerned provisions of the Electoral Act 73 of 1998 (Electoral Act) that placed restrictions on the ability of South African citizens to vote when they were registered to vote in South Africa but were overseas at the time of the relevant election. This was the position of the applicant, Willem Stephanus Richter. Richter was registered to vote in South Africa but was to be working as a teacher in the United Kingdom at the time of the 2009 elections. Section 33, Electoral Act prohibited him from voting in these circumstances.

Richter commenced an action claiming that s 33 violated his rights under the *South African Constitution*—most notably, his s 19 right to vote. After he was successful before the Pretoria High Court, Richter sought confirmation of the invalidity of s 33, Electoral Act before the SACC. The Minister for Home Affairs opposed this application and sought to appeal against the judgment of the High Court.

The SACC confirmed the orders of the High Court in their essential particulars, agreeing that s 33, Electoral Act violated the s 19 right to vote. In reaching this conclusion, O’Regan J

⁶⁴ This is noted by Sandra Fredman. See Fredman, *Human Rights Transformed* (n 36) 3.

⁶⁵ *Richter v The Minister for Home Affairs* [2009] ZACC 3.

(writing for the Court) held that the right to vote does not only impose a duty to refrain from interfering with a right-holder's ability to vote:

[53] ... [T]he right to vote imposes an obligation upon the state not merely to refrain from interfering with the exercise of the right, but to take positive steps to ensure that it can be exercised. ...⁶⁶

In accepting in its reasoning that the right to vote corresponds to both a negative duty not to interfere in the exercise by right-holders of their right to vote and a positive duty to take steps to ensure that right-holders can exercise their right to vote, the SACC committed itself to the *Multiple Duty View*. It recognised that there are (at least) two duties that correlate with the right to vote enshrined in the *South African Constitution*. The Court's endorsement of the *Multiple Duty View* was essential to its conclusion that s 33, Electoral Act's limitation on the ability of South African citizens to vote when overseas violated the right to vote in s 19. By holding that the right to vote imposes both a duty not to interfere with right-holders' exercise of that right *and* a duty to take positive steps to ensure that it can be exercised, the Court was able to hold that the government was required to provide mechanisms for overseas citizens to vote in elections.

(e) Conclusion

What I have set out above is a snapshot of some of the cases and jurisdictions that are committed to the *Multiple Duty View* of the structure of human rights. This should suffice to show that the *Multiple Duty View* has been influential in the reasoning of and outcomes arrived at by authoritative human rights institutions across a wide range of jurisdictions—at the international, supranational, and domestic levels.

⁶⁶ *ibid* para 53.

B *Why the Multiple Duty View has been so influential*

Why then are human rights bodies at pains to endorse the *Multiple Duty View* of the structure of human rights? What difference do they think it makes to accept that each human right correlates with multiple duties rather than just one? Does this view have any basis in the text of human rights instruments? In what follows I attempt to answer some of these questions.

1 *Adopting the Multiple Duty View is thought to make a difference*

Many human rights courts like the ECtHR⁶⁷ and the IACtHR⁶⁸ endorse the principle of effectiveness interpreting the rights in human rights instruments. That is, they take human rights instruments to be intended to ‘guarantee not rights that are theoretical or illusory but rights that are practical and effective.’⁶⁹ When we look at the way that the *Multiple Duty View* has been enlisted in the cases above, we can see that human rights bodies take the view that it is only by acknowledging that the rights recognised in human rights instruments impose multiple duties that those rights can be effectively enjoyed. Courts take the view that failing to recognise that human rights correspond to multiple duties (including a positive duty to protect those rights) leaves those rights open to frustration and makes them into ineffective instruments for vindicating the fundamental interests of their holders.

This reason for adopting the *Multiple Duty View* is most clearly articulated in the ECtHR’s reasons in the *Belgian Linguistic Case (No 2)*.⁷⁰ In that case the ECtHR held that recognising that the right to education imposes only a negative duty of restraint would render that right ineffective. Such a negative duty is clearly envisaged by Art 2, *ECHR Protocol 1*. But as the Court states, ‘the right to education would be meaningless if it did not imply, in favour

⁶⁷ *Markin v Russia* (2013) 56 EHRR 8, 308 para OI-7 (Judge de Albuquerque).

⁶⁸ I/A Court H.R., *Barrios Altos v Peru*, Judgment of September 3, 2001, Series C, No. 83, para 17.

⁶⁹ *Airey v Ireland* (1980) 2 EHRR 305, 314 para 24.

⁷⁰ *Belgian Linguistic Case (No 2)* (n 41).

of its beneficiaries, the right to be educated in the national language or in one of the national languages'.⁷¹

While the endorsement of the *Multiple Duty View* in the *Belgian Linguistic Case (No 2)* was not determinative of the outcome of that case, it has been considered to be critical in many of the other cases discussed above. For example, in *X and Y v The Netherlands*, the ECtHR held that the Art 8 protection against arbitrary interference in the lives of right-holders by public authorities cannot be confined to a negative duty of non-interference but also includes a duty to take measures to ensure respect for the private lives of right-holders. The ECtHR's endorsement of the *Multiple Duty View* in this case allowed it to hold that The Netherlands had violated the applicants' Art 8 rights, despite it having played no active role in interfering in the applicants' private lives. The Court's acceptance that the Art 8 right correlates with a negative duty not to interfere in right-holders' private lives as well as a positive duty to secure respect for the private lives of right-holders opened the way for it to hold that The Netherlands was under a duty to ensure that those accused of rape can be prosecuted for a criminal wrong.

Similarly, in *Richter*, the SACC considered that the right to vote would be useless if it imposed only a duty not to interfere with right-holders' exercise of that right and no positive duty to set up an electoral system and to call elections. It was only by endorsing the *Multiple Duty View*—and accepting that the right to vote correlates with both kinds of duties—that the Court could conclude that the applicant's right to vote had been violated, even though the South African government had not actively interfered with the applicant's right to vote.

If any further evidence of the *Multiple Duty View*'s perceived essentiality is needed it can be found in the ECtHR's decision in *Plattform 'Ärzte für das Leben' v Austria*.⁷² Plattform was an association driven by religious principles, including being opposed to abortion. Plattform

⁷¹ *ibid* 281 para 3.

⁷² *Plattform 'Ärzte für das Leben' v Austria* (1991) 13 EHRR 204.

decided to hold a religious service on 28 December 1980 at Stadl-Paura Church in Upper Austria, following which there would be a march to a doctor's surgery that performed abortions. Plattform gave notice of its plans to the Austrian police authority—in accordance with s 2, Assembly Act 1953—and was granted permission to use the public highway for its march. The Austrian police banned two other pro-abortion demonstrations that were to be held at the same time and place. Plattform subsequently changed its plans, opting for a new route. The Austrian police indicated to Plattform that the new route was not suited to crowd control. The police did not refuse to provide protection to Plattform's demonstration, but they did suggest that it would be impossible to prevent counter-demonstrators disrupting the planned mass and march. As it turned out counter-demonstrators did indeed interfere with Plattform's mass and the march and were not dispersed by police. However, riot control units were able to separate the opposing groups before any violence broke out.

On 21 January 1981 Plattform lodged a disciplinary complaint against the Austrian police. This was eventually dismissed by the Austrian Constitutional Court. Plattform was subsequently given permission to conduct a further demonstration in Salzburg on 1 May 1982, and a demonstration by the Socialist Party on the same day was cancelled because notice of the demonstration was given after the Plattform's demonstration was registered. Again, there were significant counter-demonstrations, but police units formed a cordon sanitaire to protect the Plattform demonstrators.

Plattform considered that the Austrian police had violated the rights of its members by failing to provide adequate protection during the 1981 and 1982 demonstrations. It applied to the European Commission on Human Rights, and subsequently the ECtHR, complaining of a violation of its members' *ECHR* rights, in particular the Art 11 right to assembly. The Austrian government resisted Plattform's claims, arguing that Art 11 did not create any positive obligation

to protect demonstrations, being directed at protecting individuals from direct interference by the state.

Though the ECtHR ultimately found that Austria had not violated the Art 11 rights of the members of Plattform, it rejected the government's claims about that provision. The Court held that the right to freedom of assembly is not just a negative right to non-interference but also imposes certain positive obligations on the state:

[32] ... Genuine, effective freedom of peaceful assembly cannot ... be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11 (art. 11). Like Article 8 (art. 8), Article 11 (art. 11) sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be⁷³

As the extract from the Court's reasons should make clear, the ECtHR endorsed the *Multiple Duty View* of human rights in *Plattform*. What this extract also makes clear is that the ECtHR did so because it considered that only the *Multiple Duty View* could make the Art 11 right into a meaningful and useful protection of the interests underlying it. Accepting that the right to assembly corresponds only to a negative duty not to interfere with demonstrations would not provide to right-holders '[g]enuine, effective freedom of peaceful assembly'.

These cases illustrate the kind of difference that human rights institutions think accepting the *Multiple Duty View* makes to human rights situations. It is seen as fundamental to the ability of human rights bodies to reach outcomes in which the rights of right-holders are truly given effect.

2 *The textual basis for the Multiple Duty View in human rights instruments*

So far in this chapter I have examined a sample of decisions of human rights bodies to show, first, that the *Multiple Duty View* has been influential in human rights practice and, second, to offer some explanation as to why it has been influential in that practice. As part of this second

⁷³ *ibid* 210 para 32.

aim, aside from just considering what human rights bodies think they are doing when adopting the *Multiple Duty View* in their reasoning and outcomes, it is important to note that the *Multiple Duty View* appears to make the best sense of the rights enshrined in human rights instruments.

There are two features of the framing of the rights in the *ICCPR* and the *ICESCR* that appear to make them fit best with the *Multiple Duty View* of the structure of human rights. First, the *ICCPR* and the *ICESCR* enshrine only a small number of human rights. Second, the *ICCPR* and *ICESCR* rights are (in general) framed at a high level of generality. The combination of the small number of rights enshrined in these instruments and their generality means that, if these rights are to provide the kind of strong and comprehensive protection of right-holders' interests that human rights are supposed to provide, they must correspond to many different and more specific duties.

Take, for example, the *ICCPR* Art 6 right to life:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.⁷⁴

Article 6 sets out one of the few rights protected by the articles of the *ICCPR*. It enshrines a very general right to life which gives few specifics about exactly what this right requires of duty-bearers. While Art 6(1) does say that the right to life must be protected by law, and that it entitles right-holders not to be arbitrarily deprived of life, it goes no further than this—despite the fact that properly protecting a right-holder's interest in their life inevitably requires much more specific action than this. Given its wide scope, it appears to make the best sense of the Art 6 right to life to take it as correlating to multiple duties which set out exactly what it takes to protect a right-holder's interest in life.

⁷⁴ International Covenant on Civil and Political Rights (New York, 16 Dec. 1966) 999 U.N.T.S. 171 and 1057 U.N.T.S. 407, *entered into force* 23 Mar. 1976.

Something similar can be said about Art 11, *ICESCR*—which again is one of the few rights enshrined in the *ICESCR*:

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.⁷⁵

Like Art 6, *ICCPR*, the Art 11 right is framed very broadly, as a right to an adequate standard of living. However, unlike Art 6, Art 11 does give some further detail about what this broad right requires—‘adequate food, clothing and housing, and ... the continuous improvement of living conditions’. Even so, these further particularisations of the right to an adequate standard of living leave much unanswered. It is left open what it means to give someone adequate food, provide them with clothing, and to continuously improve their living conditions. Again, given its framing, it appears to make the best sense of Art 11 to take it as corresponding to multiple duties which prescribe the specific act-types duty-bearers are obliged to perform in order to respect this right.

The rights contained in the *ECHR* reflect these same two features: there are only a limited number of rights that are enshrined in that instrument, and each is framed at a fairly high level of generality. For example, consider the Art 2 right to life and the Art 5 right to liberty and security of person:

Article 2 – Right to life

1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
...

Article 5 – Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty ...
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and

⁷⁵ International Covenant on Economic, Social and Cultural Rights (New York, 16 Dec. 1966) 993 U.N.T.S. 3, *entered into force* 3 Jan. 1976.

- shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.⁷⁶

Like Art 6, *ICCPR*, Art 2, *ECHR* is framed widely as a ‘right to life’. In addition, like Art 6, Art 2 leaves it largely undefined what exactly the right to life requires of duty-bearers. It is framed in such a general way that its corresponding duties cannot be read off the face of the right. Article 2 then appears to best fit with the *Multiple Duty View* of the structure of human rights, as such a view allows for the specifics of the right’s content to be spelled out by multiple correlative duties.

Article 5 is a little different. It enshrines two rights—a right to liberty and a right to security of person. Article 5(1) frames the right to security of person in much the same way as the right to life. It is left undefined what exactly is the content of that right. As above with the right to life, this generality of the right to security of person in Art 5(1) means that it appears to fit best with the *Multiple Duty View*. Taking that right to correlate with multiple different duties appears to make sense of its abstract framing and protective purpose, and to spell out its content with specific duties.

However, the same cannot be said of the right to liberty. Article 5 paras (2)-(5) provide various particularisations of the right to liberty. While the provision is consistent with the *Multiple Duty View*—such that Article 5 paras (2)-(5) provide specifications of the duties that correlate with the right to liberty—it also makes sense of the provision to take each of paragraphs

⁷⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 Nov. 1950), 312 E.T.S. 5, as amended by Protocol No. 3, E.T.S. 45; Protocol No. 5, E.T.S. 55; Protocol No. 8, E.T.S. 118; and Protocol No. 11, E.T.S. 155; *entered into force* 3 Sept. 1953 (Protocol No. 3 on 21 Sept. 1970, Protocol No. 5 on 20 Dec. 1971, Protocol No. 8 on 1 Jan 1990, Protocol 11 on 11 Jan 1998).

(2)-(5) as setting out a different iteration of the right to liberty, such that each of these paragraphs creates its own right-duty pair.

Something similar can be said of the rights enshrined in the *South African Constitution*. The first thing to note here is that the points that I have made above in respect of the *ICCPR*, the *ICESCR*, and the *ECHR* apply equally to the rights enshrined in the *South African Constitution*. Take the s 11 right to life and s 27 right to health care, food, water and social security:

11. Life.

Everyone has the right to life.

27. Health care, food, water and social security.

- (1) Everyone has the right to have access to - ...
- (b) sufficient food and water; ...⁷⁷

The s 11 right to life is framed similarly to how it is expressed in the *ICCPR* and the *ECHR*. Section 11 frames the right in a general manner, such that its corresponding duties cannot be read off its face. Similarly, s 27(2) frames the right to food in a general manner, which gives little indication of what the right actually requires of duty-bearers. These features of the provisions of the *South African Constitution* mean that, again, the rights it enshrines appear to be made best sense of by the *Multiple Duty View*. The abstract rights contained in that instrument can be given specific content by multiple correlative duties.

The second thing to notice is that there is an additional reason why the *Multiple Duty View* appears to make sense of the rights enshrined in the *South African Constitution* that is unique to that instrument. Section 7(2) of the *South African Constitution* provides that '[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights.' Section 7(2) sets out in general what applies to each of the rights in the *South African Constitution* in particular—

⁷⁷ Constitution of the Republic of South Africa, Act 108 of 1996.

that each right corresponds to duties on the state to respect that right, to protect that right, to promote that right, and to fulfil that right.⁷⁸ As such, the *South African Constitution* specifically incorporates the *Multiple Duty View* into its provisions.

Having looked closely at some of the provisions from key human rights instruments, what should be clear is that the *Multiple Duty View* appears to best explain the small number and abstract framing of the rights enshrined in those instruments. This in turn provides an explanation for why the *Multiple Duty View* has been so influential in the reasoning of and outcomes arrived at by the human rights bodies that apply these instruments.

C Conclusion

To take stock then, what I hope to have established in this chapter are two things: first, that the *Multiple Duty View* has been influential in authoritative human rights institutions, across a wide range of jurisdictions; and, second, that the reason why the *Multiple Duty View* has been influential in human rights practice is because human rights bodies think that its adoption is essential to the effectiveness of the human rights enshrined in key human rights instruments, and because the *Multiple Duty View* appears to make the best sense of the small number and general framing of the rights in those instruments.

To this end, in Part A I demonstrated how the *Multiple Duty View* shows up in the reasoning of and outcomes arrived at by the UN human rights treaty bodies, the ECtHR, the IACtHR, the African Commission, and the SACC. In making good my second aim, in Part B I examined some decisions of key human rights courts to show that those courts consider the adoption of the *Multiple Duty View* to make the difference between rendering effective and ineffective the rights enshrined in key human rights instruments. I also set out how the *Multiple Duty View* appears to best explain the rights in key human rights instruments, because of the

⁷⁸ See the discussion of *SERAC v Nigeria* at Section A.2(c) above for an explanation of what these duties require.

small number of rights enshrined in those instruments and because of their wide framing. In the next chapter, I turn to consider how some theorists of human rights have endorsed and developed the *Multiple Duty View* of the structure of human rights.

2

Three versions of the *Multiple Duty View*

IN THE PREVIOUS chapter I explored the view of the structure of human rights taken in human rights practice. I made two key claims: first, that the *Multiple Duty View* of the structure of human rights has been influential in authoritative human rights institutions, across a wide range of jurisdictions; and second, that the *Multiple Duty View* has been influential in human rights practice because its adoption is thought to be essential to the effectiveness of the human rights enshrined in key human rights instruments, and because it appears to make the best sense of the framing of the rights enshrined in those instruments.

In this chapter I explore the *Multiple Duty View* as it has been adopted and developed by theorists of moral human rights. Various theorists accept the *Multiple Duty View* of the

structure of rights,¹ but the accounts of Henry Shue,² John Tasioulas,³ and Rowan Cruft⁴ are perhaps best known for endorsing this view in the domain of moral human rights.⁵ Although their accounts of the structure of moral human rights vary in material respects, what unites them is a commitment to the basic idea that each human right correlates with (or has the potential to correlate with) multiple duties.

The accounts of Shue, Tasioulas, and Cruft also share in common their focus on *moral* human rights. That is, what these theorists are concerned with are rights that exist separately and independently of human action and recognition, and which meet the conditions for their being classified as *human* rights.⁶ Such rights are to be distinguished from legal human rights

¹ In the domain of legal rights, see Neil MacCormick, 'Rights in Legislation' in PMS Hacker and Joseph Raz (eds), *Law, Morality, and Society: Essays in Honour of H.L.A. Hart* (Clarendon 1977) 206 and Carl Wellman, *Real Rights* (OUP 1995) 8. As to moral (and legal) rights, see Joseph Raz, *The Morality of Freedom* (OUP 1986) 170-1; Jeremy Waldron, 'Rights in Conflict' (1989) 99(3) *Ethics* 503, 510-12.

As Raz states, '[m]any rights ground duties which fall short of securing their object, and they may ground many duties not one. A right to personal security does not require others to protect a person from all accident or injury. The right is, however, the foundation of several duties, such as the duty not to assault, rape or imprison the right-holder.'

² Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton University Press 1980) (in this chapter abbreviated as *BR I* to mark the first edition).

³ John Tasioulas, 'The Moral Reality of Human Rights' in Thomas Pogge (ed), *Freedom from Poverty as a Human Right: Who owes what to the very poor?* (OUP 2007); John Tasioulas, 'Taking Rights out of Human Rights' (2010) 120(4) *Ethics* 647.

⁴ Rowan Cruft, 'Human rights as rights' in Gerhardt Ernst and Jan-Christoph Heilinger (eds), *The Philosophy of Human Rights: Contemporary Controversies* (De Gruyter 2012).

⁵ Notable omissions from this list include Jeremy Waldron and James Nickel. In a draft paper, Waldron applies both Raz's multiple duty view and his own waves of duties thesis to socio-economic rights, claiming that 'their duties might be multiple and multi-faceted.' Waldron argues that the *Multiple Duty View* '... is attractive on many grounds besides its ability to help in our thinking about social and economic rights. (It explains why the idea of a right is neither redundant nor eliminable; it gives a better account of negative rights, or civil and political rights than the strict static approach; and it puts us in a much better position to deal with conflicts of rights.)'. He goes on to note that, '[m]any human rights theorists are unaware of the details of the [*Multiple Duty View*]', and declares that '[i]t is time we brought that state of affairs to an end'. See Jeremy Waldron, 'Duty-bearers for Positive Rights' (2014) NYU School of Law, Public Law Research Paper No 14-58, 8-12 <<https://ssrn.com/abstract=2510506>> accessed 14 February 2019. However, Waldron's paper remains in draft form, his claims are formally limited to socio-economic rights, and his arguments are not as fully fleshed-out as those of Shue, Tasioulas, and Cruft. This is why I focus on the latter three theorists here.

Similarly, James Nickel's claims about the structure of human rights are not well-developed. He hints at his preference for the *Multiple Duty View* when he says that, '[t]he normative content of [a] right specifies or sketches the *duties*, liabilities, powers, and immunities of governments ...': James Nickel, 'Goals and Rights: Working Together?' in Malcolm Langford, Andy Sumner, and Alicia Ely Yamin (eds), *The Millennium Development Goals and Human Rights: Past, Present and Future* (CUP 2013) 41 (emphasis added).

⁶ While all moral human rights are moral rights, not all moral rights are human rights. Human rights are a subset of moral rights that have some distinctive quality that other moral rights lack. Various accounts have been given of what distinguishes moral human rights from other kinds of moral rights. Some candidate explanations include that human rights are: rights that humans have simply in virtue of being human (James Griffin, *On Human Rights* (OUP 2008)); rights whose violation licences infringements of sovereignty (Joseph Raz, 'Human Rights without

(which exist as part of international human rights law or human rights law in-general), which require some institutional action to be brought into existence.⁷ As such, Shue, Tasioulas, and Cruft are not necessarily concerned with the structure of the human rights that we find in positive law (at the international, supranational, or domestic level)—although, human rights law does have some bearing on their accounts.

In what follows I outline in detail each of the accounts of the structure of human rights of Shue, Tasioulas, and Cruft. I begin with Shue's *Tripartite Duty Thesis*, which holds that each human right corresponds to three duties: a duty not to deprive the right-holder of the subject of their right; a duty to protect the right-holder against deprivations of the subject of their right; and a duty to aid the right-holder when deprived of the subject of their right. Next I discuss Tasioulas's *Dynamic Duty Thesis*. This version of the *Multiple Duty View* takes each human right to be the ground of whatever feasible duties will serve to protect the interests of the right-holder in the circumstances in which they find themselves. Finally, I will outline Cruft's *Dynamic Normative Factor Thesis*. Like Tasioulas, Cruft takes each human right to be the ground of multiple changing duties, which serve to protect important features of the right-holder. However, Cruft's account is more expansive than Tasioulas's since it holds that human

Foundations' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010); Joseph Raz, 'Human Rights in the Emerging World Order' in Rowan Cruft, S Matthew Liao, and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015)); or rights that are constitutive of human dignity (Thomas Nagel, 'Personal Rights and Public Space' (1995) 24(2) *Philosophy & Public Affairs* 83, 93; John Gardner, "'Simply in Virtue of Being Human": The Whos and Whys of Human Rights' (2008) 2(2) *Journal of Ethics & Social Philosophy* 1, 21–2). I discuss some of the claims made by Shue, Tasioulas, and Cruft as to the distinctiveness of human rights below.

⁷ The way these theorists carve up the subject matter of their inquiry—into legal human rights and moral human rights—favours a positivist theory of law. That is, the proposition that human rights can be divided into moral human rights (which obtain independently of human action or recognition) and legal human rights (which obtain in virtue of some institutional action) will be acceptable to legal positivists—at least, those who agree that there are in fact moral human rights—given that they claim that something's qualifying as law in any legal system depends on its sources rather than its merits as being good or bad, consistent with morality or inconsistent with morality. See John Gardner, 'Legal Positivism: 5½ Myths' (2001) 46(1) *American Journal of Jurisprudence* 199, 201. Anti-positivists by contrast take law and legal rights to be a subset of morality, which means that they will not necessarily recognise a strict divide between the domains of legal human rights and moral human rights. Despite this, anti-positivists do recognise that institutional action (and not just morality) is among the determinants of the content of the law and legal rights, and so may recognise some divergence between legal human rights and moral human rights. See Ronald Dworkin, *Justice for Hedgehogs* (HUP 2011) 405–6; Mark Greenberg, 'The Moral Impact Theory of Law' (2014) 123(5) *Yale Law Journal* 1288.

rights can ground not just duties but multiple normative factors, depending on the circumstances.

To be clear I do not suggest that what Shue, Tasioulas, and Cruft say is to be taken as a comprehensive treatment of the *Multiple Duty View*. My discussion of their work is intended simply to provide examples of how those that endorse the Multiple Duty View tend to think about the structure of human rights. This discussion forms the basis for certain challenges I pose for the *Multiple Duty View* in Chapter Four.

A *Shue's Tripartite Duty Thesis*

Shue's *Tripartite Duty Thesis* is perhaps the most famous of the three versions of the *Multiple Duty View* that I set out above. His claim that each human right generates duties to avoid depriving, to protect, and to aid is the basis of the 'respect, protect, fulfil' formula that has become one of the mainstays of the human rights enterprise.⁸ Shue's account is also the longest standing. So it is natural to begin with his account of the structure of human rights.

1 *Shue's definition of a moral right*

Before getting into the details of Shue's claims about the structure of human rights, it is necessary to examine his definition of a moral right in some detail, as it underpins much of his thinking about moral *human rights*. For Shue:

A moral right provides (1) the rational basis for a justified demand (2) that the actual enjoyment of a substance be (3) socially guaranteed against standard threats.⁹

1. *Rational basis for a justified demand.* Turning first to the '*rational basis for a justified demand*' part of the definition. On Shue's account, that someone has a moral right to something

⁸ See Committee on Economic, Social and Cultural Rights, General Comment 12, Art. 11 (Twentieth session, 1999), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. E/C.12/1999/5 (1999) para 15; Henry Shue, 'The Interdependence of Duties' in Philip Alston and Katarina Tomaševski (eds), *The Right to Food* (Martinus Nijhoff 1984) 84.

⁹ Shue, *BR1* (n 2) 13.

means that they have reasons—‘especially compelling reasons’—on their side for demanding that thing from someone else.¹⁰ To be clear, Shue does not appear to entertain the thought that having a moral right gives the right-holder a reason to demand the substance of the right.¹¹ Shue claims that ‘to have a right is *to be in a position* to make demands of others, and to be in such a position is, among other things, for one’s situation to fall under general principles that are good reasons why one’s demands ought to be granted.’¹² That is, on Shue’s account, having a moral right means that the right-holder has some standing to make demands of the duty-bearer that they provide the substance of the right. Having a moral right to φ means—for Shue—that the right-holder is in a position vis-à-vis the duty-bearer to demand that the right-holder’s ability to φ be secured for them. Nothing about this proposition is inconsistent with the right-holder having discretion as to whether they exercise their right and make demands of the duty-bearer. The mere standing of a right-holder to make demands of the duty-bearer does not entail—without more—that the right-holder acts contrary to right reason if they do not assert their right and make demands of the duty-bearer. So, Shue’s account seems compatible with the claim that the existence of a right does not necessarily give its bearer any reason to exercise it or not.

In respect of the ‘*justified demand*’ component of the definition, Shue explains that ‘a demand for social guarantees has been justified when good enough reasons have been given for it’.¹³ So, according to Shue, a justified demand is one that is sufficiently supported by reason. This underscores the close connection—on Shue’s definition of a moral right—between rights and duties, on the one hand, and reasons, on the other.

¹⁰ *ibid.*

¹¹ As I discuss in some detail in Chapter Three, Section B.1(b), rights themselves do not (except in some limited circumstances) give their holders reasons for action. Rights (and the duties to which they correlate) give duty-bearers reasons for action in respect of the right-holder. Holding a right makes it the case that the right-holder has a particular moral authority to hold the bearer of its correlative duty accountable for the performance of that duty. However, the fact of holding a right does not necessarily give its holder a reason for asserting the right. It may actually be morally wrong to assert a right in some circumstances.

¹² Shue, *BR1* (n 2) 13 (emphasis added).

¹³ *ibid.*

In addition, Shue appears to have in mind here demands that *could* be made by a right-holder if they choose to stand on their moral right. It does not appear that Shue takes a moral right only to obtain when a right-holder *actually* makes a justified demand of a duty-bearer. It is enough for Shue's account that the putative right-holder be in a position where they are entitled to make demands of the duty-bearer. The obtaining of a moral right is not conditional on such demands being made by the putative right-holder.

2. *Actual enjoyment of a substance.* A moral right (on Shue's account) is a claim to be able to enjoy something else—like liberty, physical security, or subsistence—which Shue calls 'a substance', or the 'substance of the right'. That is, as Shue explains, '[a] right is not a right to enjoy a right'.¹⁴ To enjoy a right is to enjoy that other thing that makes up its substance—liberty, physical security, or subsistence—rather than simply enjoying the fact that one has a right or has the status of a right-holder. For example, enjoying something like physical security means not being confronted with threats to your bodily integrity, such as assault, rape, or murder.

3. *Socially guaranteed.* That a moral right gives rise to a justified demand that the enjoyment of a substance be '*socially guaranteed*' means for Shue that there must be someone with an obligation to ensure that the right-holder enjoys or continues to enjoy the substance of their right. As Shue explains:

A right is ordinarily a justified demand that other people make some arrangements so that one will still be able to enjoy the substance of the right even if—actually, *especially* if—it is not within one's own power to arrange on one's own to enjoy the substance of the right.¹⁵

What Shue means here is that moral rights make mandatory some action by someone other than the right-holder to ensure that the right-holder enjoys the substance of their right, rather than leaving it up to the right-holder to use their own means to ensure that they enjoy the substance of their right. That *A* can get access to α at t' via her own means does not necessarily mean that

¹⁴ *ibid* 15.

¹⁵ *ibid* 16 (emphasis in original).

A has a *right to α* . *A* only has a *right to α* where *B* is under an obligation to *ensure* that *A* can access α , so that *A*'s enjoyment of α is not solely dependent on whether *A* can herself get hold of α .

Similarly, Shue notes that 'a right has been guaranteed only when arrangements have been made for people with the right to enjoy it. It is not enough that at the moment it happens that no one is violating the right.'¹⁶ That *A* happens to enjoy being able to φ at t' does not necessarily mean that *A* has a right to φ that has been *guaranteed or secured*. It could be entirely contingent on the mood of *B* that *A* enjoys being able to φ , and *B* might be free to deprive *A* of her ability to φ at any moment. For Shue *A* will only have a right to φ that has been guaranteed if it is the case that *B* is under an obligation to not to deprive *A* of her enjoyment of φ and to ensure that *A* continues to enjoy being able to φ . That is, Shue takes moral rights to impose categorical duties—duties that do not depend on what the duty-bearer's goals or inclinations are at any one time—on others variously not to interfere with the right-holder's enjoyment of the substance of that right, to put measures in place to prevent violations of that right, and to restore the right-holders' right when it is violated. For Shue these duties are 'correlative' to rights of right-holders.¹⁷

4. *Standard threats*. Finally, the notion of a 'standard threat' is meant to capture the idea that the demands that can be made by right-holders, and the obligations imposed by such demands, are not unlimited or entirely at large. Rights only need to be secured against standard threats—threats that are real, foreseeable, avoidable, and remediable, and whose materialisation would prevent or substantially hinder the enjoyment of the substance of the right.¹⁸

¹⁶ *ibid* 16. This comes very close to the republican concept of freedom as non-domination: Philip Pettit, *Republicanism: A Theory of Freedom and Government* (OUP 1999) 24.

¹⁷ Shue, *BR 1* (n 2) 16.

¹⁸ *ibid* 32-3.

2 *Basic and non-basic rights*

Shue avoids the term ‘human rights’ in *Basic Rights*.¹⁹ Instead, he divides the category ‘moral rights’ into ‘*basic*’ and ‘*non-basic*’ rights. Basic rights make up ‘the morality of the depths. They specify the line beneath which no one is allowed to sink’.²⁰ That is, these kinds of rights secure the things and treatment that people must be accorded as a moral minimum. What basic rights secure for their holders are the kinds of things that right-holders need if they are to enjoy any other kind of right. What this means is that the protection and fulfilment of a basic right cannot be traded-off to achieve the protection and fulfilment of some non-basic right. Such a strategy is nonsensical on Shue’s picture of moral rights, since the non-fulfilment of a basic right means that no other rights can be fulfilled either. As Shue states, ‘[w]hen a right is genuinely basic, any attempt to enjoy any other right by sacrificing the basic right would be quite literally self-defeating, cutting the ground from beneath itself.’²¹

Non-basic rights are then every other kind of moral right that is not a basic right. Non-basic rights are the kind of rights that depend on the fulfilment of other rights in order to themselves be effectively enjoyed. If a right to φ is necessary for the enjoyment of a right to ψ , then that right to ψ is a non-basic right. Unlike basic rights, the fulfilment and protection of non-basic rights can indeed (and probably ought to) be sacrificed to achieve the fulfilment and protection of basic rights.

It might appear that Shue’s definition of a ‘basic right’ is overinclusive—and that all or most moral rights will end up being basic rights—because we should be able to find of most rights that their fulfilment is necessary for the enjoyment of some other right. However, although he is not abundantly clear on this, Shue seems to want to classify as ‘basic rights’ all

¹⁹ Despite this, Shue’s work is routinely cited in discussions about human rights, with his label ‘basic rights’ being taken to refer to the same thing as the label ‘human rights’.

²⁰ Shue, *BR I* (n 2) 18.

²¹ *ibid* 19.

those moral rights that are both: (1) necessary for the enjoyment of other rights, *and* (2) which do not depend for their enjoyment on the fulfilment of any other right. This second condition for a basic right makes the best sense of Shue's claim that basic rights are *morally fundamental* and 'essential to the enjoyment of *all other rights*.'²² A right's being essential or necessary to the enjoyment of *all other rights* excludes the possibility that there remains any right whose fulfilment is necessary to the enjoyment of the first (basic) right. For something to be a basic right, then, the relation of essentiality or necessity must run in one direction only—from the putative basic right to all other moral rights. That right *Y* requires for its enjoyment by right-holders the fulfilment of right *X* automatically makes right *Y* a non-basic right, even if right *Y*'s fulfilment is necessary for the enjoyment of right *Z*. But if there is no other right whose fulfilment is necessary for right-holders to enjoy right *X*, but right *X* is necessary to the enjoyment of right *Y*, then right *X* is a basic right.

Shue does not commit himself to comprehensively cataloguing all basic rights but he claims that this category includes at least rights to liberty, physical security, and subsistence.²³ So, it seems that at the very least that the category of 'human rights' and Shue's category of 'basic rights' are going to overlap.

3 *Three duties, one right*

When it comes to the duties to which moral rights correlate, Shue claims that all basic rights (and *most* moral rights) have both positive *and* negative duties. Shue's account of the structure of rights is largely reactive—it aims to show that the claim that human rights can be classified into positive and negative varieties²⁴ (and from there into urgent and less urgent rights,

²² *ibid* 19 (emphasis in original).

²³ *ibid* 9.

²⁴ See eg Onora O'Neill, 'The dark side of human rights' (2005) 81(2) *International Affairs* 427, 428.

demanding and less demanding rights) is misconceived. Shue's argument goes something like this.

Take the classic right to physical security. As it is typically understood, if someone has a right to physical security, this means that they have a right not to have their physical security undermined—or, at least, a right not to have their physical security undermined without a good reason (such as self-defence). This is a straightforwardly negative right, which correlates with a straightforwardly negative duty—not to interfere with right-holders' physical security without good reason. My right to physical security correlates with duties on all others not to interfere with my physical security—that is, it requires duty-bearers to refrain from assaulting me and doing other things that might undermine my physical security.

But—so Shue contends—this kind of negative duty starts to look quite useless on its own. Sure, everyone might have duties not to interfere with my physical security, but what is stopping them from doing so? After all, people are fallible—arguments happen, tempers get lost, and conflicts break out—and they often like to push boundaries.

What Shue claims is that it just does not make sense to talk about there being a right to physical security that only requires duty-bearers not to undermine right-holders' physical security:

[I]t would be very misleading to say that physical security is a negative matter of other people's refraining from violations. Ordinarily it is instead a matter of some people refraining from violations and of third parties being prevented from violations by positive steps taken by first and second parties.²⁵

That is, Shue claims that the right to physical security (and the correlative duty to avoid depriving²⁶ right-holders of their physical security) only starts to look meaningful if it is backed-up by another duty—this one positive in character—a duty to put mechanisms in place to

²⁵ Shue, *BR1* (n 2) 39.

²⁶ Shue frames this duty as one to 'avoid depriving' rather than 'not deprive' to capture the negative character of this duty while also acknowledging that 'duties that are as nearly negative as possible still demand some effort': Shue, 'The Interdependence of Duties' (n 8) 84.

protect against violations of the negative right to avoid depriving right-holders of their physical security.

That is, not only does the right to physical security correlate with a negative duty to avoid depriving right-holders of their physical security, but it also correlates with a positive duty to set up institutions (like police forces, courts, prisons, and so on) that can protect right-holders from their rights being violated. Shue acknowledges that it might be that the core of the right to physical security is its correlative obligation on all others not to deprive right-holders of their physical security. But ‘the core of the right does not contain its whole structure.’²⁷ We live in an imperfect world, in conditions of relative scarcity, and in which people are fallible, desperate, and violate their moral obligations on occasions. For the right to physical security to be meaningful, it requires protection against those who violate the negative duty that correlates with it—and so we get the positive duty to protect against such violations.

According to Shue, this reasoning also explains why the right to physical security correlates with a third duty—the duty to aid. The possibility of rights violations brings with it not just duties to protect against violations but duties to aid those who have been deprived of their physical security and to restore their physical security when their right has been violated—when non-deprivation and protection both fail to deliver the right-holder the substance of their right. So, according to Shue, in addition to the positive duty to protect, the right to physical security also correlates with a positive duty to aid.

Shue claims that something similar can be said about subsistence rights. As it is ordinarily understood, the right to subsistence correlates with a positive duty of provision. My right to subsistence correlates with a duty on others to provide me with enough food to ensure my subsistence. But, again, Shue says that this positive right-duty pair is ineffective on its own.

²⁷ Shue, *BR1* (n 2) 39.

Consider:

Careless Sharecropper. Alvin lives in a small village in the state of Utopia and owns a large tract of land that has belonged to his family for several generations. Alvin uses the land—as his predecessors have done for decades—to cultivate lentils which make up about a quarter of the lentils supplied to the village. He employs six people from the village. Beatrice, a wealthy investor from the capital, offers to enter into a lucrative 10-year lease of Alvin’s land if he uses his land to grow flowers for export. Beatrice also offers to sell to Alvin at a discount plant and equipment which will mean he only has to employ two people in the future. Alvin accepts the offer, as do some other villagers in a similar position to Alvin. There is subsequently a sharp drop in the supply of lentils to the village, and a significant increase in their price. The children in the four families whose parents lost their jobs at Alvin’s farm suffer malnutrition, as do others in the village who can no longer afford to buy lentils at the current price.²⁸

What Shue claims about *Careless Sharecropper* is that ‘[t]he malnutrition was a social disaster. The malnutrition was the product of specific human decisions permitted by the presence of specific social institutions and the absence of others’.²⁹ That is, the malnutrition of the villagers is not simply the result of a failure by particular individuals to discharge a duty to provide villagers with subsistence once they began to suffer malnutrition. The villagers were—in the first instance—deprived of their means of subsistence by the switch from cultivating lentils to the growing of (inedible) flowers. They were deprived of their means of subsistence by an action rather than an omission from acting. That deprivation was continued by the absence of any positive action to restore the means of subsistence of the villagers.

²⁸ This is an adaption of Shue’s own illustration: see *ibid* 42–5.

²⁹ *ibid* 44.

Discharging the rights to subsistence of the villagers, then, required duty-bearers to comply with a combination of positive and negative duties: a negative duty to avoid depriving right-holders of their means of subsistence; a positive duty to protect against such deprivations; and a positive duty to provide aid in the event of a deprivation. While there was in *Careless Sharecropper* some breach of a positive duty to provide subsistence to each of the rights-holders who can no longer provide for their own subsistence, their rights were also violated by Alvin's reorientation of the use of his land towards the cultivation of inedible flowers and by there being no mechanisms in place to protect rights-holders' means of subsistence by preventing the execution of contracts of the sort that Alvin and Beatrice entered into.

So, according to Shue, all basic rights correlate with the same three duties:³⁰

- I. To avoid depriving.
- II. To protect from deprivation
 1. By enforcing duty (I) and
 2. By designing institutions that avoid the creation of strong incentives to violate duty (I).
- III. To aid the deprived
 1. Who are one's special responsibility,
 2. Who are victims of social failures in the performance of duties (I), (II-1), (II-2) and
 3. Who are victims of natural disasters.³¹

We might call this the *Tripartite Duty Thesis*.

To expand on what each of these duties is, the duty to avoid depriving (duty I) is for Shue straightforwardly a negative duty—it requires duty-bearers not to deprive the right-holder of the substance of the right, whether that be physical security or the means of subsistence. It is also for Shue the only primary duty. What Shue means by 'primary duty' here is the kind of duty that must be discharged in the first instance for the correlative right to qualify as being

³⁰ Shue notes that these are just general kinds of duties rather than specific duties, as 'the full specification of the correlative duties ... would be an enormous undertaking': Shue, 'Interdependence of Duties' (n 8) 83-4.

³¹ Shue, *BR I* (n 2) 60.

fulfilled. Secondary duties are for Shue back-up duties, that are remedial or supplementary in nature.³²

The first limb of the duty to protect (duty II) is a secondary positive duty to create enforcement mechanisms for the primary duty to avoid depriving (duty II.1)—to set up police forces, courts, and other institutions to make sure that people do not go around depriving others of their basic rights to liberty, physical security, and subsistence. But Shue claims that this duty also has an aspect that is not secondary—but not quite primary. That is, the duty to protect also requires the creation of institutions that manage the allocation of duties to avoid depriving so as to avoid imposing too heavy a burden on the primary duty-bearers, which could generate incentives for non-compliance with the primary duty (duty II.2). An example of this might be the taking of coordinated institutional action to reform a widespread practice of slaveholding in a society dependent on slavery—rather than expecting each individual to take steps release their slaves, which might be ineffective because of the high personal costs involved and the absence of any guarantee that others will do the same.³³

The duty to aid (duty III) is more complex again—it has three components. In the first instance, there is a duty on all to aid those who fall within each duty-bearer’s domain of special responsibility (duty III.1)—their family members, friends, and others in respect of whom they have a particular relationship or role. Then there is a duty to aid those who are affected by violations by duty-bearers of their duties to avoid depriving and to protect (duty III.2). It is important to note that duty-bearers in this category are not limited to those who are *responsible* for the latter breaches of duty but include those who have a certain capacity to help victims of such breaches. Finally, there are duties to aid those who are deprived of physical security or

³² Elizabeth Ashford, ‘The Nature of Violations of the Human Right to Subsistence’ in Adam Etinson (ed), *Human Rights: Moral or Political?* (OUP 2018) 345.

³³ This example is Ashford’s: see *ibid* 354.

subsistence, not by human action but by natural forces (duty III.3)—such as famines, floods, severe weather, or animals. Despite these differences, Shue characterises the duty to aid as a whole as a secondary duty.

That all basic rights have the same three correlative duties means that different basic rights cannot be distinguished by reference to the positive or negative character of their duties, as some philosophers try to do.³⁴ On the *Tripartite Duty Thesis*, while the duty not to deprive might be the primary duty that correlates with the right to physical security, this is also the same for the right to subsistence. Similarly, while the right to subsistence might generate three duties to aid, which are secondary to the primary duty not to deprive, this is also the same for the right to physical security. Finally, both kinds of right generate the same duties to protect. So, there is no right that has a different set of duties, or even a different ordering of duties. Shue concludes that, ‘the common notion that *rights* can be divided into rights to forbearance (so-called negative rights), as if some rights have correlative duties only to avoid depriving, and rights to aid (so-called positive rights), as if some rights have correlative duties only to aid, is thoroughly misguided.’³⁵

One might question the symmetry of the ordering of duties across all basic rights. While it seems plausible that the right to security has as its correlates a primary duty of non-interference, a secondary duty of protection, and a further secondary duty of aid, this ordering of duties makes less sense in the context of something like the right to subsistence. When talking about subsistence, while a duty not to deprive is important, there is a certain sense in which the duty to aid has (at least) equal moral priority. Unlike physical security—which a person can have in the absence of interference—it is not the case that one can just have the means of subsistence in

³⁴ See eg O’Neill, ‘The dark side of human rights’ (n 24) 428; Alan Gewirth, *The Community of Rights* (University of Chicago Press 1996) 35.

³⁵ Shue, *BR I* (n 2) 53.

the absence of interference. It is just as important (and sometimes more so) for a person to be provided with the means of subsistence (if they are unable to secure subsistence through their own means) as it is for them not to be deprived of their means of subsistence. While this point about the priority of duties does not undermine the *Multiple Duty View* as a whole, Shue's *Tripartite Duty Thesis* is impoverished to the extent that it does not recognise this difference in the ordering of the duties correlative to the right to subsistence.³⁶

It is clear then that Shue takes each basic right to correlate with (at a minimum) three duties. What is less clear is what Shue means by 'correlative duties' here. For Hohfeld and others who adopt his schema, correlativity is an analytical-technical term that describes the relation of mutual entailment between rights and duties. That is, for Hohfeld, that a right exists necessarily means that there must also be in existence some duty that shares its content, and that a duty exists necessarily means that there must be some right that also exists and shares its content. Put otherwise, according to the full-blooded Hohfeldian correlativity thesis, a right cannot exist without a duty and a duty cannot exist without a right.³⁷ David Frydrych calls this 'existential correlativity'.³⁸ But existential correlativity is not the only brand of correlativity associated with rights and duties. Frydrych also notes that some rights-theorists take correlativity to refer to a justification relation between rights and duties—that is, 'justificational correlativity'. Justificational correlativity obtains when 'one normative position justifies another's existence.'³⁹

³⁶ Elizabeth Ashford makes the same observation in Ashford, 'Violations of the Human Right to Subsistence' (n 32) 341-342.

³⁷ Michael Thompson, 'What is it to Wrong Someone? A Puzzle about Justice' in R Jay Wallace et al (eds), *Reason and Value: Themes from the Moral Philosophy of Joseph Raz* (OUP 2004) 344 fn 18.

³⁸ David Frydrych, 'Rights Correlativity' in Shyam Balganes, Ted Sichelman, and Henry Smith (eds), *The Legacy of Wesley Hohfeld: Edited Major Works, Select Personal Papers, and Original Commentaries* (CUP Forthcoming) 3.

³⁹ *ibid* 12.

For example, many rights theorists take each right to justify or ground or operate as a reason for⁴⁰ the existence of certain duties.⁴¹

Shue's account appears most consistent with justificational correlativity. Shue is fairly clear that that he takes the duties that correlate with his basic rights to be 'right-grounded duties'.⁴² That is, Shue takes each right to justify the existence of certain duties. This is what he means when he says that rights giving rise to a justified demand that the substance of the right be socially guaranteed '*necessitates* correlative duties'.⁴³ Shue also appears at times to have existential correlativity in mind when he refers basic rights and duties being 'correlative'. He refers to rights and duties as being 'paired concepts',⁴⁴ which is consistent with a claim that rights and duties mutually entail one another. Probably the most plausible reading of Shue is that his notion of correlativity embraces both existential and justificational correlativity. That is, Shue appears to hold that basic rights and duties co-obtain, and that basic rights justify the existence of duties.

Finally, not everyone takes Shue to be committed to the claim that all basic rights correlate with the same three duties. Michael Green interprets Shue to endorse Jeremy Waldron's thesis that rights generate waves of duties, and to be committed to the claim that

⁴⁰ Although often used interchangeably—including here by Frydrych, and seemingly by Shue, Tasioulas, and Cruft—'justification' and 'grounding' are also used by some philosophers to describe two quite different relations between things. Andrea Sangiovanni draws the distinction thus: "'normative grounding" is a normative relation between a principle and a further principle or fact The grounds of a principle tell us in virtue of what the principle holds, or what explains why it holds. "Normative justification" is, on the other hand, an epistemic relation between two or more beliefs about principles rather than a relation between the principles themselves': Andrea Sangiovanni, 'How Practices Matter' (2016) 24(1) *Journal of Philosophy* 3, 11. See also Karen Bennett, *Making Things Up* (OUP 2017) 12; David Tan, 'Precedent, Rules and the Standard Picture' (2016) 41 *Australian Journal of Legal Philosophy* 81, 98-9. In this thesis, I use 'grounding' and 'justification' interchangeably to refer to the normative relation whereby a moral right holds in virtue of some moral fact. I am not concerned in this thesis with the epistemic relation between beliefs and rights.

⁴¹ The main proponents of this view are Raz and MacCormick.

⁴² Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (2nd edn, Princeton University Press 1996) 153 (in this chapter abbreviated as *BR2* to mark the second edition).

⁴³ Shue *BR1* (n 2) 16 (emphasis added).

⁴⁴ *ibid* 32.

‘basic rights have *at least* three corresponding kinds of duties’.⁴⁵ Indeed, in the second edition of *Basic Rights* Shue adds that ‘the provisions for the secure enjoyment of any one thing that people have a right to will involve duties of several kinds. ... “Each right is best thought of not as correlative to one particular duty (which might then be classified as a duty of omission or as a positive duty of action or assistance), but as generating successive waves of duty”’.⁴⁶

While Shue might now endorse Waldron’s waves of duties view—bringing his account closer to those of Tasioulas and Cruft⁴⁷—this does not mean that we should elide his account with that of Tasioulas or Cruft. Shue’s account remains materially different from these two accounts of the structure of human rights, although each seem to accept that human rights generate changing waves of duties. The salient difference in Shue’s account is his commitment to the *Tripartite Duty Thesis*. That is, in addition to taking basic rights to correspond to changing waves of duties, Shue is committed to the claim that each and every basic right correlates with (at a minimum) a duty to avoid depriving, a duty to protect, and a duty to aid. Neither Tasioulas nor Cruft takes up this same position.

B *Tasioulas’s Dynamic Duty Thesis*

It is worth noting at the outset that, while I attribute the *Dynamic Duty Thesis* to Tasioulas, it could just as well be attributed to Joseph Raz or Jeremy Waldron, as the idea has its origins in their theories of rights. However, unlike Raz⁴⁸ and Waldron,⁴⁹ Tasioulas is concerned with

⁴⁵ Michael Green, ‘Global Justice and Health: Is Health Care a Basic Right?’ in Michael Boylan (ed), *Public Health Policy and Ethics* (Kluwer 2004) 211 (emphasis added).

⁴⁶ Shue, *BR2* (n 42) 156. Shue here quotes Jeremy Waldron, *Liberal Rights: Collected Papers 1981-1991* (CUP 1993) 25.

⁴⁷ See the discussion below at Sections B.2 and C.2.

⁴⁸ Raz develops a political conception of human rights which gives less attention to the structure of such rights than to how they function: See Raz, ‘Human Rights without Foundations’ (n 6) 321; Raz, ‘Human Rights in the Emerging World Order’ (n 6) 217.

⁴⁹ Like Raz, Waldron’s position on the structure of human rights is less fleshed out than Tasioulas’s: Waldron, ‘Duty-bearers for Positive Rights’ (n 5) 11.

human rights—rather than rights-in-general—as I am in this thesis, so for my purposes I attribute the *Dynamic Duty Thesis* to him.

With those parenthetical remarks out of the way we can turn to the details of Tasioulas’s account. As with Shue, it is worth starting off with how Tasioulas understands the nature and grounding of human rights, as his commitments differ somewhat from Shue’s.

1 *The interest-based account of human rights*

Tasioulas self-identifies as an ‘orthodox’ or ‘foundational’ theorist of human rights, in both his understanding of the nature and grounding of human rights.⁵⁰ That is, he believes: (1) that human rights are the kinds of rights that we each possess simply in virtue of our shared humanity—rather than being the kinds of rights that play a distinctive role in international politics (such as limiting sovereignty or operating as standards for political legitimacy)⁵¹—and (2) that human rights are a species of natural or moral right grounded in important features of humanity—rather than being justified solely by a set of institutional facts.⁵² For Tasioulas:

- (i) For all human beings within a given historical context, and simply in virtue of their humanity, having *X* (the object of the putative right) serves one or more of their basic interests, for example, interests in health, physical security, autonomy, understanding, friendship, achievement, play, etc.
- (ii) The interest in having *X* is, in the case of each human being and simply in virtue of their humanity, pro tanto of sufficient importance to justify the imposition of duties on others, for example, to variously protect, respect or advance their interest in *X*.
- (iii) The duties generated at (ii) are feasible claims on others given the constraints created by general and relatively entrenched facts of human nature and social life in the specified historical context. Therefore:
- (iv) All human beings within the specified historical context have a right to *X*.⁵³

In what follows, I expand on some of the elements of Tasioulas’s schema.

⁵⁰ Tasioulas, ‘The Moral Reality of Human Rights’ (n 3) 76.

⁵¹ For examples of accounts of this sort, see John Rawls, *The Law of Peoples with “The Idea of Public Reason Revisited”* (HUP 1999); Charles Beitz, *The Idea of Human Rights* (OUP 2009); Raz, ‘Human Rights without Foundations’ (n 6); Allen Buchanan, *The Heart of Human Rights* (OUP 2013); Raz, ‘Human Rights in the Emerging World Order’ (n 6).

⁵² For examples of accounts of this sort, see Griffin (n 6); Nagel (n 6).

⁵³ John Tasioulas, ‘On the Foundations of Human Rights’ in Rowan Cruft, S Matthew Liao, and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 50-1.

1. *Having X serves one or more basic interests.* As the schema above should make clear, Tasioulas's account of the grounds of human rights is interest-based, meaning that for him human rights are justified by how they protect important interests of humans. When asking whether there is a human right to something, for Tasioulas, 'the operative question is whether any particular interest of ours ... suffices to generate duties on others to respect or protect that interest.'⁵⁴ Tasioulas's account of human rights is pluralist in nature, in that he does not have in mind a defined list of interests, one master interest from which all others are derived, or a closed list of other prescribed goods that ground human rights. For Tasioulas, any interest will do, so long as it is one that: (1) we all have simply in virtue of our humanity (rather than in virtue of something else like the position of the putative right-holder in society), and (2) is important enough to merit placing duties on others to respect it, duties that are feasible in the circumstances. That is, the interests that ground human rights need to be universal and meet a threshold of importance.

What Tasioulas means by 'interests' is those things the fulfilment of which makes the interest-holder's life better in some way. So, I have an interest in liberty if having liberty makes my life better somehow—for example, by allowing me to pursue endeavours that are important to me. But interests for the purposes of Tasioulas's account are not subjective interests that are contingent on the putative interest-holders believing that something is in their interest. Tasioulas's notion of an interest is objective. Something can be an interest of a person even if they do not believe it to be or still would not believe it to be even if they were apprised of all of the salient facts. That being said, what interests exist and may ground human rights will depend on what will make an individual's life better at a particular point in time. Our interests are not static, and they may change over time. Furthermore, it is not the case that each human

⁵⁴ *ibid* 51.

right needs to be grounded by a single interest. Each human right may be grounded by one or a number of different interests operating in combination.⁵⁵

Despite being interest-based, Tasioulas's account also places significant reliance on the notion of human dignity in grounding human rights. As Tasioulas explains:

What emerges is a form of the interest-based theory which regards the interests in question as generative of human rights in crucial part because they are the interests of human beings who possess equal moral status: human dignity and universal human interests are equally fundamental grounds of human rights, characteristically bound together in their operation.⁵⁶

For Tasioulas, human dignity and universal human interests both operate to ground human rights. Although it is universal human interests that are the focal point of Tasioulas's theory, these interests are always interests of humans with the status of inherent human dignity. So, dignity plays a role 'in intimate alliance with universal human interests' in grounding human rights.⁵⁷ According for Tasioulas, it is only by understanding what it means to be a human with inherent human dignity that we truly understand the normative significance of the universal human interests that ground human rights. Dignity is the lens through which universal human interests must be viewed, and it explains (in part) how particular human interests can generate human rights and duties. Taking this approach, '[w]hat emerges is a form of the interest-based theory which regards the interests in question as generative of human rights in crucial part because they are the interests of human beings who possess equal moral status'.⁵⁸ Right-generating universal human interests only have the normative significance and importance that they do because they are interests of humans with the intrinsically valuable status of dignity. Tasioulas's account then attempts to take insights both from status-based theories⁵⁹ and interest-based theories of human rights.

⁵⁵ *ibid.*

⁵⁶ *ibid* 53-4.

⁵⁷ *Ibid* 56.

⁵⁸ *ibid* 53.

⁵⁹ See eg Nagel (n 5) and Frances Kamm, *Intricate Ethics: Rights, Responsibilities, and Permissible Harm* (OUP 2007) 270-1.

Tasioulas's account, however, 'does not equate human rights either with the universal interests of human beings or with the principle that they possess an equal share in human dignity'.⁶⁰ That a particular interest is universal and one held by beings with inherent dignity does not automatically mean that it will generate a human right. To ground a right such interests must also pass the threshold of being important enough to justify the imposition of a duty on others. Tasioulas concedes that '[i]t is doubtful ... that there is a great deal that can be helpfully said, at the abstract level at which philosophers customarily operate, about the threshold at which universal interests give rise to duties'.⁶¹ However, determining whether this threshold has been met characteristically involves asking questions including about the burdens imposed on putative duty-bearers, the compossibility of duty fulfilment in respect of all right-holders, and the feasibility of the duty.

2. *Sufficient importance to justify the imposition of duties on others.* For Tasioulas, whether some interest of a right-holder can ground a human right depends on its importance. As he explains, 'the interest must have a very specific *kind* of moral importance, namely, it must be capable of generating a duty ... and, since we are speaking here of human rights, it must be a duty in the case of each and every human being simply in virtue of their humanity.'⁶² Not all interests will be able to meet this threshold and to justify the imposition of the kinds of duties that correlate with human rights. For example, it is doubtful that my interest in eating Pizza Shapes could generate a duty on all others to provide me with Pizza Shapes (assuming the absence of conditions of starvation or other medical need). It is simply not important enough to have a duty-generating capacity.

⁶⁰ Tasioulas, 'On the Foundations of Human Rights' (n 53) 56-7.

⁶¹ *ibid* 57-8.

⁶² *ibid* 62.

Some interests will lack this duty-generating capacity because ‘the object of the supposed right cannot be secured to the right-holder because it is impossible to do so.’⁶³ As Tasioulas explains, this ‘impossibility may be logical, metaphysical or empirical (in the specified socio-historical context).’⁶⁴ Tasioulas here gives the example of a right to give birth irrespective of one’s sex. Another way in which an interest can fail to have this duty-generating capacity is where the existence of a duty would be antithetical to securing the object of the right or would undermine other important interests of the right-holder. Of the former, Tasioulas gives the example of a duty to love romantically, the existence of which would actively frustrate the realisation of what we value about romantic love—its spontaneity and free expression; and of the latter, Tasioulas gives the example of a duty to provide a right-holder with the highest attainable standard of health, whose existence would licence many autonomy undermining interventions.⁶⁵

3. *Feasible claims on others.* Linked to the duty-generating capacity of interests is Tasioulas’s requirement of feasibility. Not only must the interests of the right-holder be important enough to generate duties on others but those duties must also make feasible claims on others. What Tasioulas means by this is that the duties correlative to each human right must not be ‘excessively burdensome’.⁶⁶ They must not place demands on potential duty-bearers that require them to make excessive sacrifices or that will unduly compromise the realisation of other competing human rights. Something like a right to be rescued in all circumstances is likely to fall foul of this requirement, despite the importance of the interests that underlie it and the plausibility of its putative correlative duties. The duties grounded by such a right would place

⁶³ *ibid* 58.

⁶⁴ *ibid*.

⁶⁵ *ibid* 59.

⁶⁶ *ibid* 60.

excessive burdens on duty-bearers, requiring them to make significant sacrifices and to incur great costs. As such, it is likely to fail the feasibility requirement.

4. *All human beings within the specified historical context.* For Tasioulas, an important feature that distinguishes human rights from other kinds of rights is that they are universal. If human rights are the kinds of rights that are held by right-holders simply in virtue of their humanity, then all those who share that humanity must be right-holders. However, Tasioulas does not think that human rights are the kind of rights that need to be held by all humans at all times. He instead claims that a right need only meet a condition of ‘constrained universality’ to qualify as a human right: ‘For people today and the foreseeable future, human rights are those rights possessed in virtue of being human and inhabiting a social world that is subject to the conditions of modernity’.⁶⁷ Accordingly, Tasioulas’s schema allows for human rights to pass in and out of existence over time, according to whether in a given historical context having the object of the right advances an interest of the right-holder, and whether any circumstances obtain in that period that make realising the right infeasible. As long as a right is held by all humans in a given historical context, it will be a human right, irrespective of whether it did not exist at some earlier time. This allows for some variation in the corpus of human rights (avoiding the problem of attributing rights like freedom of press to cave dwellers) while preserving the universality of human rights.

2 *One right, dynamic duties*

Tasioulas’s interest-based theory of human rights in large part reflects Raz’s account of rights-in-general. Both accounts take rights to be prior to duties—at least in terms of justification or grounding. As Tasioulas explains, ‘[t]he existence of a right to *x*, on the part of *A*, grounds duties

⁶⁷ Tasioulas, ‘The Moral Reality of Human Rights’ (n 3) 76-7. See also John Tasioulas, ‘Human Rights, Universality and the Values of Personhood: Retracing Griffin’s Steps’ (2002) 10(1) *European Journal of Philosophy* 79, 87.

on the part of others variously to protect, respect, and so on A's possession, access, and so on to x.⁶⁸ That is, human rights occupy some middle ground between important interests and duties on others to 'respect or advance' those interests. That an interest is sufficiently important justifies the existence of a human right, and the existence of that human right justifies the existence of duties. To be more concrete, if my interest in not being assaulted is of sufficient importance to justify the existence of a right of mine against assault, it is the existence of that right that justifies placing others under duties not to assault me. That is, Tasioulas believes that human rights are the source of, or generate or ground, duties, and so are upstream of duties in any order of argument—even if they are not temporarily prior to duties.

The justificational priority of human rights over duties produces what Tasioulas calls 'the dynamic character' of the normative implications of human rights⁶⁹—and what Waldron calls the 'waves of duties' that correlate with rights.⁷⁰ What it means for human rights to have a dynamic character is that the duties that each human right grounds are not static. They are dynamic and can change according to the circumstances in which the right applies. As Tasioulas explains:

The duties that a right generates are not comprehensively specifiable once and for all; instead, they can vary with changes in the nature of the agents, institutions, and social contexts in question.⁷¹

That is, because each human right operates as a ground of the duties to which it correlates—a ground that is itself grounded in the universal human interest(s) it protects. Accordingly, the duties that each human right is capable of generating are at large. Any human right can generate whatever duties are needed to protect the relevant interest(s) that ground it, so long as those interests meet the threshold of importance and the duties satisfy the feasibility condition. This

⁶⁸ Tasioulas, 'Taking Rights out of Human Rights' (n 3) 656.

⁶⁹ Tasioulas, 'The Moral Reality of Human Rights' (n 3) 94. Raz's theory of rights-in-general also claims to have such dynamicity: Raz, *The Morality of Freedom* (n 1) 171.

⁷⁰ Waldron, 'Rights in Conflict' (n 1) 509-512.

⁷¹ Tasioulas, 'The Moral Reality of Human Rights' (n 3) 94.

means that, the duties generated by a particular human right ‘can undergo tremendous variation depending on changes in social conditions, and can also admit of rival specifications in the same conditions, while the right nevertheless persists throughout.’⁷²

Tasioulas’s account of the structure of human rights can therefore be rendered as:

Dynamic Duty Thesis. The existence of a human right generates whatever duties are necessary and feasible to variously protect, respect, or advance the interest that underlies the right.

Tasioulas’s adoption of the *Dynamic Duty Thesis* is partly driven by his desire to provide an answer to the powerful objection to the existence of universal socio-economic rights (or positive human rights to provision) that is often associated with the work of Onora O’Neill—the Claimability Objection.⁷³ O’Neill’s overarching claim is that socio-economic rights are not claimable, and so cannot truly be universal moral human rights. For her, only those rights (human or otherwise) that are claimable can be properly described as rights.⁷⁴ There are two aspects to this claimability condition. To be claimable (and therefore, for O’Neill, a right-properly-so-called): (1) a right must be a claim to something—it must have an object or correlate with a duty with reasonably precise content; and (2) a right must be a claim against someone—it must have a definite and identifiable duty-bearer.⁷⁵ O’Neill claims that typical socio-economic moral rights fail to meet either of these conditions of claimability.

Her argument goes something like this. The duties correlative to socio-economic rights are not like those correlative to rights like the negative right not to be assaulted. The duty not to assault, correlative to the right not to be assaulted, can be complied with by all people in

⁷² *ibid.*

⁷³ Onora O’Neill, *Towards justice and virtue: A constructive account of practical reasoning* (CUP 1996) 129.

⁷⁴ *ibid.*

⁷⁵ *ibid* 129-30.

respect of all other people by simply refraining from assaulting those others. Such negative duties are claimable because they give rise to an obligation of reasonably precise content (do not assault right-holders) and a claim that can be made against identifiable duty-bearers (everyone). Socio-economic duties are different. They are the sorts of duties that cannot possibly be borne by all persons in respect of all other persons—at least to the same extent. Positive socio-economic human rights like the right to food correlate with duties that require for their discharge the provision of scarce resources. And the scarcity of these resources means that (as a matter of justice and practicality) no one person can discharge socio-economic duties in respect of all those suffering from deprivations of socio-economic goods. No one person has sufficient resources or means of delivering those resources to meet the claims of all of those who are suffering from deprivations of socio-economic goods. At most, a single duty-bearer can justly be expected to assist only *some* (but not all) of those in the latter group. Furthermore, these scarce resources are unevenly distributed among all potential duty-bearers, meaning that potential duty-bearers cannot even be expected to do the same thing in respect of the discharge of their duties. More burdensome obligations will be able to be justly imposed on some duty-bearers but not others.

So, exactly who bears the duties correlative to moral socio-economic rights, in respect of whom, and what exactly those duties require of their bearers is left undefined by the bare moral right. As O’Neill frames the problem, ‘rights not to be killed or to speak freely are matched by and require universal obligations not to kill or not to obstruct free speech; but a universal right to food cannot simply be matched by a universal obligation to provide an aliquot morsel of food’.⁷⁶ This means that moral socio-economic rights are not claimable. Such rights lack reasonably precise content (because it is systematically unclear what can be expected of each duty-bearer) and an identifiable duty-bearer (because it is unclear who bears what duties and in respect of which right-holders). For these rights to be claimable, institutions are required to

⁷⁶ Onora O’Neill, *Bounds of Justice* (CUP 2000) 135.

intervene to allocate the duties that correlate with socio-economic rights and to specify their content. So, for O'Neill, socio-economic rights can only exist in institutional form, rather than as universal moral rights.⁷⁷

Tasioulas takes exception with O'Neill's Claimability Objection. He notes that her whole argument against moral socio-economic rights rests on the premise that each human right's deontic implications must always be determinate for the right to exist—or, put otherwise, that a human right can only exist when we know who bears the duties correlative to the right and what those duties require of their bearers.⁷⁸ But, he claims, once we take human rights to be dynamic entities O'Neill's premise loses much of its force and we are no longer compelled to deny the existence of particular human rights where there is some indeterminacy in their normative implications. Tasioulas argues that once we take each human right to give rise to an ever-changing list of duties a certain level of indeterminacy will be built into the concept of a human right.⁷⁹ The duties correlative to the right will always be subject to variation and cannot be specified and allocated once-and-for-all. That there is such indeterminacy in the normative implications of any particular human right does not affect its existence. As Tasioulas explains:

[W]hat drives the interest-based theory of rights are the interests a right protects rather than any *specific* set of normative implications they generate. The latter can undergo tremendous variation depending on changes in social conditions, and can also admit of rival specifications in the same conditions, while the right nevertheless persists throughout. But if rights are conceived in this protean way, the thesis that their very existence at any given time depends on a specific assignment of duties loses its grip on us. What is crucial to the existence of rights is the duty-grounding character of the underlying interests they protect, not whether a particular distribution or specification of duties has been fixed.⁸⁰

So, on Tasioulas's account, the existence of a particular human right does not require that its correlative duties have a fixed content or fixed duty-bearer—they need only provide protection for the interest that grounds the right and impose some obligation or duty on duty-

⁷⁷ *ibid* 132-136. See also O'Neill, *Towards justice and virtue* (n 73) 128-136; O'Neill, 'The dark side of human rights' (n 24); Onora O'Neill, 'Response to John Tasioulas' in Rowan Cruft, S Matthew Liao, and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015).

⁷⁸ 'The Moral Reality of Human Rights' (n 3) 94.

⁷⁹ *ibid* citing Raz, *The Morality of Freedom* (n 1) 186.

⁸⁰ 'The Moral Reality of Human Rights' (n 3) 94-5.

bearers that is feasible in the circumstances. These duties might change frequently, may differ from place-to-place, and there may be a number of candidate allocations of duties that provide such protection. But none of this matters to the existence of the right. The right continues to exist throughout all of these changes in its correlative duties.

In this way, the *Dynamic Duty Thesis* also preserves the universality of socio-economic rights (and other human rights). If we take socio-economic rights to correlate with dynamic duties then, as long as there is some set of feasible duties that correlate with each right in a given historical period, we can say that all humans living in that historical period have that human right, even if those duties differ from place to place.⁸¹ As Jean Thomas puts it, what makes versions of the interest theory like Tasioulas's so compelling is that its taking rights as prior to the duties they ground 'means that we can say that every child in the world has the right to subsistence, to education, and to health care even without being able to specify on whom the duty to provide those things can be justifiably imposed.'⁸²

What is immediately apparent is that the *Dynamic Duty Thesis* is not a version of the *Multiple Duty View* in the same way that Shue's *Tripartite Duty Thesis* is. It is not built into the *Dynamic Duty Thesis*—as it is built into the *Tripartite Duty Thesis*—that every human right must correlate with at least three duties—a duty to not interfere, a duty to protect, and a duty to aid. The dynamic character of human rights on the *Dynamic Duty Thesis* means that they have the potential to correlate with many different duties that require a vast array of act-types (or, even just one duty requiring one particular act-type) depending on the prevailing circumstances; the existence of countervailing considerations; the requirement of feasibility; and

⁸¹ *ibid* 94.

⁸² Jean Thomas, *Public Rights, Private Relations* (OUP 2015) 67.

what protection of the underlying interest(s), the demands of justice, and considerations feasibility require.⁸³

To take an example from Jeremy Waldron:

The right not to be tortured, for example, clearly generates a duty not to torture. But, in various circumstances, that simple duty is likely to be backed up by other duties: a duty to instruct people about the wrongness of torture; a duty to be vigilant about the danger of, and temptation to, torture; a duty to ameliorate situations in which torture might be thought likely to occur; and so on. Once it is discovered that people have been tortured, the right generates remedial duties such as the duty to rescue people from torture, the duty on government officials to find out who is doing and authorizing the torture, remove them from office, and bring them to justice, the duty to set up safeguards to prevent recurrence of the abuses, and so on. If these duties in turn are not carried out, then the right generates further duties of enforcement and enquiry with regard to them. And so on.⁸⁴

So, on the *Dynamic Duty View*, the same human right can have different duties in different settings. And, as I indicated above—a right, according to Tasioulas, may even generate rival patterns of duties, given the sensitivity of Tasioulas’s account to context and the fact that there will rarely be only one way in which the interest which underlies the right can be advanced and protected.⁸⁵ This should also make clear that Tasioulas’s *Dynamic Duty Thesis* rejects the view that there is a one-to-one relationship between rights and duties and that one can simply read each duty off of the face of each right.⁸⁶ What duties attach to each human right will depend on the circumstances in which the right obtains, the institutions that exist, the relative positions of putative duty-bearers, and any countervailing considerations. Changes to any one of these factors will produce changes in the duties that correlate with the relevant right.

As with Shue, Tasioulas refers to the duties that attach to human rights as being ‘correlative’ to them.⁸⁷ But what Tasioulas means by this is a bit clearer. Given that Tasioulas believes that human rights ground the duties to which they correlate, he is clearly committed to justificational correlativity.⁸⁸ That is, he takes each human right to justify the duties to which

⁸³ John Tasioulas, ‘On the Foundations of Human Rights’ (n 53) 56–62.

⁸⁴ Waldron, ‘Rights in Conflict’ (n 1) 510.

⁸⁵ Tasioulas, ‘The Moral Reality of Human Rights’ (n 3) 94.

⁸⁶ *ibid* 96.

⁸⁷ *ibid* 99.

⁸⁸ Frydrych, ‘Rights Correlativity’ (n 38) 3.

it correlates. However, Tasioulas's commitment to existential correlativity is weaker than Shue's.⁸⁹ As I have hinted above, at times Tasioulas seems to suggest that human rights can in fact exist without there being a correlative duty in existence—at least one that is fully specified and allocated. He claims that his theory can 'allow for the knowledge of the existence of rights (hence of the justification of duties corresponding to those rights) without the duties being precisely specified or allocated to particular agents'.⁹⁰ Tasioulas here does not appear to countenance human rights without correlative duties *tout court*. Instead, he suggests that a human right can exist even if the duties it grounds are not fully specified or allocated. In sum, then, Tasioulas takes each human right to be the ground of potentially multiple changing duties. For him, the normative implications of each human right are never closed.

C *Cruft's Capacious Dynamic Normative Factor Thesis*

Cruft's account of human rights shares many features in common with Tasioulas's. Like Tasioulas, the focus of Cruft's account is moral human rights. And Cruft's theory of the grounding of human rights is also pluralist—like Tasioulas's—in that Cruft takes it that there is no closed list of the features of each right-holder that can ground human rights and their correlative duties. His thesis embraces a dynamic view of the duties that attach to human rights—which makes it a variant of the *Multiple Duty View* in much the same way as Tasioulas's *Dynamic Duty Thesis*. However, Cruft's dynamic duty thesis is more capacious than Tasioulas's—it envisages normative positions other than duties attaching to human rights, but in the same context-sensitive way.⁹¹

⁸⁹ *ibid.*

⁹⁰ Tasioulas, 'The Moral Reality of Human Rights' (n 3) 92.

⁹¹ It should be noted at the outset that my discussion below focuses on Cruft's views of human rights prior to the publication of his monograph, Rowan Cruft, *Human Rights, Ownership, and the Individual* (OUP 2019).

There is much about the view of human rights Cruft sets out in that book that remains continuous with his earlier work. In particular his account remains committed to the Razian thesis that rights and duties are grounded by goods of the right holder (whether that be their interests, needs, projects, or well-being, or the value to them of possessing freedom, agency, capabilities, wisdom, or other things that are good), moderated by the demands of

1 *Human rights as individualistically justified*

The first thing to note is that Cruft, like Shue and Tasioulas, takes human rights to be a subset of our moral rights. For him, they are the kinds of rights held by humans simply in virtue of their humanity and irrespective of their recognition, enforcement, or enshrinement in law.⁹² In this vein, Cruft takes it as one⁹³ of the defining features of human rights that they are justified by what they do for the right-holder—that they are the kinds of rights that are ‘morally grounded

countervailing considerations and the requirements of feasibility. This is what Cruft calls the ‘individualistic grounding’ of human rights and their duties (106).

However, Cruft also appears to depart quite radically from his earlier views, despite not expressly renouncing them. In particular, his current view of human rights is less consistent with his endorsement of the *Multiple Duty View*. First, he explicitly eschews the idea that rights ground duties, despite showing some sympathy for this idea in the earlier work that I discuss below (See Cruft, ‘Human rights as rights’ (n 4) 146). He now claims that rights are not the grounds of their duties, because such a view ‘leaves it unclear what distinguishes a right from either a value or a good. If rights are ... simply the grounds of duties and *can exist independently of duties*, then rights seem to play a role most naturally ascribed to the idea of value or good; it is not clear what distinguishes them as rights’ (7) (emphasis in original). The path to the *Multiple Duty View* from an account that rejects the premise that rights ground their correlative duties is considerably less clear than from one that endorses this premise.

Second, Cruft claims that his Addressive Theory of rights preserves the ‘Hohfeldian correlativity axiom’ and embraces ‘the Hohfeldian model even in conceiving *natural* rather than created rights’ (7) (emphasis in original). While Cruft is not explicit about what he means by this, we might infer that he means to endorse a conception of human rights that takes each human right to correlate with a single duty—rather than the *Multiple Duty View*. In his 2012 paper Cruft distinguishes the ‘Hohfeldian’ conception of rights—according to which ‘any right with a certain content must strictly correlate with a directed duty (owed to the right-holder) with the same content’—from the ‘non-Hohfeldian’ conception of rights—according to which ‘a given right must ... be the ground for a changing set of directed duties owed to the right-holder and perhaps to others’ (See Cruft, ‘Human rights as rights’ (n 4) 137). Cruft’s explicit identification of his Addressive Theory with a Hohfeldian—rather than a non-Hohfeldian—conception of rights would—given this distinction he draws in his earlier work—suggest that he now endorses a conception of human rights which denies that they correlate with multiple duties and instead takes each right to correlate with a single duty.

Third, Cruft’s Addressive Theory also appears to fit more naturally with a Hohfeldian conception of the structure of human rights, where each right is correlated with a single duty. According to the Addressive Theory, a directed duty formally requires: (1) that the duty-bearer take the action or omission enjoined by the duty (φ) as being done to the right-holder, where the right-holder is conceived second-personally (φ is done to you’); and (2) that the right-holder take the action enjoined by the duty (φ) as owed to them, where the right-holder conceives of themselves first-personally (φ is done to me’) (64). Correlative rights obtain in respect of such duties where the right-holder exercises a significant degree of control over the directed duty (83). These aspects of right-holding under the Addressive Theory appear to fit best with a conception of human rights that takes each right to be correlated with a single, specific duty, and which shares its content, rather than with one that takes each human right to correlate with multiple different and changing duties.

⁹² Cruft, ‘Human rights as rights’ (n 4) 132; Cruft, *Human Rights, Ownership, and the Individual* (n 91) 89.

⁹³ In his recent work, Cruft adds another defining feature of human rights: that they are ‘rights that are “everyone’s business” in the sense of being rights that anyone anywhere can, *ceteris paribus*, permissibly demand on behalf of the right-holder’. See Cruft, *Human Rights, Ownership, and the Individual* (n 91) 89.

primarily “for the right-holder’s sake”.⁹⁴ This is what Cruft calls the ‘individualistic account’ of human rights.⁹⁵ According to Cruft:

... [W]e can say that human rights include any case in which some proper feature F (perhaps needs, important interests, freedom) of a person P is of sufficient non-instrumental importance to justify some serious normative factor protecting that feature: either a directed duty with some content or other that will protect F, or an undirected duty protecting F, or some serious high-weight non-duty reason, important goal or aim, etc. that asks for protection for F. On this account, we take individualistic justification as the hallmark of human rights and thereby allow human rights to include individualistically justified moral factors that are not rights.⁹⁶

Cruft’s definition of a human right is quite dense and needs unpacking.

1. *Some proper feature of the right-holder.* At the core of Cruft’s definition of a human right is the right-holder. As indicated above, for him, what makes human rights distinctive from other kinds of moral rights is the ‘individualistic structure of their justification’⁹⁷—or the way in which they are justified by what they do for the right-holder, rather than by some value or good separate and distinct from the right-holder. But what constitutes such individualistic justification is largely left open by Cruft. A human right on his account is just any right that in some way serves ‘some proper feature’ of the right-holder. As Cruft states, ‘a right will qualify as a human right whenever it is justified simply by what it “does for” its holder considered independently of whether it serves or disservices others.’⁹⁸ In this way, Cruft’s conception of what grounds a human right is not limited to some master good or distinctive value, or even to human interests: ‘[s]o long as the right’s justification is individualistic, it will be a human right whatever the particular values at work in the justification’.⁹⁹ Cruft suggests that a right’s doing something for

⁹⁴ Cruft, *Human Rights, Ownership, and the Individual* (n 91) 89; Cruft, ‘Human rights as rights’ (n 4) 132.

⁹⁵ Cruft, ‘Human rights as rights’ (n 4) 132; Cruft, *Human Rights, Ownership, and the Individual* (n 91) 106.

⁹⁶ This formulation of Cruft’s definition of a human right is a reconstruction of various claims he makes in Cruft, ‘Human rights as rights’ (n 4) 143; Rowan Cruft, ‘Human Rights as Individualistically Justified’ in Thom Brooks (ed), *Current Controversies in Political Philosophy* (Routledge 2015) 48-51.

⁹⁷ Cruft, ‘Human rights as rights’ (n 4) 132.

⁹⁸ *ibid.*

⁹⁹ *ibid* 132-3.

the right-holder ‘might involve serving the holder’s interests, or protecting her needs, or securing her freedom, or reflecting her status, etc.’¹⁰⁰

The important point for Cruft’s account is that what is being served by the right are features of the *right-holder* rather than features of anyone else or any other value or good. While other rights can be grounded by what they do for other values and other persons, what makes human rights distinctive—according to Cruft—is that they are the kinds of rights that are justified just by what they do for the right-holder. The focus of Cruft’s account, then, is on the individual. His account of human rights reflects what John Rawls calls the ‘separateness of persons’.¹⁰¹ Human rights on this account do not play a moral role defined by what they do for non-individualistic values like the common good. They are moral claims that provide special protection for particular individuals.¹⁰²

2. *Sufficient non-instrumental importance.* As with Tasioulas’s account, for Cruft whether some proper feature of a right-holder justifies a human right depends on its importance. What Cruft means by ‘importance’ is the ‘specific deontic generative capacity across different circumstances’ of the relevant feature of the right-holder—or the ability of a feature of the right-holder to generate normative content for others.¹⁰³ Not all features of a person will be able to justify the imposition of the kinds burdens that attach to the normative implications of human rights. Many features of persons are too trivial to justify the existence of a human right. Cruft gives the example of trivial property rights, such as rights over a pen. As he explains, ‘such rights are clearly morally justified, but they are surely not justified simply by what they do for their

¹⁰⁰ *ibid* 132.

¹⁰¹ John Rawls, *A Theory of Justice* (HUP 1971) 26-7.

¹⁰² Cruft, ‘Human Rights as Individualistically Justified’ (n 96) 50.

¹⁰³ Cruft, *Human Rights, Ownership, and the Individual* (n 91) 95.

individual holders, whether this is conceived in terms of interests, autonomy or status'.¹⁰⁴ They therefore cannot be human rights according to the individualistic account.

Cruft's account also leaves space for the rights-generating capacity of important features of a person to be defeated. He acknowledges that sometimes even important features of a right-holder will fail to justify human rights, because the obligations which their protection entails are too burdensome. As he explains, '[t]he account of individualistic justification leaves open the possibility that the burdens on duty-bearers or, indeed, other considerations (perhaps the burdens on third parties) could defeat the grounding.'¹⁰⁵

Finally, to be rights-generating, the relevant feature must also be *non-instrumentally important*. That is, the feature must possess importance in itself, irrespective of whether it is important in attaining some kind of further end.

3. *Some serious normative factor*. Cruft's definition of a human right is notable in that it is framed in terms of features of the right-holder grounding serious *normative factors*—rather than simply duties. He says that such normative factors can include 'either a directed duty with some content or other that will protect F, or an undirected duty protecting F, or some serious high-weight non-duty reason, important goal or aim, etc that asks for protection for F.'¹⁰⁶ He also adds that human rights may generate other Hohfeldian positions, including privileges, powers and immunities.¹⁰⁷ That is, for Cruft, human rights do not generate just duties. Their normative implications will vary on a spectrum ranging from directed duties to powerful non-duty reasons.¹⁰⁸

¹⁰⁴ Cruft, 'Human rights as rights' (n 4) 131.

¹⁰⁵ Cruft, 'Human rights as Individualistically Justified' (n 96) 52.

¹⁰⁶ Cruft, 'Human rights as rights' (n 4) 143.

¹⁰⁷ Cruft, 'Human rights as rights' (n 4) 149; Rowan Cruft, 'Rights: Beyond Interest Theory and Will Theory?' (2004) 23(4) *Law and Philosophy* 347.

¹⁰⁸ A similar thesis is advanced by James Forrester. See James Forrester, *Being Good and Being Logical: Philosophical Groundwork for a New Deontic Logic* (Armonk 1996) 179.

2 *Changing normative factors, static rights*

This then brings us to a consideration of how human rights and duties pair up on Cruft's account. His account of human rights operates very much like Tasioulas's in this respect. He denies that—at least in the case of human rights—each right with a certain content must strictly correlate with a directed duty with the same content. That is, he rejects the Hohfeldian¹⁰⁹ one-to-one pairing of each human right with a single duty that matches its content. Cruft instead endorses the position that each human right is the ground for a range of 'contextually variable' normative factors, including directed duties.¹¹⁰

Like Tasioulas, Cruft reaches this position by reflecting on O'Neill's objection to the existence of moral socio-economic rights.¹¹¹ Cruft claims that O'Neill's objection only gets purchase if we accept the premise that genuine *human rights* are (or need to be) 'genuine *rights*'. Cruft notes that 'genuine rights have a strict logical relation to directed duties (duties owed to someone).'¹¹² And it is this strict pairing of each right with a single and determinate duty that makes moral socio-economic rights vulnerable to O'Neill's objection. What Cruft suggests is that human rights may be different from other rights, and that genuine human rights might not be genuine rights in the strict sense of having a single correlative directed duty. He claims that O'Neill's objection can be avoided¹¹³ if we 'allow that such human rights need not entail

¹⁰⁹ Thompson, 'What is it to Wrong Someone? A Puzzle about Justice' (n 37) 344 fn 18.

¹¹⁰ Cruft, 'Human rights as rights' (n 4) 137-140.

¹¹¹ Cruft has a new response to O'Neill in his 2019 book. He claims that we have been looking in the wrong place for universal moral socio-economic rights. Cruft claims that such rights are prevalent but they obtain as recognition-independent natural rights held against the state. See Cruft, *Human Rights, Ownership, and the Individual* (n 91) 161.

¹¹² Cruft, 'Human rights as rights' (n 4) 137.

¹¹³ I discuss in Chapter Five how abandoning the *Multiple Duty View* and adopting my proposed alternative view of the structure of human rights—the *Individuation View*—closes off this avenue for avoiding O'Neill's Claimability Objection. However, I suggest there that Tasioulas's and Cruft's strategy for avoiding the Claimability Objection was never an effective one at any rate, as it works a conceptual sleight of hand by affirming the existence of rights that we do not actually possess.

directed duties to supply their precise content to each right-holder', but instead entail anything ranging from weaker directed duties to high-weight reasons for some action.¹¹⁴

Cruft says that in fact this is exactly how we should conceive of human rights. He claims that such an approach rescues our ability to talk about moral socio-economic human rights. It fits naturally with the way the concept of a human right seems to have expanded beyond the strictures of a Hohfeldian claim-right to something else entirely. Many putative moral human rights appear overly burdensome when considered through the lens of strict logical correlativity—because they demand things (like the provision of food and health care by impoverished governments) that vastly exceed the capacities and capabilities of duty-bearers.¹¹⁵ Taking human rights as the kinds of things that do not need to have a strict one-to-one relationship with their duties allows us to see both the rights in positive international law and moral human rights as meaningful.

This leads Cruft to reject the view that each human right with a particular content must correlate with a directed duty with the same content as the right. Instead he endorses the view that each human right entails whatever normative factors are necessary to protect the important features of the right-holder that justify the right.¹¹⁶ This brings his position very close to Tasioulas's *Dynamic Duty Thesis*. But Cruft goes further than Tasioulas. As I noted above, Cruft's account entertains the prospect of human rights corresponding to normative entities other than directed duties. Depending on context, a feature of a person may generate any number of serious normative factors which afford protection to that feature, including directed duties, undirected duties, serious high-weight non-duty reasons, or important goals or aims.

Accordingly, Cruft's thesis about the structure of human rights can be rendered as:

¹¹⁴ Cruft, 'Human rights as rights' (n 4) 142.

¹¹⁵ *ibid* 143.

¹¹⁶ *ibid* (emphasis in original).

Dynamic Normative Factor Thesis: Each human right entails whatever normative factors are necessary to protect, serve, or in some other way ensure respect for the feature(s) of the right-holder that grounds the right.

In a similar way to Tasioulas's *Dynamic Duty Thesis*, Cruft's *Dynamic Normative Factor Thesis* leaves open how many normative factors each right generates. Each human right has the potential to entail many and varied normative factors or—because of countervailing considerations or the requirement of feasibility—just one. What normative factors are entailed by a particular human right is dependent on context.

Cruft's *Dynamic Normative Factor Thesis* then provides a ready response to O'Neill's objection. If each moral socio-economic human right (and other human rights) need not entail a single determinate duty that matches its content, but instead can entail directed duties with a differing content, undirected duties, and even just high-weight reasons, it is no objection to the existence of such a right that we cannot identify a fully-specified directed duty with a determinate bearer. As Cruft explains:

The individualistic extended non-Hohfeldian approach allows us to say that there are human rights to the full goods, held against the poor governments: it is just that such rights do not entail directed duties with the same content as the rights. (Instead, they can exist while entailing weaker directed duties or no directed duties at all but simply other powerful normative factors.)¹¹⁷

For example, it might be that in a country that has been devastated by war and famine there cannot be a duty on the state to provide affordable primary and secondary education to its citizens. The existence of such a duty might be defeated by the need to direct precious state resources towards dealing with the famine. But even in these circumstances the interests of citizens in education may be of sufficient importance to ground an undirected duty on the state to begin planning for the development of a primary and secondary education system, or a high-

¹¹⁷ *ibid* 156.

weight non-duty-based reason to build schools. On Cruft's account this will be enough to affirm the existence of a right to education held by citizens.

Cruft claims that, even though his *Dynamic Normative Factor Thesis* drops the requirement that each human right correlate with a directed duty, his thesis preserves the directed nature of the obligations that correspond to human rights. He claims that the individualistic justification of human rights which underpins the *Dynamic Normative Factor Thesis* places a special focus on the right-holder and (in a sense) foregrounds them as the beneficiary of the normative implications of the right, even when there are no directed duties in play. As Cruft explains:

Sometimes, on this approach, a human right will entail merely that certain goals ought to be pursued, and failure to pursue such goals will not qualify as a 'violation' but simply as a failure to do all that one ought—or perhaps even simply as a failure to respond to all the reasons bearing on one. But even then, there will necessarily be a sense that a particular person has been let down by such failure: the person whose F is the justifying source of the 'ought' or reason. ...¹¹⁸

Cruft claims that the correlation of human rights with directed duties is not necessary to maintain the sense in which right-holders whose rights go unfulfilled are especially affected by that lack of fulfillment. By taking each right-holder to be the justificational source of their rights and the normative implications that flow from them, the *Dynamic Normative Factor Thesis* 'preserves the premise that human rights have bearers who are let down (or, in some sense, 'violated') when human rights are not respected ...'.¹¹⁹

This then brings us to the relationship Cruft takes human rights to have with their duties. Unlike Shue and Tasioulas, Cruft avoids using the words 'correlation' or 'correlativity' to describe the relationship between human rights and their duties. It is clear that he wants to abandon any claim to strict Hohfeldian existential correlativity.¹²⁰ He specifically rejects the

¹¹⁸ *ibid* 151.

¹¹⁹ *ibid* 155.

¹²⁰ Frydrych, 'Rights Correlativity' (n 38) 3.

Hohfeldian orthodoxy that ‘a right’s correlative duty is whatever duty must exist wherever the right exists, no matter the changing context’—at least when talking about human rights.¹²¹ But even more than this, Cruft denies that human rights need to entail directed duties at all. According to the *Dynamic Normative Factor Thesis* human rights can entail non-duty normative factors and undirected duties—as well as directed duties—based on the circumstances. So, for Cruft, a human right can exist even without some correlative duty. Despite this, Cruft does appear to endorse justificational correlativity.¹²² As I mentioned above, on Cruft’s account, each human right operates as ‘the ground for a range of directed duties that vary with context’, as well as other normative factors.¹²³ Cruft appears to deny that both existential and justificational correlativity between human rights and their duties. For him, the existence of a human right neither necessarily entails nor justifies the existence of a directed duty.

D Conclusion

What should be clear from the discussion above is that, while Shue, Tasioulas, and Cruft each put forward a different account of human rights, they are all committed to the *Multiple Duty View* of the structure of human rights. Each of them rejects the Hohfeldian orthodoxy that there is a one-to-one relation between human rights and their duties, where each human right has a correlative duty that matches the content of the right. They are all committed to the view that for each human right there are as many duties as it takes to feasibly protect the value that underpins the right.

Shue’s *Tripartite Duty Thesis* takes each human right to generate (at least) a duty to avoid depriving the right-holder of the substance of their right, a duty to protect right-holders from being deprived of the substance of their right, and a duty to aid right-holders when they

¹²¹ Cruft, ‘Human rights as rights’ (n 4) 147.

¹²² Frydrych, ‘Rights Correlativity’ (n 38) 3.

¹²³ Cruft, ‘Human rights as rights’ (n 4) 155.

suffer a deprivation of the substance of their right. Tasioulas's and Cruft's theses are not as rigid as Shue's. Tasioulas's *Dynamic Duty Thesis* takes each human right to be the ground of the duties to which it corresponds. What this means is that, depending on context, each human right might generate multiple different duties—whatever it takes to protect the interest that grounds the human right. Tasioulas is not committed to any claim that human rights entail a minimum number of duties. A human right could generate only one duty or it could generate many different duties—it all depends on context. It is this potential for human rights to generate many different duties that makes the *Dynamic Duty Thesis* a version of the *Multiple Duty View*. Cruft's *Dynamic Normative Factor Thesis* is very similar to Tasioulas's thesis. However, it is more capacious than Tasioulas's. It takes human rights to correspond not only to directed duties but also to non-directed duty normative factors, too—including undirected duties, serious high-weight non-duty reasons, and important goals or aims. It holds that important features of a right-holder may ground human rights that correspond to one or a number of these normative factors. What normative factors correspond to a particular human right ultimately depends on context.

The short point is that Shue, Tasioulas, and Cruft each think that each human right correlates with potentially multiple duties. They consider this structure to make the best sense of moral human rights as a concept. What I have set out in Chapters One and Two, then, shows that the *Multiple Duty View* is an influential view of the structure of human rights in both the practice of human rights and human rights theory. While Chapter Two shows that Shue, Tasioulas, and Cruft each take every moral human right to correspond to multiple duties, this view is also reflected in the views of authoritative human rights institutions about the structure of the rights found in positive human rights law, set out in Chapter One.

There is no necessary connection between moral human rights and those rights that we find in positive human rights law.¹²⁴ However that the view of the structure of human rights espoused by Shue, Tasioulas, and Cruft—the *Multiple Duty View*—is reflected in how human rights are understood in human rights practice¹²⁵ might be taken to lend that view a degree of credence.

As Adam Etison notes, “fidelity to practice” has come to be seen as a primary virtue of any theoretical account of human rights’.¹²⁶ Some philosophers of human rights—like Samantha Besson—take human rights law to be the starting point for any theory of human rights.¹²⁷ For philosophers like Besson, human rights law provides the pre-interpretive material from which analysis begins, and from there one engages in a process of reflective equilibrium—moving back and forth between legal norms and moral ones—to arrive at an account of human rights.¹²⁸

Even those philosophers who start from moral principles generally accept that more plausible theories of human rights are those that reflect and account for human rights practice. For example, James Griffin claims, any philosophical account of human rights ‘cannot do without some explanation of how the notion of human rights is used in our social life. We need it to test whether what is derivable from ... highly abstract moral principles *are* human rights and *all* human rights.’¹²⁹ Similarly, Tasioulas, suggests that ‘a credible account of human rights must exhibit an appropriate level of fidelity to the human rights culture that has flourished post-

¹²⁴ See Allan Buchanan and Gopal Sreenivasan, ‘Taking International Legality Seriously: A Methodology for Human Rights’ in Adam Etison (ed), *Human Rights: Moral or Political?* (OUP 2018) 213-15. ‘While individual legal rights are one of the most powerful legal instruments, the morally legitimate purposes they can serve are not limited to (though they certainly include) implementing individual moral rights or giving them better practical effect.’

¹²⁵ The term ‘human rights practice’, as James Nickel suggests, arguably includes (1) ethical beliefs and attitudes, (2) action and activism, (3) law, (4) political practice, and (5) journalistic and scholarly work. See James Nickel, ‘What Future for Human Rights?’ (2014) 28(2) *Ethics & International Affairs* 213, 214-16.

¹²⁶ Adam Etinson, ‘On Being Faithful to the “Practice”’: A Response to Nickel’ in Adam Etinson (ed), *Human Rights: Moral or Political?* (OUP 2018) 163.

¹²⁷ Samantha Besson, ‘Legal Human Rights Theory’ in Kasper Lippert-Rasmussen, Kimberley Brownlee, and David Coady (eds), *A Companion to Applied Philosophy* (John Wiley & Sons 2017) 332.

¹²⁸ *ibid.*

¹²⁹ Griffin (n 6) 29.

1945, especially as it is crystallized in the so-called International Bill of Human Rights', even when it begins from moral premises.¹³⁰ So, that the *Multiple Duty View* of human rights expressed by Shue, Tasioulas, and Cruft is also reflected in human rights practice might be taken by some to give that view some theoretical credence.

Another plausible candidate for linking the philosophical views set out in Chapter Two with the views expressed by human rights bodies in Chapter One is to take the latter to be approving the former. That is, that human rights institutions have taken human rights to correlate with multiple duties has been driven (at least in part) by their endorsement of philosophical accounts of human rights that express the *Multiple Duty View*. This is certainly a plausible line of thought, especially given: (1) the symmetry between the 'respect, protect, fulfil' formula that features in the jurisprudence of human rights institutions and *Shue's Tripartite Duty Thesis*; and (2) the fact that the former appeared after the appearance of the latter.¹³¹ This again might be taken by some to give the *Multiple Duty View* some credence as a view of the structure of human rights.

As such, that the *Multiple Duty View* finds support both in the philosophical literature and in views about the structure of legal human rights expressed by authoritative human rights institutions makes it an influential view of the structure of moral human rights. Despite this, in the following chapters I raise some concerns about the *Multiple Duty View* of the structure of human rights—and accordingly each of the accounts of Shue, Tasioulas, and Cruft. I question whether the Multiple Duty View best accounts for how human rights work in our world.

¹³⁰ John Tasioulas, 'Are Human Rights Essentially Triggers for Intervention?' (2009) 4(6) *Philosophy Compass* 938, 939.

¹³¹ Shue, 'The Interdependence of Duties' (n 8) 84-85; As Thomas Pogge notes, '[the respect, protect, fulfill] typology is most directly due to Philip Alston and Asbjorn Eide. They in turn were both influenced by Henry Shue...'. See Thomas Pogge, 'Shue on Rights and Duties' in Charles R Beitz and Robert E Goodin (eds), *Global Basic Rights* (OUP 2011) 125 n 11.

3

A case for limited waiver of human rights

HAVING EXPLORED THE *Multiple Duty View* in the last two chapters, the remaining chapters of this thesis are devoted to raising some concerns about that view of the structure of human rights and then proposing an alternative view. The present chapter lays the groundwork for the concerns raised about the *Multiple Duty View* in Chapter Four. In that chapter I claim that the *Multiple Duty View* encounters problems in accounting for cases of waiver of moral human rights.

When it comes to rights-in-general¹—and especially private law rights like tortious, contractual, and property rights—it is relatively uncontroversial that a right-holder can waive their rights and that waiver is an ordinary part of right-holding.² As Robert Stevens claims, ‘[a]t common law it is possible to waive all of our rights. ... Waiver is in fact the distinguishing

¹ The term ‘rights-in-general’ is commonly used in the literature on rights to refer to the core case of rights, or rights freed of all the specifics that attach to particular or special classes of rights—like property rights, human rights, legal rights, etc—and reduced to their minimum essential components.

² By ‘part of right-holding’, I do not mean to suggest that waiver is part of the existence conditions for a right, as Will Theorists claim. As John Gardner puts it, the question of whether a particular right is waivable always requires some additional argument; ‘[t]o work out the answer we need to ask why the (alleged) fact that a duty towards one was (or is about to be) breached should make one a suitable person to wield *any* new powers and/or permissions over *anyone*’. See John Gardner, *From Personal Life to Private Law* (OUP 2018) 205 (emphasis in original). When I say that ‘waiver is part of right-holding’ I mean simply that waiver of rights-in-general (and especially private law rights) is a long-standing, well-accepted, and common practice—that few take issue with the claim that it is *possible* to waive a private law right.

feature of private rights’, as opposed to public duties.³ But that waiver of *human* rights is both possible and an ordinary part of holding those rights is more controversial. Accordingly, in this chapter I present a case for why limited waiver of moral human rights⁴ is both possible and an ordinary part of holding moral human rights.⁵

In part A I discuss the concept of waiver and what it means to waive a right. In part B I turn to focus on human rights. I outline five arguments for why human rights are typically thought to be inalienable⁶ or unwaivable: (1) that there is a strong intuitive case for unwaivable human rights; (2) that waiver of human rights would produce bad social consequences; (3) that waiver of human rights amounts to a failure to respect morality; (4) that as long as a right-holder is human they cannot lose their human rights; and (5) that human rights are framed as ‘inalienable’ in positive international law. After advancing some responses to these arguments—which creates space for the possibility of waiver—I present an autonomy-based case for limited

³ Robert Stevens, ‘Not Waiving but Drowning’ in Andrew Dyson, James Goudkamp, and Frederick Wilmot-Smith (eds), *Defences in Contract* (Hart 2017) 126.

⁴ I argue here for the possibility and ordinariness of waiver of at least some *moral* human rights. This is not to deny that there are some human rights that are not waivable at law.

⁵ Again, I do not mean to say that waiver is part of the definition of a human right. Some additional argument will always be required as to why some particular human right is waivable. In this sense, waiver mirrors forfeiture of human rights. It is relatively well-accepted that human rights can be forfeited when someone becomes liable to some kind of (otherwise rights-violating) defensive action or punishment. See eg David Rodin, ‘The Reciprocity Theory of Rights’ (2014) 33(2) *Law and Philosophy* 281; Christopher Wellman, *Rights Forfeiture and Punishment* (OUP 2017). But whether someone has forfeited a particular right on a particular occasion depends on what case can be made for that forfeiture. I think something similar applies to waiver of human rights—a case will always have to be made for the waiver of any particular human right. What I seek to establish in this chapter is the first step in this inquiry—the possibility of waiving human rights. I do not go on to argue for the waivability of any particular human right.

⁶ The term ‘inalienable’ is sometimes used as a synonym for ‘unwaivable’. See eg Neil MacCormick, ‘Rights in Legislation’ in PMS Hacker and Joseph Raz (eds), *Law, Morality, and Society: Essays in Honour of H.L.A. Hart* (Clarendon 1977) 198-9; Hillel Steiner, ‘Directed Duties and Inalienable Rights’ (2013) 123(2) *Ethics* 230, 230. However, some rights theorists distinguish waiver as a ‘temporary relinquishment’ of a right from alienation as a permanent divestiture of a right or its transfer to another person. See eg Carl Wellman, *The Moral Dimensions of Human Rights* (OUP 2011) 35-6; Robert Stevens, ‘Private rights and public wrongs’ in Matthew Dyson (ed), *Unravelling Tort and Crime* (CUP 2014) 115-6. In this Chapter I use waiver synonymously with alienation, as this is the approach generally taken in the field of human rights. See eg James Nickel, ‘Human Rights’, *The Stanford Encyclopedia of Philosophy* (Summer edn, 2019) <<https://plato.stanford.edu/entries/rights-human/>> accessed 15 June 2020: ‘Inalienability does not mean that rights are absolute or can never be overridden by other considerations. Rather it means that its holder cannot lose it temporarily or permanently by bad conduct or by voluntarily giving it up.’

waiver of human rights. Finally, I make some observations about the ordinariness of waiver of human rights.

A *Waiving rights*

Waiver of rights is a favourite topic of rights theorists. Much has been written about the possibility of waiver and how it affects the operation of rights and their structure.⁷ In fact, practices of waiver are integral to many instances of right-holding, and especially right-holding in private law.⁸ To take a basic and classic example from private law,⁹ let us say that Shiva lends Lawrence \$10 on the basis that Lawrence pay her back within a week. Shiva later finds out that Lawrence recently lost his job. Aware of his rising stress levels, and in light of their friendship, Shiva tells Lawrence, ‘Don’t stress about the \$10. You don’t need to pay it back.’

At the point that Shiva lent Lawrence the \$10, as the owner of the \$10 Shiva had a right against Lawrence that he pay her back within a week. Lawrence had a correlative duty to pay Shiva back within a week. At this point, if Lawrence had failed to pay Shiva back within a week, Lawrence would have committed a wrong against Shiva, and Shiva would have been entitled to demand that Lawrence compensate her for this wrong. However, all that changed when Shiva decided to tell Lawrence that he did not need to pay her back. At that point—and without having engaged in any wrongdoing¹⁰—Shiva became unable to stand on her right and demand that Lawrence pay her back within a week. Correspondingly, Lawrence was released from his

⁷ A sample of some classics includes: HLA Hart, ‘Are There Any Natural Rights?’ (1955) 64(2) *Philosophical Review* 175; Herbert Morris, ‘Persons and Punishment’ (1968) 52(4) *The Monist* 475, 495-501; Joel Feinberg, ‘Voluntary Euthanasia and the Inalienable Right to Life’ (1977) 7(2) *Philosophy & Public Affairs* 93; Edward Rubin, ‘Toward a General Theory of Waiver’ (1981) 28(3) *UCLA Law Review* 478; Judith Jarvis Thomson, *The Realm of Rights* (HUP 1990) Ch 14; Heidi Hurd, ‘The Moral Magic of Consent’ (1996) 2(2) *Legal Theory* 121; Terrance McConnell, *Inalienable Rights: The Limits of Consent in Medicine and the Law* (OUP 2000) 3-23.

⁸ See eg *Mulcahy v Hoyne* (1925) 36 CLR 41, 55-6 (Isaacs J): ‘Anyone may relinquish a right which has been created for his sole benefit.’

⁹ The example of waiving a right to repayment of a debt is used as a paradigm example of waiver by Joseph Raz. See Joseph Raz, *Practical Reason and Norms* (2nd edn, OUP 1990) 96. See also Sean Wilken, *Wilken and Villiers: The Law of Waiver, Variation and Estoppel* (2nd edn, OUP 2002) 60 para 4.28: ‘X can expressly or by its conduct suggest that Y need no longer perform its future obligations under the contract.’

¹⁰ Aside from suppressing our rights through waiver, one familiar example of how we can lose our rights is by forfeiting them in virtue of having engaged in wrongdoing.

obligation to pay Shiva back within a week, and he was permitted not to repay Shiva the \$10, without committing any wrong against her.

To explain exactly why Shiva loses her ability to stand on her right, why Lawrence is released from his duty, and why Lawrence's failure to repay the \$10 no longer wrongs Shiva, we need a concept of waiver. We explain what happened by saying that, when Shiva tells Lawrence that he need not pay her back, she waives her right against Lawrence, which waiver affects a release of Lawrence from his correlative duty to her and makes it the case that Lawrence will not wrong Shiva if he does not repay her the \$10.

Before getting into what exactly it means to '*waive a right*', it is worth noting the connection between consent and waiver. Consent is what Heidi Hurd calls a '*moral transformative*'.¹¹ When validly given, voluntarily and intentionally, it transforms conduct that would in the absence of consent be wrongful into conduct that is rightful—or at least morally permissible.¹² It does this by modifying the rights and obligations of the parties to a particular course of conduct. The giving of consent by one party to a relationship changes the moral profile¹³ of the parties to that relationship in respect of each other, and sometimes in respect of external parties.¹⁴ As John Gardner explains, '[t]o consent is to exercise a normative power to permit (or empower) another to do something that the other has, or would otherwise have, a duty not to do (or no power to do).'¹⁵ That is, to consent to something is to remove a normative impediment that otherwise stands in the way of that thing being done.

¹¹ Hurd (n 7) 124.

¹² *ibid* 125-7.

¹³ The term '*moral profile*' was coined by Mark Greenberg to refer to the moral obligations, powers, privileges, and rights of agents. See Mark Greenberg, 'The Moral Impact Theory of Law' (2014) 123(5) *Yale Law Journal* 1288, 1308.

¹⁴ Hurd (n 7) 121-4.

¹⁵ John Gardner, 'Justification under Authority' (2010) 23(1) *Canadian Journal of Law and Jurisprudence* 71, 75.

For Gardner, consent can be broken down into three more specific normative activities, each of which shares this feature of removing a normative impediment to something. As he explains:

The power to consent is a power to affect what other people can do to, on, or in place of the consenter. A's consent given to B is a way of waiving certain duties that B might otherwise owe to A, authorising certain breaches of those duties by B without waiving them or conferring powers upon B to alter A's normative position (or to alter C's normative position in a way that would otherwise fall to A).¹⁶

There are then three different things A might do by consenting to something: (1) A might be waiving a right against B; (2) A might be authorising B's breach of his duty to A; or (3) A might be conferring power on B to alter A's normative position. So, waiver is just one kind of consent. While all cases of waiver of rights are cases of consent, not all cases of consent are cases of waiver of rights. Some cases of consent may be cases of the second or third kind of consent, depending on the circumstances. What exactly it means to 'waive a right' will become clear by reflecting on each of the other kinds of consent. I will consider each in reverse order, starting with the conferral of power to alter another's normative position.

1 *A conferral of power to alter A's normative position*

The third kind of consent is the most dissimilar from waiver (and the second kind of consent). It involves the conferring of a power to alter the normative position of a person (generally through the imposition of new duties), rather than dispensation from compliance with some mandatory requirement (permitted deviation from existing duties). Gardner notes that where consent empowers a person to impose duties, that person will usually only have that power in respect of the consenter.¹⁷ Take the case of marriage. When A and C consent to be married, their consent involves conferring powers on the marriage celebrant B to alter their normative

¹⁶ John Gardner, 'The Opposite of Rape' (2018) 38(1) *Oxford Journal of Legal Studies* 48, 57.

¹⁷ Gardner, 'Justification under Authority' (n 15) 76.

position by imposing on them the rights and duties of a married couple.¹⁸ The married couple give B a normative power (in relation to them, only) that B previously lacked. However, Gardner also notes that in certain rare cases ‘the scope of consent’s force is wider’, and the consent of A can empower B to impose duties on third parties. He gives the example of where the executive arm of government consents to legislation: ‘The President¹⁹ consents to legislation, and thereby validates the power of the legislature to impose duties on those who are subject to the legislation.’²⁰ Here the President’s consent confers on the legislature a power it previously lacked—the power to impose on third parties the particular duties it has created in the relevant statute.

2 *Authorising a breach of duty*

The second category of consent is the most similar to waiver.²¹ It involves A voluntarily and intentionally authorising B to breach some duty (whether that duty be a directed duty that is owed to a right-holder or an undirected duty that is owed to no one in particular²²). That is, it involves a dispensation from compliance with some duty by B. But, as Gardner makes clear, this dispensation from compliance is not perfect. The duty continues in existence and it continues to exert part of its reason-giving force on B. But through A’s consent to B, B is afforded a

¹⁸ Note that consent never involves the direct imposition of new duties by one person on another. It only ever involves the indirect imposition of new duties ‘by validating the imposition of those duties by another’, as is reflected in the case of marriage. And this is one of the main ways in which giving consent differs from exercising authority: *ibid* 77.

¹⁹ Gardner appears to have been writing for a US audience.

²⁰ Gardner, ‘Justification under Authority’ (n 15) 76.

²¹ In fact, so similar is authorised breach of duty to waiver that it is often confused with it. For example, Terrance McConnell states, ‘[w]hat is common to waiver and transfer is that the possessor’s consent (or behavior that warrants the inference of consent) authorizes others to infringe the possessor’s right; the infringement is justified because of consent’: McConnell (n 7) 11. On the analysis that I present here, McConnell is talking about authorised breach of duty, rather than waiver properly-so-called.

²² A distinction is drawn in the literature on rights between directed and undirected duties. Directed duties are those duties that are correlated with rights. They set up a normative arc of obligation between right-holder and the duty-bearer. Breach of a directed duty wrongs the right-holder—this is sometimes referred to as a *wronging*. Undirected duties by contrast have no correlative rights. They are pure obligations that are owed to no one, and their breach wrongs no one in particular. However, breach of an undirected duty is still a *wrong*. See Rowan Cruft, ‘Why is it Disrespectful to Violate Rights?’ (2013) 113(2) *Proceedings of the Aristotelian Society* 201, 201; David Owens, *Shaping the Normative Landscape* (OUP 2012) 45-6. On the distinction between committing a wrong against someone and committing a general moral wrong see below at 104.

justification for non-compliance with the duty. As Hurd explains, this kind of consent ‘conveys ... a “stained permission,” for the act done remains, in some sense, wrong, and hence morally stained, but the consent defeats any rights that the actor not do the wrong act.’²³ To see how this all works, we need to consider the relationship between duties and reasons.

Our action (and inaction) in the world and in relation to one another is always guided by reasons. At any one moment in time we will generally have a number of reasons that apply to us that counsel for some action, some that counsel against it, and some that counsel for an alternative course of action, etc. All of the reasons that apply to us have particular weights, and what we ought to do (or what we ought to do *all-things-considered* or what we have conclusive reason to do) at any moment in time depends on how the reasons for and against some action—and for and against alternative actions—stack up, or on the normative relations between those reasons for action that apply to us.²⁴ When a reason for action is outweighed by another it is defeated and the course of action that it demands is taken off the table—at least from the perspective of rationality. For, as John Gardner and Timothy Macklem observe, ‘[w]hat rationality strictly speaking asks is that one always act for an undefeated reason.’²⁵ If a reason for action is defeated, one cannot rationally act on it. If after all of the reasons that apply to me have been balanced what is left is an undefeated reason to φ , then I have conclusive reason to φ —at least until some other reason emerges that defeats my reason to φ .²⁶ That being said, it is not always the case that reasons can be neatly balanced like this, such that we have just one undefeated reason for action at the end of an instance of practical reasoning. Sometimes two (or more) actions may be incommensurable, because ‘neither is supported by weightier reasons than

²³ Hurd (n 7) 123.

²⁴ Ruth Chang, ““All Things Considered”” (2004) 18(1) *Philosophical Perspectives* 1, 2.

²⁵ John Gardner and Timothy Macklem, ‘Reasons’ in Jules Coleman, Kenneth Himma, and Scott Shapiro (eds), (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004) 463.

²⁶ TM Scanlon, *Being Realistic About Reasons* (OUP 2014) 105.

the other and yet the reasons on the two sides are not equal in weight either'.²⁷ In such as case, the principle of rationality that one must act for undefeated reasons does not determine which course of action to choose, because each course of action is supported by an undefeated reason.

The existence of an undirected duty gives the agent bound by it a reason for action, which is sometimes described as a mandatory reason.²⁸ Such duty-based reasons for action are reasons of a special kind. They are what Joseph Raz calls 'protected reasons'.²⁹ That someone is under a duty means that they have a reason for action—with the status of any other first-order reason for action³⁰—but this reason for action also has 'a special, built-in exclusionary force' that *protects* it from being defeated by conflicting reasons for action.³¹ That is, the reason for action generated by the existence of a duty is—in addition to being a first-order reason for action (that may be balanced against and outweighed by any other undefeated and non-excluded first-order reasons for action)—a second-order reason not to act for certain countervailing first-order reasons, irrespective of their weight. This second-order reason is sometimes referred to as an 'exclusionary reason'.³² As Gardner puts it, the structure of the reason generated by the existence of a duty 'means that it punches above its weight. Of course, it still has weight as an ordinary reason for action, but it also has a second dimension of force'.³³ Because of this second dimension of force it is sometimes said that the existence of a duty generates reasons with 'peremptory

²⁷ Gardner and Macklem, 'Reasons' (n 25) 470.

²⁸ John Gardner, 'What is Tort Law For? Part 1. The Place of Corrective Justice' (2011) 30(1) *Law and Philosophy* 1, 31.

²⁹ Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, OUP 2009) 17-19.

³⁰ I follow Joseph Raz in taking the reasons generated by the existence of a duty not to have any automatic primacy, or special importance or weight simply in virtue of their connection to a duty. As Raz notes, that the reasons for action generated by the existence of duties do not have any automatic primacy or special force is borne out by the existence of trivial duties (like the duty not to break a promise to go to the movies with someone) that may be overridden by other undefeated and non-excluded first-order reasons for action. What makes duties normatively special is that they can put out of play certain reasons that would otherwise conflict with the first-order reason for action they generate: Joseph Raz, 'Promises and Obligations' in P M S Hacker and Joseph Raz (eds), *Law, Morality, and Society: Essays in Honour of H.L.A. Hart* (Clarendon 1977) 223.

³¹ Gardner and Macklem (n 25) 466.

³² Raz, *Practical Reason and Norms* (n 9) 39.

³³ John Gardner, 'Fletcher on Offences and Defences' (2004) 39(4) *Tulsa Law Review* 817, 822.

force' for the duty-bearer.³⁴ That the reason generated by the existence of a duty operates as a second-order reason not to act on countervailing reasons means that it puts out of play those countervailing reasons before they are weighed against the duty-based first-order reason for action, so that there is no opportunity for the duty-based first-order reason to be defeated by these countervailing reasons. So, the reason for action generated by the existence of an undirected duty has two aspects: it is a first-order reason with the same status and force as any other first-order reason and a second-order reason not to act on reasons that conflict with that first-order reason. Where an agent bound by an undirected duty fails to do what the duty demands of them they fail to conform to the reason for action generated by the existence of the duty and commit a general moral wrong. But this failure wrongs no one in particular.

Duties correlated with rights held by other persons—or, directed duties—have a similar structure and role in practical reasoning. The reason for action generated by the existence of such a duty is a mandatory reason that functions as a first-order reason for action (with the same status and force as any other first-order reason for action) as well a second-order exclusionary reason not to act on reasons that conflict with that first-order reason. However, the reason generated by the existence of a directed duty is a reason for action in respect of a particular person—the right-holder. Failure by the agent bound by a directed duty to conform to the reason which its existence generates means that the agent wrongs a particular person—the right-holder.³⁵ So, a duty-bearer's failure to discharge a duty correlative to a right is a moral failure that affects a particular person—the right-holder.

That a reason for action has been outweighed and defeated does not necessarily mean that its normative force is spent. As I mentioned above, the effect of a reason for action being

³⁴ Raz, 'Promises and Obligations' (n 30) 223.

³⁵ Owens (n 22) 45–6.

defeated ‘is to eliminate the rationality of acting for [it]’.³⁶ But, aside from this, a defeated reason remains a reason for action and may still have some normative pull on the life of the agent to whom it applies. This will be the case at least where a duty-based reason has been defeated, either because its second-order exclusionary aspect has been cancelled and it has been outweighed by some previously excluded first-order reason, or because it has been outweighed *in toto* by some sufficiently powerful countervailing first-order reason.³⁷ This is because, as Gardner and Macklem note, ‘every reason corresponds to a value’, and that a reason is defeated does not mean that this value disappears.³⁸ What this means is that when a reason is defeated, non-compliance with it may still leave some trace on the life of the agent to whom it applies—that is, the defeated reason may leave behind a ‘moral residue’³⁹ or ‘remainder’⁴⁰ in virtue of its having not been conformed to.⁴¹ The normative force of this moral residue or moral remainder⁴² will, according to Gardner and Macklem, be stronger or weaker depending on the circumstances and the nature of the defeated reason. Where the defeated reason is an ordinary first-order reason, non-compliance may (at best) leave behind reasons with advisory force, such as reasons for regretting the action not taken—which reasons may themselves be outweighed by reasons not to regret.⁴³ However, where the defeated reason is a mandatory reason—such as a duty—it

³⁶ Gardner and Macklem (n 25) 464.

³⁷ I leave open whether it is correct to say, as Gardner and Macklem do, that ‘[e]very time one does not do what *any reason* would have one do, be that reason mandatory or otherwise, a trace is left on one’s life. This is always in principle a matter of regret, for as we saw reasons do not lose their force as reasons merely because they are defeated’: Gardner and Macklem (n 25) 467 (emphasis added). The claim I rely on here is just that non-conformity to the reasons generated by the existence of a *duty* always leaves a moral residue or moral remainder, regardless of whether it is justified. See Frederick Schauer, ‘Rightful Deprivations of Rights’ (2018) Virginia Public Law and Legal Theory Research Paper No 2018-43, 12-13 <<https://ssrn.com/abstract=3221184>> accessed 6 March 2019; Frances Kamm, *Intricate Ethics: Rights, Responsibilities, and Permissible Harm* (OUP 2007) 328.

³⁸ *ibid.*

³⁹ Michelle Madden Dempsey and Jonathan Herring, ‘Why Sexual Penetration Requires Justification’ (2007) 27(3) *Oxford Journal of Legal Studies* 467, 488; Thomson, *The Realm of Rights* (n 7) 84.

⁴⁰ Gardner, ‘Fletcher on Offences and Defences’ (n 33) 820.

⁴¹ Gardner and Macklem (n 25) 467.

⁴² There is no distinction drawn between these two terms in the literature. However, one might take ‘moral residue’ to refer to those defeated reasons that have advisory force only and ‘moral remainder’ to refer to those defeated reasons that exert pressure to provide a remedy or purgatory reaction. Thanks to Dale Smith for this suggestion.

⁴³ Gardner and Macklem (n 25) 467.

may leave behind more stringent reasons to adopt ‘remedial and purgatory reactions, such as apology, payment of compensation, penance or punishment.’⁴⁴

Returning then to authorised breach, when A gives consent of the second kind—authorising B to breach a duty—this does not cancel the entire duty or its reason-giving force, regardless of whether it is a directed or an undirected duty. Provided A’s consent is valid and effective, what A’s consent does is cancel part of the second-order exclusionary aspect of the duty-based reason and put back into play certain first-order reasons for action—reasons against doing what the duty requires—that were previously excluded by that exclusionary reason. As Gardner puts it, ‘[t]he consent does not cancel the duty, but merely makes available certain reasons, reasons that would otherwise have been excluded by the duty, as acceptable reasons to breach it.’⁴⁵ As with justificatory defences in criminal law, consent ‘creates a gap in the mandatory force of the mandatory norm, a gap through which certain conflicting reasons are readmitted as ... acceptable reasons for acting’.⁴⁶ Those unexcluded first-order reasons are then put into balance with the first-order reason for action generated by the duty and—depending on the relative weight of each reason—may outweigh that latter reason and defeat it (either by itself or in combination with other undefeated and unexcluded reasons for action) or be outweighed and defeated themselves.

That giving the second kind of consent means that previously excluded first-order reasons are put into conflict with the first-order reason for action generated by the existence of the duty is important. As I indicated above, when it is outweighed by a non-excluded and undefeated first-order reason, the normative force of that first-order reason generated by a duty is not spent. Even when outweighed by other first-order reasons, this duty-based first-order

⁴⁴ *ibid* 467-8.

⁴⁵ Gardner, ‘Justification under Authority’ (n 15) 76.

⁴⁶ Gardner, ‘Fletcher on Offences and Defences’ (n 33) 823.

reason continues to exist, even though it does not guide the duty-bearer's action in the first instance.⁴⁷ What this means is that the duty-bearer still commits a wrong when they act contrary to a duty that they are authorised to breach. But the wrong to which non-compliance with the duty gives rise is a '*justified wrong*'.⁴⁸ That is, when B breaches the duty he was authorised by A's consent to breach, he still commits a wrong, but that wrong is justified by A's consent. B's breach leaves behind a moral residue or moral remainder in virtue of the first-order duty-based reason having not been conformed to. As Gardner explains, doing something contrary to a duty but which one is authorised to do,

... albeit justified, remains regrettable. It would have been better still had there been no occasion to commit it, and hence no need to ask whether its commission was justified or not. This we can call the 'remainders thesis': justified action still leaves a remainder of conflicting reasons that were regrettably not conformed to.⁴⁹

So, B's breach of a duty, authorised by A, always leaves some moral residue or moral remainder which is not wiped out by A's consent.

It is important to note here that, as consent in cases of authorised breach creates a gap in the mandatory force of the duty by cancelling part of the second-order aspect of the reason generated by the existence of the duty—which permits the agent to act on first-order reasons that conflict with the duty-based first-order reason—the moral residue or moral remainder left behind in cases of authorised breach is produced by the defeat of a duty-based first-order reason by another first-order reason or other first-order reasons. It is not produced by defeat of a whole mandatory norm. As such, and as discussed above, non-compliance with this defeated reason will simply be a matter for regret, rather than giving rise to reasons to provide compensation or to adopt purgatory reactions.⁵⁰

⁴⁷ *ibid.*

⁴⁸ Gardner, 'Justification under Authority' (n 15) 76.

⁴⁹ Gardner, 'Fletcher on Offences and Defences' (n 33) 819–20.

⁵⁰ You might be wondering then, if consent in cases of authorised breach cancels part of the second-order exclusionary aspect of a duty-based reason so that non-compliance with the defeated duty-based reason is merely a matter for regret, in what circumstances will breach of a duty both be permissible and leave the second-order

Authorising a breach of duty need not be permanent. The consentor can withdraw their consent and reinstate the second-order aspect of the duty at any time. The withdrawing of consent and reinstating of the second-order aspect of the duty will, again, mean that certain reasons that conflict with the reason generated by the existence of the duty are put out of play, making it the case that if the duty-bearer breaches the duty they will commit a wrong.

As an example of authorised breach Gardner refers to consensual assaults, such as surgeries. He claims that '[c]onsensual assaults are still assaults, albeit on occasion justified assaults.'⁵¹ That one commits an assault against another person, rather than doing something that does not amount to an assault, is for Gardner always regrettable, despite being justified. However, I do not think Gardner is quite right here. There may be some cases of consensual assault that are cases of authorised breach, but I do not think that all cases of consensual assault are cases of authorised breach. Take tattooing, for example. It hardly seems that a tattoo artist who tattoos a client who has signed up and duly paid for their services, in full control of their faculties, should feel any regret at all when of tattooing their client—despite the fact that, without the client's consent, this would be a serious breach of the tattoo artist's duty to respect the client's bodily integrity. So, I suggest, not all consensual assaults will fall into this category of consent.

A better example is the case of the injured soldier who urges their comrade to go on without them.⁵² In this case, two soldiers are out on patrol when one is badly injured by a

exclusionary aspect intact so as to give rise to a moral remainder that calls for compensation or a purgatory reaction? As I explain in the next section, waiver does not work this way—it suppresses the right and duty, and the reasons the duty's existence generates. I do not have the space to deal with this in any detail here, but my inclination is to say that such moral remainders arise in the kinds of cases Joel Feinberg describes as infringements of rights and Frederick Schauer describes as rightful deprivations of rights—where the reason generated by the existence of a duty is defeated by some other kind of mandatory reason. Such cases include the stranded mountaineer caught in a life-threatening blizzard who, in order to preserve her own life, breaks into an unoccupied cabin. We might think that the mountaineer was justified breaching her duty to the cabin owner not to trespass on their property, but that she owes the property owner compensation for that trespass. See Feinberg (n 7) 102–4; Schauer (n 37).

⁵¹ Gardner, 'Justification under Authority' (n 15) 76.

⁵² I take this example from Nicholas Cornell, with some modifications. See Nicholas Cornell, 'The Possibility of Preemptive Forgiving' (2017) 126(2) *Philosophical Review* 241, 252.

landmine. The injured soldier is unable to walk and return to the camp, even with the help of the unharmed soldier. The unharmed soldier radios for assistance but is told that aid cannot be dispatched for several hours. The unharmed soldier promises to stay with the injured soldier until aid arrives. After an hour of waiting the two hear gunfire in the distance and ascertain that it is heading in their direction. The injured soldier says, 'Please go on without me.' The unharmed soldier leaves. Here the injured soldier's consent to being left behind makes the unharmed soldier's leaving him an authorised breach of his promissory duty to the injured soldier.⁵³ While it is permissible for the unharmed soldier to leave, there is still some sense in which the unharmed soldier's leaving the injured soldier is wrong. His leaving is a justified wrong, given the injured soldier's consent to being left behind. The unharmed soldier should feel regret for having left the injured soldier behind. However, the reasons generated by his interests in his own life may mean that this regret does not weigh heavily.

Given the specificity of this case, it is actually quite hard to see what kinds of consents will amount to authorised breach (rather than cases of waiver). In most cases, consenting to something (where the consent is valid) will mean that no moral residue or residue of regret remains when that thing happens. Many cases of this sort may in fact be cases of waiver.

3 *Waiver of rights*

The first kind of consent—waiver—differs from the other two kinds of consent. However, like the second kind of consent it involves a voluntary and intentional dispensation from compliance with some duty by B. However, the dispensation from compliance with a duty authorised by waiver is generally a dispensation from compliance with a right and its correlative directed duty.

⁵³ Cornell interprets this case differently to me. He takes the injured soldier to have relinquished any complaint he may have against the unharmed soldier while not releasing the unharmed soldier from his promissory duty to stay with the injured soldier. On this basis, Cornell claims that the unharmed soldier's leaving is not permissible. I agree that the injured soldier's consent to being left does not release the unharmed soldier from his promissory duty, but it *does* afford him a justification for leaving, one which leaves a residue of regret.

Gardner's formulation bears this out when he states, 'A's consent given to B is a way of waiving certain duties *that B might otherwise owe to A*.'⁵⁴ That is, typically the only agents who get to exercise the normative power of waiver are right-holders or the subjects of directed duties. Undirected duties or those duties to which no rights correlate cannot be waived.

Furthermore, this dispensation from compliance with some duty does not, in the case of waiver, operate to give the duty-bearer a *justification* for breaching their duty, as it does in the case of authorised breaches of duty. Waiver operates to *suppress* the right and duty on which it operates, such that when the duty-bearer acts contrary to what the duty previously required there remains no wrong that requires justification.⁵⁵ As Gardner states, 'the fact that a certain action is consented to means that there is now no wrong. There would otherwise be a duty not to do what one does, but the consent ... waives ... the duty.'⁵⁶ Returning to my example above, when Shiva decides to waive her right against Lawrence and release Lawrence from his obligation to Shiva, the normative relationship of directed obligation established by the mutual promises is suppressed, such that Shiva is not wronged by Lawrence's failure to repay her the \$10.

This is because, rather than putting back into play certain first-order reasons for action that were previously excluded by a duty-based second-order exclusionary reason—which first-order reasons are then balanced against the duty-based first-order reason for action—when a right is waived, the waiver suppresses the normative force of both the right, the duty, and the reason generated by the existence of the duty for the operative period of the waiver.⁵⁷ It fundamentally changes the moral profiles of the parties by putting out of play both aspects of the reason generated by the existence of the duty: the first-order reason for action and the

⁵⁴ Gardner, 'The Opposite of Rape' (n 16) 57 (emphasis added).

⁵⁵ Hurd (n 7) 123; Owens (n 22) 165.

⁵⁶ Gardner, 'Justification under Authority' (n 15) 76.

⁵⁷ Gardner, 'Justification under Authority' (n 15) 76.

second-order exclusionary reason. So, following A's waiver of her right against B, and her release of B from his duty, there remains no duty-based reason which applies to B non-conformity to which needs to be justified. What this means is waiver of rights does not produce any moral remainders or moral residue. After a right is waived the duty-based reason for action that previously applied to the duty-bearer is no longer available to come into conflict with non-excluded and undefeated countervailing first-order reasons. Accordingly, there is no failure to comply with a defeated duty-based reason that is to be regretted.

It should be noted here that a waiver of a right need not be permanent—the normative relationship between the parties can be revived. To take another example from private law, Vincenzo might tell Ivan that it is okay for Ivan to park his car in Vincenzo's driveway. By doing this Vincenzo waives his right against Ivan that Ivan stay off his land and releases Ivan from his duty to stay off Vincenzo's land. Vincenzo can reverse this situation. Vincenzo can later tell Ivan that—because he has just purchased a new boat—Vincenzo now needs that driveway space back and so it is no longer okay for Ivan to park there. Here, Vincenzo has revived his right against Ivan that Ivan stay off Vincenzo's land. There will of course be some situations in which a waiver of a right becomes permanent or irreversible. This will happen when insufficient notice of the right-holder's change of mind has been given to the duty-bearer or where the subject of the right has been destroyed. For example, to the extent that it is morally possible, waiver of one's right to life (for the purposes of euthanasia) will be permanent where the duty-bearer acts on it and takes the life of the right-holder.

That being said, in general, where a right-holder waives their right, the reason generated by the existence of the correlative duty will be suppressed only for the period during which the right-holder's consent remains active. That is, during the period of consent, the reason generated by the existence of the correlative duty will be put out of play, and the duty-bearer will not wrong the right-holder if they do some act that was previously forbidden by that duty. However,

withdrawal of consent by the right-holder will—provided the appropriate notice is given to the duty-bearer—revive the right-holder’s right. At this point, the reason generated by the existence of the correlative duty will once again become rationally binding on the duty-bearer and acting inconsistently with it will wrong the right-holder.

This is what I mean when I say that waiver *suppresses*⁵⁸ the right and duty—and the reason generated by the existence of that duty—in respect of which it operates. I do not have a full account of the suppression theory of waiver, and the remarks that I make here are only tentative and would benefit from further work. However, I think ‘suppression’ is a useful way to think about waiver.⁵⁹ ‘Suppression’ captures the way that the duty-based reason can be brought in and out of normative play by the right-holder’s consent—the way that waiver permits acting against that reason but only for the period during which the right-holder’s waiver-generating consent remains active. Again, speaking tentatively, we might say that waiver effects the suppression of rights and duties, rather than their forfeiture or renunciation, because whatever justified the existence of the right and duty before the right-holder’s waiver *ceteris paribus* still exists following that waiver. This is why the right-holder can revive the relation of right by withdrawing their consent. That is, when a right is waived, the transformative force of waiver-generating consent—grounded in the value of autonomy⁶⁰—makes it the case that the ground of the right and duty is no longer sufficient to justify their existence. Once that consent is withdrawn, the justificatory force of the ground of the right and duty is reinstated, and the right, its correlative duty, and the reason for action generated by the existence of that duty, are revived.

⁵⁸ Above I talked about how authorised breach affects a cancellation of the second order aspect of the reason generated by the existence of the duty to which it relates, as this is how authorised breach tends to be analysed in the literature. However, there is an interesting question whether authorised breach—like waiver—actually only suppresses the second order aspect of the reason generated by the existence of the duty. I do not go into this here because I am primarily concerned with how waiver works for the purposes of this thesis.

⁵⁹ Thanks to Dale Smith for this suggestion.

⁶⁰ I discuss in more detail the autonomy-based case for waiver below in Section B.2.

Accordingly, it is wrong to say—as some commentators do—that by waiving a right the right-holder ‘foregoes’, ‘relinquishes’, or ‘gives up’ that right.⁶¹ As I said above, although sometimes waiver of a right will not be able to be withdrawn—as in cases of voluntary euthanasia—ordinarily waiver suppresses the right and its correlative duty for the period during which the right-holder’s consent remains active.

I said above that waiver effects the suppression of *both* the right and duty at which it is directed. This is not an uncontroversial position. There is some contention in the literature about what exactly happens to rights and duties at the point of waiver. Terrance McConnell claims that waiver ‘suspends’ the duty correlative to the right but that the right-holder continues to hold the right. As he explains, with reference to P1’s waiver of his right against P2 that P2 stay off his land:

... There are two reasons why I say this. First, P1 has a right against all other agents (to whom no such permission has been granted) that they stay off his land; so P1 must still have the right. And second, ordinarily P1 can take back the permission that he has given to P2. But surely P1 has the authority to take back the permission only if he still has the right in question.⁶²

I think McConnell’s picture misses some important aspects of waiver that are accounted for when we take *both* the right and the duty to be suppressed by a waiver. Specifically, when a right is waived, we generally take the right-holder to lose their ability to stand on their right. In my example above, when Shiva tells Lawrence that he need not repay the \$10, she loses the ability to complain about his failure to repay—at least without some attempt to revive her right. If we say that following a waiver the right-holder continues to hold their right but the duty is ‘suspended’ we have only half the explanation for why the right-holder cannot make demands of the duty-bearer—the suspension of the duty. Taking both the right and duty the subject of a waiver to be suppressed by that waiver captures the fact that (1) acting contrary to a duty that has been waived does not amount to a wrong to the right-holder; and (2) the right-holder

⁶¹ See eg Rubin (n 7) 483; Jessica Berg, ‘Understanding Waiver’ (2003) 40(2) *Houston Law Review* 281, 283.

⁶² McConnell (n 7) 10.

cannot, without some attempt to revive their right, stand on their right and demand compliance with it.

Furthermore, nothing is lost if we abandon McConnell's claim that following a waiver the right continues in existence while the duty is 'suspended'. *Pace* McConnell, the revival of rights and duties following a waiver can be explained without the need to specify the continuing existence of the right. As I argued above, the ability of a right-holder to revive their right and its correlative duty following a waiver may be explained by the continuing existence of the ground of the right and the duty. As for McConnell's point about accounting for the continuing existence of a right against duty-bearers whose duties are not the subject of a waiver, again, this can be explained without taking waiver to 'suspend' only the duty at which it is directed and not its correlative right. If we take each relation of right to have only one right-holder and one duty-bearer—such that where Carmel, Daniel, and Edward each owe a duty to Alex not to trespass on her land, Alex has a separate right held against each of Carmel, Daniel, and Edward not to trespass on her land—then we can say that waiver targeted at only one of those relations of right—say, if Alex waives her right not to have her land trespassed on in respect of Carmel, but not in respect of Daniel or Edward—suppresses only that right and duty. Each of the other right-duty pairs—held by Alex against Daniel and against Edward—remains intact and unaffected by the waiver. I provide a substantive argument in favour of this view of the structure of rights in Chapter Four, Section D.1.

It should also be noted that waiver can only ever be intentional and voluntary⁶³—the right-holder must agree to the suppression of her right and its correlative duty. Involuntary

⁶³ Hurd (n 7) 125-7.

cancelling of the normative relationship between the parties is called rights forfeiture,⁶⁴ and generally requires the right-holder to have engaged in some kind of wrongdoing.⁶⁵

Waiver of rights is also unilateral, in the sense that the duty-bearer has no say in the matter. Whether a right is waived is generally solely up to the right-holder—rather than any other agent.⁶⁶ Rights would lose much of their point if the duty-bearer could also suppress the normative relationship between them and the right-holder and release themselves from the duty correlative to the right.

A right-holder's waiver of their rights will not necessarily be valid in all cases. There will of course be cases in which waiver will be ineffective because the right-holder is not aware of salient facts, is too young, is seriously mentally ill, or their ability to make decisions has been impaired by some other distorting influence—like unjustified coercion or drugs.⁶⁷ There may also be other limitations on waiver—and especially waiver of human rights—created by duties to the self or the objective interests that ground our rights. I will discuss some of these limitations below in Section B.1(c).

Gardner takes consensual sex as the paradigm case of waiver. As he states, '[c]onsensual sex is not justified rape, for it is no rape at all.'⁶⁸ For Gardner, when A consents to sex with B, A waives her right to sexual autonomy and releases B from his duty not to violate A's sexual autonomy, such that there is no wrong committed against A when B does things that would

⁶⁴ See eg Thomson, *The Realm of Rights* (n 37) 361–6; Massimo Renzo, 'Rights Forfeiture and Liability to Harm' (2017) 25(3) *Journal of Political Philosophy* 324; Wellman, *Rights Forfeiture and Punishment* (n 5).

⁶⁵ Some theorists also accept that the normative relationship between right-holder and duty-bearer can also be overridden by other weighty moral considerations. See eg Schauer (n 37); Judith Jarvis Thomson, 'Self-Defense and Rights' in *Rights, Restitution, and Risk* (William Parent (ed), HUP 1986) 43; Andrew Botterell, 'In Defence of Infringement' (2008) 27(3) *Law and Philosophy* 269; Philip Montague, 'Specification and Moral Rights' (2015) 34(3) *Law and Philosophy* 241. This remains controversial, and I will not go into it here. For a contrary view, see Steiner (n 6) 236–8.

⁶⁶ Gardner, 'The Opposite of Rape' (n 16) 58. The point is made by Gardner, thus: 'Suppose that I consent to my teenage son's staying out until midnight tonight. I thereby waive the duty that he would otherwise owe me, under our usual rule, to be home by eleven. His being home by midnight is not, however, something that he gets to consent to.'

⁶⁷ Hurd (n 7) 140–5.

⁶⁸ Gardner, 'Justification under Authority' (n 15) 76.

ordinarily violate this duty.⁶⁹ There is nothing to be regretted, and no moral remainder to be repaired, when consenting adults engage in sexual intercourse.⁷⁰ As John Gardner and Stephen Shute claim, ‘a person’s consent is capable of licensing, in the name of sexual autonomy itself, some suboptimal sexual relationships, which in this case means depressingly dehumanizing relationships, relationships of objectification.’⁷¹ As I noted above, I think there may also be many cases of assault that fit into this category of consent. It seems that when people engage in properly regulated boxing matches, participate in contact sport, and go to get a tattoo, they waive their right to physical security and release the relevant duty-bearers from its correlative duty. This is because it would be strange to say of boxers, participants in contact sport, and tattoo artists that they ought to feel some regret, or have reason to take reparative action, after participating in these activities.

What I have argued above is that to waive a right is to remove a normative impediment that otherwise stands in the way of something being done. This makes waiver a species of consent. However, unlike the other kinds of consent, waiver involves the suppression of both a right and a duty rather than operating as a justification for breaching a duty or empowering someone to change another’s normative position.

B *Waiving human rights*

While it is relatively well-accepted that we can waive our rights that people perform promises made to us—releasing them from a duty to make good on what they promised to do—it is more controversial whether we can do the same with our human rights and their correlative duties.

⁶⁹ John Gardner and Stephen Shute, ‘The Wrongness of Rape’ in Jeremy Horder (ed), *Oxford Essays in Jurisprudence: Fourth Series* (OUP 2000) 208.

⁷⁰ It should be noted that for Gardner, consent marks the line between consensual sex and rape, only. He claims that there are other criteria that determine what it would take for sex to ‘go well or better than well—or, indeed, to be at its best’. He suggests that, ‘[i]deally ... the question of consent does not arise between sexual partners, for the question of consent belongs to sex individualistically, even solipsistically, conceived, to sex conceived as something that one person does to another’. See Gardner, ‘The Opposite of Rape’ (n 16) 60.

⁷¹ Gardner and Shute (n 69) 208-9.

Given this, in what follows I first consider and reject what have been regarded as some good arguments against waiver of human rights in Section B.1, before turning to consider the positive case for waiver of human rights in Section B.2. Finally, in Section B.3 I show how waiver of human rights is an ordinary part of holding human rights.

1 *Arguments against waiver and some responses*

(a) *The ‘unwaivable rights’ intuition*

Human rights practitioners and activists rarely talk about waiver.⁷² There is almost an unspoken assumption that waiver of human rights is not permitted.⁷³ This is based on what appears to be a strong intuitive case against the possibility of waiver of human rights. Consider:

Trade Off: The state of Utopia promises its citizens that if they each waive their human right to a fair trial, the money saved will be used to provide universal free tertiary education. Each of the citizens of Utopia, in full understanding of what they are doing, waives their right to a fair trial.

At the outset, we can take it that each of the citizens of Utopia has a right to a fair trial that correlates with a duty on agents of Utopia to ensure that each citizen receives a fair trial. After the government proposes to put money saved from running trials into providing free tertiary education, each citizen purports to waive this right and releases Utopia from its duties to ensure that each citizen receives a fair trial.

⁷² Some exceptions include: Oliver De Schutter, ‘Waiver of Rights and State Paternalism under the European Convention on Human Rights’ (2000) 51(3) *Northern Ireland Legal Quarterly* 481 (who served as the UN Special Rapporteur on the Right to Food); *DH v Czech Republic* (2008) 47 EHRR 3, 123 para 202; *Hermi v Italy* (2008) 46 EHRR 46, 1134 para 73.

⁷³ David Miller, ‘Are Human Rights Conditional?’ (2018) Centre for the Study of Social Justice Working Paper Series, No SJ020, 1 <https://www.politics.ox.ac.uk/materials/centres/social-justice/working-papers/SJ020_Miller_Are%20Human%20Rights%20Conditional%20final%20draft.pdf> accessed 7 March 2019; Donald Van De Veer, ‘Are Human Rights Alienable?’ (1980) 37(2) *Philosophical Studies* 165, 165.

We might be uncomfortable with this conclusion. In fact, we might want to say that the citizens of Utopia lack the ability to do any such thing, and that whatever they think they are doing, they are not giving up their rights to a fair trial or making it permissible for Utopia to fail to ensure that each citizen receives a fair trial. That is, *Trade Off* represents the kind of situation that gives us the impression that human rights are unwaivable.

However, the intuitive case against waiver is often based on some distracting feature of cases of waiver of human rights, other than the right-holder's normative control over their human rights. That is, the unwaivable rights intuition appears—more often than not—to be driven *not* by any view that we have about the conceptual possibility of waiver of human rights but by something external to each right-holder's normative control over her human rights and their correlative duties. As Victor Tadros notes (in the context of discussing the case of Armin Meiwes,⁷⁴ the notorious German cannibal who killed and ate Bernd-Jurgen Brandes after securing his consent to being killed and eaten):

Some who defend the criminalization of some of this conduct might do so on the basis of the effects of criminalisation, or the effects the conduct might have on third parties, and not because they think consent is invalid.⁷⁵

The unwaivable rights intuition in such cases appears to be driven by the badness of the duty-bearer's conduct and worries about what kind of society we would live in if we permitted such conduct (even if consensual) to take place.

That this is the case in *Trade Off* should be clear from the fact that the right that is waived—the right to a fair trial—is a human right that is accepted to be waivable. The ECtHR has explicitly acknowledged the power of right-holders to waive the Art 6 right to a fair trial. For example, in *Hermi v Italy*, the Court held:

⁷⁴ Luke Harding, 'Victim of cannibal agreed to be eaten' *The Guardian* (Berlin, 4 December 2003) <<https://www.theguardian.com/world/2003/dec/04/germany.lukeharding#:~:text=In%20one%20of%20the%20most,him%20up%20and%20eaten%20him.>> accessed 7 February 2019.

⁷⁵ Victor Tadros, *Wrongs and Crimes* (OUP 2016) 265.

Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial However, such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance In addition, it must not run counter to any important public interest ...⁷⁶

Indeed, every guilty plea involves the waiver of the defendant's right to a fair trial,⁷⁷ held against the state, in that it releases the prosecution (the state) from its duty to prove that the defendant committed the crimes charged.⁷⁸ As the ECtHR has noted in *Natsvlishvili and Togonidze v Georgia*, the entry of a guilty plea by an accused 'entail[s] the waiver of his rights to an ordinary examination of his case on the merits.'⁷⁹ What we are worried about in *Trade Off*, then, is Utopia getting away with not ensuring fair trials—or, the evil of failing to put in place *any* measures which protect against mistaken convictions⁸⁰—rather than with the question of whether right-holders have the power to waive their rights.

(b) 'The bad social consequences of waiver'

That the case against waiver of human rights is based on the bad social consequences of waiver is not necessarily a problem for proponents of unwaivable human rights. Indeed, many

⁷⁶ *Hermi v Italy* (n 72) 1134 para 73. See also *Pauger v Austria* (1998) 25 EHHR 105, 123 para 58; *Navalnyy and Ofitserov v Russia* App nos 46632/13 and 28671/14 (ECtHR, 23 February 2016) para 100; *Murtazaliyeva v Russia* App no 36658/05 (ECtHR, 18 December 2018) para 117.

⁷⁷ For a canonical formulation of the right to a fair trial, see International Covenant on Civil and Political Rights (New York, 16 Dec. 1966) 999 U.N.T.S. 171 and 1057 U.N.T.S. 407, entered into force 23 Mar. 1976, Art 14(1); European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 Nov. 1950), 312 E.T.S. 5, as amended by Protocol No. 3, E.T.S. 45; Protocol No. 5, E.T.S. 55; Protocol No. 8, E.T.S. 118; and Protocol No. 11, E.T.S. 155; entered into force 3 Sept. 1953 (Protocol No. 3 on 21 Sept. 1970, Protocol No. 5 on 20 Dec. 1971, Protocol No. 8 on 1 Jan 1990, Protocol 11 on 11 Jan 1998), Art 6.

⁷⁸ *Navalnyy and Ofitserov v Russia* (n 76) para 100. As I set out in Chapters One and Two, the *Multiple Duty View* takes each human right to correlate with multiple duties. My framing of the right waived when a defendant enters a guilty plea broadly as the right to a fair trial, which correlates with various duties, including the duty on the state to prove at a trial the criminal charge against the accused—rather than more narrowly as the right that the state prove at a trial the criminal charge against the right-holder, which correlates only to a duty on the state to prove at a trial the criminal charge against the right-holder—is meant to be consistent with this view. I wish to avoid begging the question against the *Multiple Duty View* by adopting a narrow formulation of the right in play here, although in Chapter Four I will provide an argument for why we should be more precise about the rights in play in such situations.

⁷⁹ *Natsvlishvili and Togonidze v Georgia* App no 9043/05 (ECtHR, 29 April 2014) para 97. See also Rebecca Helm, 'Constrained Waiver of Trial Rights? Incentives to Plead Guilty and the Right to a Fair Trial' (2019) 46(3) *Journal of Law and Society* 423, 424.

⁸⁰ Marcello Di Bello and Collin O'Neil, 'Profile Evidence, Fairness, and the Risks of Mistaken Convictions' (2020) 130(2) *Ethics* 147, 155.

proponents of unwaivable human rights advance such an argument. They claim that allowing for waiver of human rights—even moral human rights—would create a situation in which respect for persons as persons is diminished.

Tadros notes that:

We have an obligation to show respect to others. ... This obligation is related to another: the obligation to foster respect for others. We can do so by adopting and supporting the social practices which help to generate respect. ... We must participate in the social practice of showing such respect in order to foster and support the respect that we must show towards persons ...⁸¹

A proponent of unwaivable human rights might argue that waiver of human rights is *not* a social or moral practice that fosters respect for others. In fact, it seems to do the opposite. For example, we might think that if each person could waive their right to life then this would create the perception that human life and human interests are not sacrosanct. That is, we might think that if we could waive our human rights this would lead to a slippery slope of disrespect for our fundamental human interests that eventually destroys our practices of respect for one another that we are obliged to maintain—and thus waiver must be morally impermissible.⁸²

As appealing as this kind of argument might seem, I do not believe that it presents a bar to waiver of human rights. We can accept that right-holders have the ability to waive their human rights while still holding that duty-bearers should not do what a suppressed duty previously prohibited.

The first thing to note is that space for waiver is created by the fact that having a right does not mean that the right-holder has to exercise it. As I noted earlier, the directed duties that correlate with rights generate reasons for action—reasons with peremptory force.⁸³ But these reasons for action are reasons for duty-bearers, not for right-holders. Rights offer protection to

⁸¹ Tadros (n 75) 272.

⁸² Similar instrumentalist arguments have been run against waiver. See eg Russell Hardin, 'The Utilitarian Logic of Liberalism' (1986) 97(1) *Ethics* 47, 58-9; McConnell (n 7) 34-9.

⁸³ Joseph Raz, *The Morality of Freedom* (OUP 1986) 192.

the right-holder by marking out a domain of non-interference or creating entitlements to provision in respect of a particular duty-bearer.⁸⁴ And they permit the right-holder to make certain demands of the duty-bearer. However, rights they say nothing about whether the right-holder should exercise their right or not, or anything about what the right-holder ought to do all-things-considered.⁸⁵ As Jeremy Waldron notes, ‘a moral right in itself gives me no reason for undertaking any one course of action rather than another.’⁸⁶ That Visa has a right to φ is not a reason for Visa to φ , just as much as it is not a reason for Visa not to φ . Visa’s right tells her nothing about whether she should exercise her right or what she otherwise ought to do all-things-considered.

Instead, rights—or, more correctly, the duties that correlate with them—give duty-bearers reasons to do certain things or not do certain things in respect of the right-holder. As I said above, the existence of a duty generates a reason that applies to the duty-bearer that operates both as a first-order reason for action and a second-order reason not to act on reasons that conflict with that first-order reason for action. So, that someone has a human right does not mean that they have to exercise it. Space for waiver is created by the fact that the existence of a right does not give its holder a reason to exercise it.

Second, that a right has been waived does not mean that the duty-bearer is permitted (ie has no other duty or strong, first-order moral reason not) to do what the duty to the right-

⁸⁴ Frances Kamm, ‘Rights’ in Jules Coleman, Kenneth Himma, and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004) 476.

⁸⁵ Subject to some limitations that I discuss below.

⁸⁶ Jeremy Waldron, ‘A Right to Do Wrong’ (1981) 92(1) *Ethics* 21, 28, 35. In fact, as Waldron notes in a later paper, there may sometimes be reasons that obtain that counsel against exercising a right: ‘To stand on one’s rights is to distance oneself from those to whom the claim is made; it is to announce, so to speak, an opening of hostilities; and it is to acknowledge that other warmer bonds of kinship, affection, and intimacy can no longer hold. To do this in a context where adversarial hostility is inappropriate is a serious moral failing.’ See Jeremy Waldron, ‘When Justice Replaces Affection: The Need for Rights’ (1988) 11(3) *Harvard Journal of Law and Policy* 625, 628. However, these reasons are not reasons generated by the existence of a right and a correlative duty but by considerations external to the right. Many of these considerations may not apply to the domain of human rights, but I think it should not be ruled out that sometimes it may be morally inappropriate to stand on one’s human rights.

holder previously prohibited. When a right-holder waives their right and releases the duty-bearer from its correlative duty, this alters the moral profile of the right-holder and the duty-bearer by changing how the reasons for action generated by the relevant duty apply to the duty-bearer. As I noted above, waiver suppresses both the first-order reason for action and the second-order exclusionary reason generated by the existence of the directed duty. What are left are any non-directed-duty-based first-order reasons for action. As such, waiver of a right makes it the case that acting contrary to what was previously required the duty correlative with the right will not amount to a directed wrong to the right-holder. By doing what the duty previously prohibited, the duty-bearer does not fail to conform to some directed-duty-based reason for action with respect to the right-holder.

However, the suppression of the duty does not entail that the duty-bearer ought to do what the duty previously prohibited or that they do not act *wrongly* if they do so. Just because someone waives their right to φ —thereby making it the case that the right-holder will not be wronged if the duty-bearer stops them from φ ing—does not mean that the duty-bearer ought to stop the right-holder from φ ing or that they do not act wrongly in doing so. As Jonathan Parry notes, ‘the fact that an action would not wrong someone does not generate any positive reason to perform it’.⁸⁷ Waiver of a right only suppresses the first-order reason for action and the exclusionary reason flowing from the directed duty—it does not generate any positive reason for action. Reasons for doing what was previously prohibited by the duty must be found elsewhere. That is, whether Nick ought or ought not interfere with Visa’s φ ing after she has waived her right to φ will be guided by moral considerations external to what was previously Visa’s right and Nick’s duty—that is, the first-order reasons left-over after the duty is suppressed.

⁸⁷ Jonathan Parry, ‘Defensive Harm, Consent, and Intervention’ (2017) 45(4) *Philosophy & Public Affairs* 356, 377. See also Derek Parfit, *On What Matters, Volume 1* (OUP 2011) 203.

This is because rights do not exhaust the domain of morality. There are other moral considerations that give us reasons for action—including undirected (or imperfect) duties, serious high-weight non-duty reasons, standards of excellence, and important goals or aims—that are non-directed-duty-based. As David Rodin says in respect of agents who might have forfeited their rights:

[R]ights and other obligations owed to persons are not the only moral considerations relevant to how we ought to treat them. There can be compelling reasons not to treat a person in a cruel or inhuman way, even if the person himself lacks rights against such treatment.⁸⁸

The same applies to waiver of rights. At the same time that human rights enjoin certain conduct in respect of the right-holder, there exist non-directed-duty-based normative considerations that similarly enjoin such conduct. These considerations sit alongside rights and, among other things, guide their exercise, and continue to guide our action when a right has been waived.⁸⁹ They give us reasons for action independently of whether or not there exist relations of right that also provide reasons for the same action. As Rowan Cruft notes:

[I]n saying that my right not to be tortured is grounded ... on my interest in not being tortured, I do not exclude the plausible claim that even if my interest in not being tortured failed to ground such a right (perhaps because I had no such interest), there would be further values, independent of my-not-being-tortured's good to me, that would make agents duty-bound not to torture me: for example, agents are plausibly so bound for the sake of my friends and family, and for the sake of wider society.⁹⁰

What this means is, whether or not we should exercise our rights will be guided by these non-directed-duty-based considerations. And, when a right has been waived, whether or not we should do or not do certain things that were previously prohibited by the duty correlative to the right will also be guided by these non-directed-duty-based reasons. Violating these non-directed-duty-based moral considerations wrongs no one in particular but amounts to a general moral wrong—or acting *wrongly*.⁹¹

⁸⁸ Rodin, 'The Reciprocity Theory of Rights' (n 5) 293 fn 22.

⁸⁹ Waldron, 'A Right to Do Wrong' (n 86) 35.

⁹⁰ Rowan Cruft, *Human Rights, Ownership, and the Individual* (OUP 2019) 124.

⁹¹ Thomson, 'Self-Defense and Rights' (n 65) 45.

Putting all this together then, just because a human right is waived does not necessarily mean that there is now no reason for doing what the duty previously required of its bearer, or *a fortiori* that the duty-bearer now has conclusive reason to do what was previously prohibited by the duty. It might be true to say that from the perspective of rights and duties there are now no conclusive reasons for action—as waiving a right means that there is now no directed-duty-based reason⁹² for action. However, as I noted above, directed-duty-based reasons are not the only reasons that apply to us. Performance of the act or omission required by the duty might still be required all-things-considered by other non-directed-duty-based reasons unconnected with a right or duty. Where a human right is waived it might be that the countervailing reasons unexcluded by the suppression of the protective reason are still defeated by other first-order reasons not connected with the suppressed duty.

To be more concrete, just because a citizen of Utopia waives her right to a fair trial does not give the bearer of the correlative duty, agents of Utopia, a reason not to ensure that that citizen receives a fair trial, or mean that it is all-things-considered right or good for Utopia not to ensure that that citizen receives a fair trial. The citizen's waiver of their human right means that they will not be wronged if Utopia does not ensure that the citizen receives a fair trial, but there may be other first-order reasons in play which give Utopia conclusive reason to ensure that the citizen receives a fair trial. So, that right-holders can waive their human rights does not necessarily mean that our practices of fostering respect will be undermined. This is because, waiver of a human right does not itself give anyone a reason—least of all a conclusive reason—to do what its correlative duty previously forbade.

⁹² At least, there will be no reason coming from the right that was waived. There might be other relevant right-based reasons generated by rights that have not been waived.

(c) *‘Waiver amounts to a failure to respect important protections of moral personhood’*

Another argument that is frequently made by proponents of unwaivable human rights goes to the normative power of right-holders to waive their human rights. This argument claims that right-holders lack a power of waiver in respect of their human rights because waiver of human rights amounts to a failure to respect important protections of moral personhood. Thomas Hill puts the case against waiver of human rights thus:

To act as if we could release others from their obligation to grant these rights ... would be to fail to respect morality. ... [A] person cannot release others from the obligation to refrain from killing him: consent is no defense against the charge of murder. To accept principles of this sort is to hold that rights to life and liberty are, as Kant believed, rather like a trustee’s rights to preserve something valuable entrusted to him: he has not only a right but a duty to preserve it.⁹³

Herbert Morris presents a similar argument against waiver of human rights. He argues that,

[j]ust as there are agreements nonenforceable because void (sic) is contrary to public policy, so there are permissions our moral outlook regards as without moral force. With respect to being treated as a person, one is “disabled” from modifying relations of others to one.⁹⁴

What these authors assert, then, is that the power of right-holders to waive their human rights is ruled out because its existence would be inconsistent with the moral requirement that each person is to be treated as a being to whom equal concern and respect is owed.⁹⁵ A power of waiver would allow right-holders to opt out of being treated in the way that morality demands all humans are to be treated. To the extent that morality presents as a unified, coherent system, it cannot allow for such an inconsistency to obtain.

There is some truth to this kind of claim. There are certain internal normative constraints on waiver. Not every purported waiver of a human right will be effective. However, these normative constraints are always a product of a complex balancing of the interests that a right-

⁹³ Thomas Hill, *Autonomy and Self-Respect* (CUP 1991) 15.

⁹⁴ Morris (n 7) 497.

⁹⁵ Samantha Besson, ‘Human Rights Waiver and the Right to do Wrong under the ECHR’ in Josep Casadevall, Guido Raimondi, Peter Kempees, Patrick Titun, and Jean Darcy (eds), *Essays in Honour of Dean Spielmann* (Wolf Legal Publisher 2015) 29-30.

holder has in being treated in a particular way and that right-holder's interest in being able to shape their own life as an autonomous being. While the balance will sometimes favour ruling out waiver, in other cases the balance will favour allowing waiver to take effect. In what follows I outline two potential candidate normative constraints on waiver and show how they do not rule out waiver as a conceptual possibility.

The first candidate normative constraint is self-regarding duties. Tadros claims that by waiving one's human rights, one might act contrary to reasons generated by a self-regarding duty—or, a duty owed by the right-holder to herself.⁹⁶ Tadros defends the existence of such duties on the basis that, while each person's autonomy generates normative powers to give them control over how their life goes—including a power of waiver over their human rights—this control is not unlimited. It comes with the same obligation to respect one's capacities for autonomous agency and living well as one owes to others who have those same capacities. In Tadros's words, 'I respect my autonomous agency by not destroying it, and I respect my capacity for well-being by not self-harming.'⁹⁷ According to Tadros, self-regarding duties hold simply in virtue of a person's own value, and do not correlate with rights—given the absurdity of holding rights against oneself.⁹⁸

Tadros argues that when a right-holder acts contrary to a self-regarding duty by waiving a human right this renders that waiver 'invalid'.⁹⁹ Invalidity of the waiver has the consequence that the duty-bearer is *not* released from their duty to the right-holder, and the reasons generated by the existence of that duty continue to apply to the duty-bearer. That is, if Visa violates a self-regarding duty in waiving her human right to φ , her human right to φ is not waived, and the

⁹⁶ Tadros (n 75) 269–70.

⁹⁷ *ibid* 270. See also Parfit (n 87) 203.

⁹⁸ As Joseph Raz explains, '[n]othing, however, can legitimize the notion of rights against oneself. The very idea is self-contradictory, for rights are essentially interpersonal. Their existence entails consequences to others'. See Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (rev edn, Clarendon 2001) 33.

⁹⁹ Tadros (n 75) 273–4.

first-order reason for action and the exclusionary reason generated by the duty continue to apply to Nick. But such a purported waiver might still make it the case that the right-holder lacks standing to complain if the duty-bearer acts contrary to these reasons—either, because the waiver was effective to suppress the right-holder’s right but not the duty, or because such a complaint would be hypocritical.¹⁰⁰

However, self-regarding duties do not put a blanket bar on waiver of human rights. Not all cases of waiver will be cases of invalid waiver, produced by breaching a self-regarding duty. For example, Tadros notes that the sanctity of one’s life might generate a self-regarding duty not to show disrespect to the sanctity of one’s life, including by giving up one’s life. However, he also notes that:

[A]n autonomous person need not show disrespect for the sanctity of her own life by deciding to end it, if that life is no longer capable of sustaining the things that gave it value. A person whose future contains only suffering and the gradual erosion of her autonomous agency need not show disrespect for the sanctity of her own life by ending it.¹⁰¹

Accordingly, waiver of a human right—such as the right to life—will not always misfire for breach of a self-regarding duty. Whether a particular human right can be waived will turn on the facts of the particular instance of purported waiver. Whether a waiver of a human right is valid or invalid will turn on how the autonomous agency of the right-holder (which underpins their power of waiver) and other interests of the right-holder (which generate self-regarding duties) are to be balanced in the circumstances.

A second candidate for a normative constraint on waiver—if you hold an interest theory of rights like John Tasioulas and Rowan Cruft—is the interest that underlies each human right. Raz acknowledges this when he claims that not every act of consent (or exercise of waiver) will be effective.¹⁰² That is, there will be cases where the right-holder cannot validly suppress the

¹⁰⁰ *ibid* 274; Morris (n 7) 497.

¹⁰¹ Tadros (n 75) *ibid* 271.

¹⁰² Raz, *The Morality of Freedom* (n 83) 84.

reason for action produced by the existence of a directed duty correlative to a human right because of the normative force of the interest that grounds the right. This conclusion seems to be driven by two features of rights—at least on interest theories of human rights. First, interests (and the reasons for action that they generate) are objective—we cannot change them simply by intending to do so or by changing our goals. Second, human rights (and the duties to which they correlate) exist in the service of those interests—they are there to promote and protect the underlying interest, even though they might be against our interests overall.¹⁰³ These two features of human rights leave space for placing some constraint on a right-holder's power to suppress their human rights by waiver.

That interests are objective means that the reasons that they generate will go unfulfilled if they remain undefeated and are not acted on, irrespective of whether the interest-holder has decided that those reasons need not be conformed to. That rights exist in the service of interests means that each right-grounding interest will exert a strong normative pull in favour of the continued operation of the right that it grounds, which will only be defeated by similarly important normative considerations that counsel in favour of removing the normative impediment imposed by the right. What follows from this is that the interest that grounds or underlies each human right has some say about whether or not waiver of that right will be effective. If waiver of a human right will mean that the interest that underlies it will go unfulfilled—and the reasons it generates unfulfilled to—without being outweighed, and there are no other normative considerations which weigh against the right-grounding pull of the interest, then any waiver of that right will be ineffective. Any consent granted by the right-holder to the duty-bearer in such circumstances misfires.

¹⁰³ See Chapter Two.

However, right-grounding interests will not always render an instance of waiver ineffective. Just as with self-regarding duties, whether a right-grounding interest can thwart a particular instance of waiver will depend on how that right-grounding interest is to be balanced against the value that underpins the power of right holders to waive their human rights—the value of personal autonomy. The interest underlying a right will only operate as a constraint on waiver of that right where its normative force is sufficient to defeat the normative force of the right-holder’s interest in personal autonomy. That is, a right-holder’s normative power to waive their rights will only be limited where the value of the right-holder undertaking autonomous action by waiving their right is outweighed by the normative weight of the interest that grounds the right. Personal autonomy is an important value and will often be sufficiently weighty to defeat the normative force of right-grounding interests. Accordingly, the normative force of right-grounding interests will not always defeat a right-holder’s waiver of the right that they ground.

Of course, if you are a Will Theorist or a moral subjectivist, these claims are unlikely to be persuasive. You will be more likely to say that waiver of a human right is effective whenever the right-holder decides to waive a right of theirs. Even so, you might still endorse what I said about self-regarding duties and accept that sometimes waiver of a human right will violate such a duty and mean that the right-holder’s waiver is invalid. The key point is, morality will not always lend its approval to a right-holder’s waiver of their human rights. But equally morality does not impose a blanket bar on the possibility of waiver.

(d) ‘As long you are human, you have human rights and cannot lose them’

It is sometimes said that human rights are unwaivable because human rights are the rights that are held by every and all humans *always*. This idea—that as long ‘as you are human, you have human rights’—is a cherished and strongly held view about human rights. It is rooted in the

belief that human rights are things that we possess simply in virtue of humanity.¹⁰⁴ According to this view, one's human rights are not contingent but spring from one's status as a being with inherent human dignity and distinctively human interests.¹⁰⁵ As long as one retains this status (or possesses the interests associated with it) one cannot lose their human rights, have them taken away, or suppress them.¹⁰⁶ It is this latter thought that gives rise to the claim that a right-holder cannot waive their human rights. If I have human rights simply in virtue of my humanity, then the only way that I can lose or suppress them is by ceasing to be human. I cannot lose or suppress them otherwise. When I purport to waive a right, I am suppressing that right—at least for the time being. But, when I purport to waive my human rights, I do not cease to be human. So, if it is true that human rights are the kinds of rights that we have simply in virtue of humanity—and not in virtue of anything contingent—it cannot be that I can suppress my human rights by waiving them.

¹⁰⁴ It should be noted that the claim that humans possess human rights 'simply in virtue of humanity' has been challenged by some as being speciesist. The charge is that, to say that all humans have human rights just because they are human attributes to humans an equal moral status that cannot shared by non-human animals—since those beings are by definition not part of the human species—thereby elevating the interests of the human species above those of other species (see eg Peter Singer, *Animal Liberation* (2nd edn, Jonathan Cape 1990) 6, 9).

This has led some philosophers to abandon the claim that humans possess human rights 'simply in virtue of humanity', and to propose a 'Species Neutrality Requirement' for any plausible account of human rights, which demands that the criterion for holding human rights not refer to any particular species (see eg Rowan Cruft, S Matthew Liao, and Massimo Renzo, 'Introduction' in Rowan Cruft, S Matthew Liao, and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 9). Others have defended speciesism, claiming that there is something morally significant about membership of the human species (see eg Bernard Williams, 'The Human Prejudice', in A W Moore (ed), *Philosophy as a Humanistic Discipline* (Princeton University Press 2008) 135-152).

The second approach has obvious problems, in that it involves giving in to speciesism. The first is also unappealing, as the claim that humans possess human rights 'simply in virtue of humanity' has powerful moral cachet.

However, choosing one of these two approaches only becomes necessary if 'humanity' is taken to refer to those beings that belong to the species 'human'. The preferable view—which avoids the speciesism objection—takes 'humanity' to instead refer to 'personhood'. As Allan Buchanan argues, '[i]f "humanity" refers to personhood, rather than to membership in the human biological species, and if we came to know that there were persons who were not of our biological species, then we might decide that what we have called human rights would be more accurately called persons' rights.' (Allan Buchanan, *Beyond Humanity? The Ethics of Biomedical Enhancement* (OUP 2011) 214). For an account of personhood as the ground of human rights, see James Griffin, *On Human Rights* (OUP 2008).

¹⁰⁵ Griffin (n 104); John Tasioulas, 'On the Foundations of Human Rights' in Rowan Cruft, S Matthew Liao, and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 50-1.

¹⁰⁶ This is what Gerald Lang calls 'the Status Problem'. Gerald Lang, 'Why Not Forfeiture' in Helen Frowe and Gerald Lang (eds), *How We Fight: Ethics in War* (OUP 2014) 38, 39-40. See also Leif Wenar, *The Nature of Claim-Rights* (2013) 123(2) *Ethics* 202, 218; Rodin, 'The Reciprocity Theory of Rights' (n 5) 292;

The claim that one cannot waive their human rights because human rights are generated by the right-holder's possessing the status of inherent human dignity, or because they possess distinctively human interests, is misconceived. First, it is untrue to say that one cannot lose their human rights as long as one remains a human. Such a claim flies in the face of the ordinary and prevalent phenomenon of rights forfeiture.¹⁰⁷ That human rights can be forfeited is borne out by killing in self-defence. Ordinarily, every person has a right to life. But when Adelene is faced with an unjust, lethal attack (or, at least an attack threatening grievous harm) by Betty, Adelene gains a right to take necessary and proportionate defensive action, including killing in self-defence. So, Adelene can kill (or inflict grievous harm) on Betty in order to preserve her life, in exercise of her right to self-defence. And in doing so Adelene commits no wrong, either against Betty or in general, even though—as a human—Betty also has a right to life. This is because, by being responsible for the lethal unjust threat to Adelene's life, Betty forfeits her own right to life.¹⁰⁸ As WD Ross puts it, '... the offender, by violating the life or liberty or property of another, has lost his own right to have his life, liberty, or property respected ...'.¹⁰⁹ However, forfeiture is not something we only find in the realm of defensive killing. As David Rodin notes:

¹⁰⁷ While I cannot go into the distinction here, rights forfeiture is to be distinguished from rights override. The distinction between the two roughly follows the distinction that I outlined above between waiver and authorised breach of duty. In the case of rights override, the duty-bearer has some justification for breaching their duty, which puts back into play previously excluded first-order reasons for action, which reasons outweigh the first-order reason generated by the duty. Limitations placed on individual freedom in order to combat grave threats is one example of rights override. In the case of rights forfeiture, the duty is cancelled by some sufficiently serious wrongdoing on the part of the right-holder, such that both the first- and second-order reason generated by the duty are put out of play. Cases of legitimate self-defence provide an example of rights forfeiture. What indicates rights override is a moral residue or moral remainder, whereas rights forfeiture—involving as it does the cancellation of a duty— involves no such moral residue or remainder.

¹⁰⁸ That Betty has forfeited her right to life by being responsible for an unjust lethal threat against Adelene does not necessarily mean that Betty thereby loses *all* of her rights and becomes fair game for anyone to use as they please. Such a forfeiture operates only in respect of those rights of Betty's that would ordinarily allow her to resist action taken by Adelene against Betty in order to abort or avert Betty's unjust threat, and only for so long as the threat remains on foot. So, once Betty has become responsible for an unjust threat against Adelene, Adelene can take any action against Betty that is necessary to abort that threat—including killing or seriously injuring Betty—but may not do things that are irrelevant to the abortion of that threat, such as stealing her car or defiling her body, or continuing to beat her after the threat has been averted. As David Miller states, '[t]he attacker loses his right to life because I have the right to defend myself against attack, killing him in the process if necessary. But other rights that are irrelevant to the threat he poses are retained.' See Miller (n 7) 6. I thank an anonymous examiner for drawing this point to my attention.

¹⁰⁹ WD Ross, *The Right and the Good* (Philip Stratton-Lake ed, OUP 2002) 60-1.

[R]ights can be forfeit in contexts other than defensive action. The criminal justice system is premised on the principle that we may forfeit liberty rights and become liable to punishment as a result of criminal wrongdoing. Property rights and liberty rights may become forfeit when one is liable to compensate or provide redress for a previously wrongful harm, as in a tort action or a moral duty of restitution after wrongdoing.¹¹⁰

So, the pervasive phenomenon of rights forfeiture establishes that we can in fact lose our human rights, even if it is true that they are grounded in our status as beings with inherent human dignity or in our distinctively human interests.¹¹¹ If our status grounded human rights can be lost through forfeiture, then there is no conceptual barrier to us suppressing those rights through waiver either.

Second, the disjuncture between waiver and human dignity is not as pointed as this objection makes out. The objection assumes that what human rights are grounded by human dignity or distinctively human interests are the unwaivable human rights it seeks to argue for. But this is not necessarily the case. It might be that the kinds of human rights that are grounded by our status of being humans with inherent dignity, and by our distinctively human interests, are human rights that can be waived.

There is reason to believe that the rights we have simply in virtue of our humanity are of the waivable kind. This is because part of what it means to be a human with the status of dignity is to be an autonomous individual who is the author of their own life. As I will discuss in detail below, being the author of one's own life means being able to make decisions about how to interact with others and how others interact with you. Having at least some control over our human rights allows us to make these kinds of choices, and so such control is actually internal

¹¹⁰ David Rodin, 'Two Visions of Human Rights: Relational and Beneficiary-Focused Theories' in Dapo Akande, Jaakko Kuosmanen, Helen McDermott, and Dominic Roser (eds), *Human Rights and 21st Century Challenges: Poverty, Conflict, and the Environment* (OUP 2020) 80.

¹¹¹ Rodin claims that the phenomenon of rights forfeiture and the inability of the both the status theory and the interest theory to explain how we come to forfeit our rights gives us good reason to reject both of these theories as our best theory of the grounding of human rights. He claims that his reciprocity theory of rights—which holds that 'a person possesses rights with respect to X when that person complies with reciprocal rights that X possesses with respect to them'—can explain how we forfeit our human rights, and thus provides a better account of the grounding of human rights: *ibid* 90; Rodin, 'The Reciprocity Theory of Rights' (n 5) 286.

to the status of dignity. Autonomy is one of the human interests that we hold along with others that ground the human rights that we might want to waive. As Gardner notes:

The normal case for recognizing an act of consent as valid is that it allows people to shape their own relationships and pursuits, or the relationships and pursuits of people that they care for or represent.¹¹²

What this should demonstrate is that the claim that we possess human rights simply in virtue of humanity is also not a knock-down argument against the possibility of waiver of human rights.

(e) *'The international bill of rights enshrines unwaivable rights'*

Another argument that is often made by proponents of unwaivable human rights is that, human rights are unwaivable because this is how they are expressed in core human rights instruments, like the international bill of rights.

It is true that the core instruments of the international bill of rights—the *Universal Declaration of Human Rights (UDHR)*,¹¹³ the *International Covenant on Civil and Political Rights (ICCPR)*,¹¹⁴ and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*¹¹⁵—express the rights that they enshrine to be unwaivable. Each of these instruments claims to enshrine the 'inalienable rights of all members of the human family'. However, just because these human-made legal instruments frame the rights that they enshrine as unwaivable does not necessarily mean that the same is true of moral human rights.

Such a claim fails to distinguish between legal rights and moral rights. While there might be (non-right-based) good reasons to enact a legal prohibition on waiving some human rights—like the right not to be tortured—the importance of personal autonomy and our interests in having normative control over our rights might not produce the same restriction on waiving

¹¹² Gardner, 'Justification under Authority' (n 15) 77.

¹¹³ Universal Declaration of Human Rights (10 Dec. 1948), U.N.G.A. Res. 217 A (III) (1948) preamble, para 1.

¹¹⁴ International Covenant on Civil and Political Rights (New York, 16 Dec. 1966) 999 U.N.T.S. 171 and 1057 U.N.T.S. 407, *entered into force* 23 Mar. 1976 preamble, para 1.

¹¹⁵ International Covenant on Economic, Social and Cultural Rights (New York, 16 Dec. 1966) 993 U.N.T.S. 3, *entered into force* 3 Jan. 1976 preamble, para 1.

moral human rights.¹¹⁶ It might be that we have a moral right not to be tortured that can be waived, but that the state that we live in has decided to enact a legal right not to be tortured that cannot be waived under any circumstances—like the right not to be tortured in Art 7, *ICCPR*—because this will secure other non-right-based moral goods. Or, it might be the case that the drafters got it wrong when they expressed the relevant rights to be unwaivable. Or, the law may be concerned about its ability to distinguish genuine cases of waiver from cases involving coercion, and so imposes a blanket bar on waiver—which concern would not apply to moral rights. The simple point is that positive law instruments claim to enshrine ‘inalienable’ or ‘unwaivable’ human rights is not conclusive as to whether there are also moral human rights that cannot be waived.¹¹⁷

2 *The positive case for waiver of human rights*

What I have said above, then, creates space for the possibility of waiver of human rights. None of the arguments that I have outlined above always and invariably tells against right-holders having normative control over their moral human rights and their correlative duties. What then is the reason why waiver of our moral human rights *is* possible?

As I hinted at above, that human rights are potentially waivable flows from considerations of right-holders’ autonomy.¹¹⁸ To see how this works, let us first consider the value of autonomy. Human well-being is to a large extent constituted by our participation in the basic goods that give value to our lives. Our well-being is enhanced by our having relationships, engaging in valuable pursuits and projects, and undertaking valuable activities, etc. But participation in basic goods is only one dimension of well-being. A second fundamental dimension of well-being is having some control and choice over the valuable relationships,

¹¹⁶ Peter Westen, ‘Poor Wesley Hohfeld’ (2018) 55(2) *San Diego Law Review* 449, 464.

¹¹⁷ Gardner, ‘Justification under Authority’ (n 15) 77.

¹¹⁸ See eg Christopher McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19(4) *European Journal of International Law* 655, 705.

pursuits, and activities that we engage in—or, put otherwise, leading an autonomous life.¹¹⁹

Joseph Raz puts it thus:

The ruling idea behind the ideal of personal autonomy is that people should make their own lives. The autonomous person is a (part) author of his own life. The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives.¹²⁰

Accordingly, autonomy matters because it is our ability to make choices about our commitments in life—that is, our capacity for autonomy—that allows us to shape our own lives and define the people that we want to be. This is how we shape our characters and cultivate our sense of individuality and authenticity, becoming ‘a doer-deciding, not being decided for, self-directed and not being acted upon by external nature’—at least up to a point.¹²¹

As Raz’s formulation makes clear, valuable autonomy is not to be conceived as an untrammelled capacity to choose one’s own way through life. It requires only that agents control, *to some degree*, their own destiny. That is, as Raz puts it, ‘[a]utonomy is valuable only if exercised in pursuit of the good’.¹²² One does not exercise their valuable autonomy by choosing to become a hitman, a genocidaire, or a scam-artist—or by choosing any other morally worthless option. Valuable autonomy requires that agents be able to choose among ‘*morally acceptable options*’.¹²³

But that valuable autonomy is constrained to the pursuit of morally acceptable options does not rule out that agents may sometimes validly exercise their personal autonomy in pursuit of courses of action that are dehumanising to themselves or that fail to accord them the respect that they are owed as beings with ultimate value. There is value in agents having the moral latitude to experiment with dehumanising options. This is so because respecting people as beings

¹¹⁹ Gerald Dworkin, *The Theory and Practice of Autonomy* (CUP 1988) 26; Raz, *The Morality of Freedom* (n 82) 408.

¹²⁰ Raz, *The Morality of Freedom* (n 83) 369.

¹²¹ Isaiah Berlin, ‘Two Concepts of Liberty’ in *Four Essays on Liberty* (Clarendon 1969) 131.

¹²² Raz, *The Morality of Freedom* (n 83) 381.

¹²³ *ibid* (emphasis added).

with ultimate value requires us to take them ‘as moral agents capable of understanding their own value and making up their own minds about their relationships with others.’¹²⁴ Giving agents the moral latitude to make decisions and pursue options that take them down dehumanising paths is to accord them the basic respect that is owed to all humans.¹²⁵ People must be given the moral space to make poor choices about their own moral worth, otherwise we fail to respect them as beings with ultimate value. As Gardner and Shute explain, allowing people to pursue dehumanising options ‘is, up to a point, rehumanizing, because it credits them with moral agency, without which credit their dehumanization is only compounded.’¹²⁶

Consider the example of someone who gives their life to save their sworn enemy. The giving up of one’s life to save another—especially a sworn enemy—is an act that fails to accord to oneself the respect one is owed as a being of ultimate value. However, there is no doubt that such an act is both morally valuable and an exercise of valuable autonomy. To deny the rescuer that such an act was a valid exercise of their valuable autonomy would be to consolidate their status as a mere object for the saving of others—not as a doer-deciding but as someone for whom things are to be decided. By contrast, allowing that the rescuer’s giving of their life to save that of their sworn enemy is an exercise of valuable autonomy is to credit them with a moral agency to make decisions for themselves about what is the best life for them. Something similar can be said about engaging in sado-masochistic sexual practices. Although such practices involve the instrumentalisation and dehumanisation of the parties—consisting as they do of the infliction by one party of violence and humiliation on the other (or others) in pursuit of sexual gratification—denying that the parties who engage in such practices exercise their valuable autonomy in doing so is to compound their status as sexual objects, rather than agents. Taking the engagement in sado-masochistic sex to be an exercise of valuable autonomy, instead, credits those who choose

¹²⁴ Gardner and Shute (n 69) 207.

¹²⁵ *ibid.*

¹²⁶ *ibid.*

to participate in such activities with the status of moral agents who make decisions about what they do, and what others can do, their bodies.

So, that valuable autonomy can only be exercised in pursuit of morally worthwhile options does not mean that agents cannot validly choose to pursue dehumanising options. Such choices will—up to a point—still be an exercise of valuable autonomy, given the rehumanising value of allowing people to make these decisions for themselves.

The proper exercise of our autonomy demands that right-holders be given control over their human rights and the duties to which they correlate. As Cresente Molina puts it, ‘a good and autonomous life is one in which we have some degree of control over our deontic world.’¹²⁷ Being able to waive our human rights in certain situations and contexts gives us the control over our lives that our personal autonomy demands. It allows us to choose the relationships that we enter into, the things that we permit to be done to us, and the protection and aid that we accept.¹²⁸ This is so even when waiver of a human right will take the right-holder down a dehumanising path. As I explained above, permitting such waivers is—up to a certain point—rehumanising, as it credits the right-holder with moral agency and accords them the respect that we owe to all humans as beings with ultimate value.¹²⁹

This is not to say that personal autonomy grounds an unlimited power of waiver for all human rights. As I indicated above, sometimes our control over our human rights will be diluted or blocked altogether by the normative force of self-regarding duties or the interests that ground

¹²⁷ Cresente Molina, ‘Promises, Rights, and Deontic Control’ (2020) *Law and Philosophy* (forthcoming) 12.

¹²⁸ See Parry, ‘Defensive Harm, Consent, and Intervention’ (n 87) 358; Victor Tadros, *The Ends of Harm* (OUP 2011) 295–6; Cécile Fabre, ‘Permissible Rescue Killings’ (2009) 109(2) *Proceedings of the Aristotelian Society* 149, 159–60.

¹²⁹ This is not to say that waiving a human right always involves dehumanising its bearer. In many cases waiver of a human right will involve no dehumanisation at all. For example, that Roger waives his right to education so as to pursue remunerated employment in order to fund his brother Dean’s university education does not dehumanise Roger. Thank you to an anonymous examiner for this example.

the relevant human right. However, our personal autonomy will in many cases ground a power of waiver relating to many of our human rights.

3 *The ordinariness of waiver of human rights*

In the previous sections I have endeavoured to show that waiver of human rights is conceptually possible. I have shown that five common arguments advanced against the possibility of waiver do not rule it out as a conceptual possibility. I have also presented a positive case for waiver of human rights grounded in personal autonomy. But more than being a conceptual possibility, waiver of human rights is in fact an ordinary part of holding such rights—both at law and morality.¹³⁰

As I mentioned above, every time that we participate in contact sport, get a tattoo, or undergo a surgical procedure we waive one or more of our human rights and release the other participants in those activities—the other players, the tattoo artist, and the surgeon—from their correlative duties. Take the example of a boxing match. When Ryan enters into a boxing match with Vithaya, Ryan waives his right to physical security held against Vithaya and releases Vithaya from the duty not to interfere with Ryan's physical security. Similarly, by entering the boxing match, Vithaya also waives his right to physical security held against Ryan and releases Ryan from the duty not to interfere with Vithaya's physical security. Boxers should not feel any regret—or feel compelled to offer any remedy—for the blows that they land on each other within the scope of the boxing match.¹³¹ The release they give each other from their mutual obligations is perfect, such that boxers commit no wrong when they inflict blows on one

¹³⁰ Besson (n 95) 29; John Tasioulas, 'On the Foundations of Human Rights' (n 105) 61. As Tasioulas notes, human rights are rights, and every right-holder 'has certain moral powers over the wrongdoer [who breaches the duty correlative to their right], such as the granting of forgiveness or, in some cases, the power to waive performance of the duty associated with the right.'

¹³¹ Jeff McMahan, *Killing in War* (OUP 2009) 9.

another. Something similar can be said about getting a tattoo and undergoing a surgical procedure.

The above examples are all cases of holding human rights against individuals. But waiver is not just an ordinary part of holding human rights against individuals. Waiver is also an ordinary part of holding human rights against the state. That this is the case is borne out by the prevalence of guilty pleas. As I set out in Section B.1, every guilty plea involves the waiver of the defendant's human right to a fair trial. By pleading guilty to a criminal charge, a defendant waives their right, held against the state, to insist that the state prove at a trial the criminal charge against them and releases the prosecution (the state) from its duty prove at a trial the criminal charge against the right-holder. As I set out above, that guilty pleas entail waiver of the right to a fair trial has been recognised by the ECtHR.¹³²

What this brief discussion should show—albeit not comprehensively—is that waiver of human rights is an ordinary and familiar aspect of holding human rights both against individuals and the state.

C Conclusion

Waiver of human rights, then, is both conceptually possible and an ordinary part of holding human rights—both against individuals and the state. To begin with, the intuition that human rights are unwaivable is often based on matters that have nothing to do with the normative power of right-holders to control their human rights. It is instead driven by worries about the bad social consequences that waiver of human rights might produce—such as the dismantling of our practices of respect for one another. Even when a human right is waived there remain other non-directed-duty-based normative impediments to harsh treatment in place, such that

¹³² See *Hermi v Italy* (n 72) 1134 para 73. See also *Pauger v Austria* (n 76) 123 para 58; *Navalnyy and Ofitserov v Russia* (n 76) para 100; *Murtazaliyeva v Russia* (n 76) para 117.

human rights are not the only thing that stands between us and the destruction of our practices of respect for one another. Waiver is also not rendered conceptually impossible because of the requirement that all humans are to be treated with equal concern and respect. Waiver of a human right is only possible in cases in which it does not violate a self-regarding duty or is not outweighed by the normative force of the right-grounding interest. Furthermore, the claim that human rights are the rights that we have simply in virtue of humanity does not present a conceptual bar to waiver, because the power of waiver is based on the autonomous agency of the right-holder, something that is internal to the status of human dignity. Finally, that the instruments that make up the international bill of rights are expressed to enshrine 'inalienable' human rights does not necessarily mean that moral human rights, too, are unwaivable. There may be good reasons to make such legal human rights unwaivable, reasons that do not apply to moral human rights.

That waiver is a conceptual possibility is driven by the need for right-holders to be able to control their relations with others. Human beings with the status of human dignity are autonomous agents, with the capacity to shape their own lives and their relationships with those who feature in their lives. Proper exercise this autonomous agency demands that we be given the moral latitude to make decisions about our rights, including decisions that lead us down dehumanising paths. As such, at least some human rights carry the potential to be waived to some extent.

But not only is waiver of human rights possible—it is an ordinary part of holding human rights. This is clear from practices of guilty pleas, participation in contact sport, surgical procedures, and tattooing. Each of these activities involves the suppression of human rights and their correlative duties by participants.

Having presented a case for limited waiver of human rights, in the next chapter I show how the possibility of waiver creates a problem for the *Multiple Duty View*.

4

The Individuation Objection and problem of waiver

IN THE LAST chapter I advanced an argument for the possibility of waiver of human rights. In this chapter I return to my discussion of the *Multiple Duty View* of human rights started in Chapters One and Two and argue for how the possibility of waiver of human rights causes problems for the *Multiple Duty View*.

I start my discussion in Section A by surveying some critical responses to the *Multiple Duty View*. I note that several philosophers have said that the *Multiple Duty View*'s multiple duty structure of human rights undermines analytical clarity. In Section B I go into detail about one problem this lack of analytical clarity is said to produce—namely the inability to individuate human rights properly, or the Individuation Objection. I then consider in Section C Rowan Cruft's response to the Individuation Objection—that, while the *Multiple Duty View* appears to have difficulties in individuating human rights precisely, this does not have any serious practical implications. Finally, in Section D, I argue that Cruft's response misses the mark and claim that the possibility of waiver of human rights means that there are serious practical implications that flow from the *Multiple Duty View*'s individuation problem. Because the *Multiple Duty View* restricts us from finely individuating human rights, it leaves us unable to

track properly human rights that have been waived and rights that have been retained by the right-holder.

A *Some critical responses to the Multiple Duty View*

In Chapters One and Two I demonstrated how the *Multiple Duty View* has been endorsed both by practitioners of human rights and by certain philosophical accounts of human rights. I suggested that this makes the *Multiple Duty View* an influential account of the structure of moral human rights. Despite this substantial acceptance of the *Multiple Duty View* across the domains of practice and philosophy, it has not been universally endorsed.

Some philosophers have suggested that, despite it producing gains in simplicity for our concept of human rights, the *Multiple Duty View* loses something important. By bundling up multiple duties with single rights, the *Multiple Duty View* brings simplicity to the concept of human rights while at the same time sacrificing clarity in our understanding of the relationship between rights and their correlative duties.

Take, for example, Thomas Pogge's criticism of Henry Shue's *Tripartite Duty Thesis*:

[O]ne might challenge, in particular, [Shue's] central claim that any basic right is 'an inseparable mixture of positive and negative elements' Why should this 'mixture' be so inseparable on the basic-rights side, given that Shue has managed to separate things so neatly on the correlative-duties side? Using the helpful differentiations Shue has introduced on the side of duties—distinguishing duties to avoid depriving, duties to protect from deprivation, and duties to aid the deprived—one might draw matching distinctions on the side of rights One might then ask about each of these candidate rights whether it exists at all and, if so, against whom it is held, in what formulation, and with what stringency.¹

As Pogge explains, proponents of the *Multiple Duty View* are not wrong to draw the distinctions that they do between the kinds of duties that may be grounded by the interests underlying each human right. What is wrong about the *Multiple Duty View* is the way that it does not draw matching distinctions in terms of the rights to which those duties correlate. Pogge

¹ Thomas Pogge, 'Shue on Rights and Duties' in Charles R. Beitz and Robert E. Goodin (eds), *Global Basic Rights* (OUP 2011) 113, 128.

claims that matching each human right with a single correlative duty—rather than with multiple duties—enhances analytical clarity. It allows us to take each right-duty pair separately, and to ask of each pair: Does the particular right-duty pair satisfy the existence conditions for a human right?² What is the content of the right and its correlative duty? What is the particular stringency of the right-duty pair?

Cécile Fabre makes a similar point about the *Tripartite Duty Thesis*. In the context of discussing Shue's claim that duties of non-interference, protection, and aid are jointly necessary for the enjoyment of the substance of each and every human right, she notes that,

Shue's point derives some of its force from the fact that we do indeed think that we cannot enjoy physical security if steps are not taken by the state to enforce it. However, he cannot infer from this 'demand', as he puts it, the claim that the right to physical security itself imposes a duty on the part of the state to take those steps. He has to explain why we cannot argue that we can make two demands, each encapsulated by a different right: a demand that we not be assaulted, encapsulated by a negative right not to be assaulted, and a demand that we be protected against assaults, encapsulated by a positive right that the state take steps to protect us from potential attackers.³

Again, what Fabre says here highlights the way the *Multiple Duty View* tends to undermine analytical clarity. Bundling up multiple duties under a single human right muddies the conceptual waters. It is unclear why we would opt to compress two (or more) human rights into one, rather than taking each human right to correlate with a single and separate duty so that the content of each human right matches the content of its correlative duty.

Frances Kamm makes a related claim about the intellectual predecessor to John Tasioulas's *Dynamic Duty Thesis*—Joseph Raz's interest theory of rights:

Raz can offer additional reasons for thinking that a right is more than even a directed duty based on an interest in the rightholder. He points to what he thinks is the dynamic character of rights, that is, they can give rise to new duties that do not now exist though we know the right exists. For example, if someone

² For example, is the particular right-duty pair grounded by a universal human interest? (John Tasioulas, 'On the Foundations of Human Rights' in Rowan Cruft, S Matthew Liao, and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 45) Does it have an identifiable duty-bearer? (Onora O'Neill, *Towards justice and virtue: A constructive account of practical reasoning* (CUP 1996) 129) Does violation of the right and breach of the duty licence sovereignty limiting action? (Charles Beitz, *The Idea of Human Rights* (OUP 2009); Joseph Raz, 'Human Rights without Foundations' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010); Joseph Raz, 'Human Rights in the Emerging World Order' in Rowan Cruft, S Matthew Liao, and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015)).

³ Cécile Fabre, *Social Rights Under the Constitution: Government and the Decent Life* (OUP 2000) 51-2.

has a right to education, this may give rise, he thinks, to many duties (not just one) correlative to it; which ones it does give rise to may vary with time and place. Rights can be dynamic in this way when the object of the right is more general than the specific duties it generates. (This is connected to Raz's point that not all ways in which the interest can be promoted give rise to duties.) *But notice that when the general right gives rise to these duties, it seems it will simultaneously give rise to subsidiary rights that are strictly correlative to (and, for all that the dynamic character of rights implies, may be no more than) the directed duties.*⁴

Kamm's comments suggest that the *Multiple Duty View* does not make conceptual sense. She claims that, while it may be said that one general right correlates with multiple duties, in fact each duty will be correlated with a separate right that is distinct from but subsidiary to the general right. And while changed circumstances might lead to the generation of new duties, those duties will each be correlated with a separate right. As noted above, Kamm's claims are directed against Raz's interest theory of rights—which is not a theory of human-rights-in-particular but of rights-in-general.⁵ But her points apply equally to the *Multiple Duty View* given that: (1) the *Multiple Duty View* is not materially different from Raz's interest theory in its claims about the structure of human rights; and (2) at least one philosopher of human rights who endorses the *Multiple Duty View* of the structure of human rights (Tasioulas) takes this view from Raz's interest theory of rights.⁶ So, Kamm's point that the *Multiple Duty View* makes little conceptual sense applies just as much to human-rights-in-particular as it does to rights-in-general.

What these authors note then is that the *Multiple Duty View*'s correlation of each human right with multiple duties, though simple, tends to obscure the relationship between rights and duties. The *Multiple Duty View* relegates rights to umbrella terms, under which are nested specific duties. This bundling up of each human right with multiple duties undermines analytical clarity.

⁴ Frances Kamm, 'Rights' in Jules Coleman, Kenneth Himma, and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004) 484 (emphasis added).

⁵ Joseph Raz has a separate—and quite different—account of human-rights-in-particular: See Raz, 'Human Rights without Foundations' (n 2); Raz, 'Human Rights in the Emerging World Order' (n 2).

⁶ See John Tasioulas, 'The Moral Reality of Human Rights' in Thomas Pogge (ed), *Freedom from Poverty as a Human Right: Who owes what to the very poor?* (OUP 2007) 94.

B *The Individuation Objection*

One problem that emerges from the lack of analytical clarity that the *Multiple Duty View* creates is that it encounters difficulties in individuating human rights and carries the potential to obscure the distinction between what may be separate and distinct human rights—what we might call the Individuation Objection.

1 *The individuation of duties*

Before getting into the details of the Individuation Objection, it is worth briefly noting how we can individuate duties under the *Multiple Duty View* (and in general). Given that duties make certain action obligatory (either by prescribing it or proscribing it), it is fairly natural to individuate them—as John Gardner suggests—‘according to the action that they make obligatory’.⁷ But we can be slightly more precise than this.

When talking about ‘action’ it is important to distinguish between ‘act-types’ and ‘act-tokens’. As Alvin Goldman draws the distinction, an act-type is an act property, or a generic or universal description of an action that can be exemplified by an agent when they act at a particular point in time or during a period of time.⁸ There are as many act-types as there are descriptions that can be offered of action. Examples of act-types include ‘lifting a box’, ‘waving her hand’, and ‘hitting the ball’. To say that ‘Samithy *lifted* the box’ is to say that Samithy exemplified the act-type (or act-property) of lifting the box.⁹ For Goldman, an act-token is a particular instance of action. It is the performance of an act or the exemplifying of an act-type by an agent at a particular time. As Goldman explains:

⁷ John Gardner, ‘What is Tort Law For? Part 1: The Place of Corrective Justice’ (2011) 30(1) *Law and Philosophy* 1, 29.

⁸ Alvin Goldman, *A Theory of Human Action* (Princeton University Press 1976) 10.

⁹ Alvin Goldman, ‘The Individuation of Action’ (1971) 68(21) *Journal of Philosophy* 761, 771.

An act-token is not itself a property. It is the exemplifying of a property by an agent. Act-tokens include John's mowing his lawn (at t), John's flipping the switch (at t), John's giving a lecture (at t), etc.¹⁰

To put things more precisely then, what duties make obligatory is the exemplification of some act-type or act-types. For example, a duty not to torture prohibits the exemplifying of the act-type 'torturing'. Rights and duties, then, make act-types obligatory. They prescribe or proscribe the exemplifying of an act-type. So, we might individuate a duty to φ from a duty to ψ on the basis that they make different act-types obligatory—the first duty makes the act-type of φ ing obligatory whereas the second makes the act-type of ψ ing obligatory. To be more concrete, Rafael's duty not to torture Lincoln can be individuated from Rafael's duty not to kill Lincoln on the basis that the former prohibits the act-type of torturing Lincoln whereas the latter prohibits the act-type of killing Lincoln or taking his life.

2 *The individuation of rights and the Individuation Objection*

The problem that the *Multiple Duty View* encounters is that it cannot individuate human rights in the same way that it individuates duties—that is, according to the act-type that they make obligatory. If one accepts the *Multiple Duty View*, then human rights cannot be individuated according to the act-type that their correlative duties make obligatory. This is because—as outlined in Chapter Two—if one endorses the *Multiple Duty View*, one is committed to saying that each human right can correspond to a range of changing duties (and other normative factors, in the case of the *Dynamic Normative Factor Thesis*), each of which will make a different act-type obligatory. According to this view, there is no one correlative duty that invariably exists—and one act-type that is invariably made obligatory—wherever a particular human right exists. Each human right correlates instead to different duties—requiring different act-types—depending on context. What this means is that not all of the duties that correspond to each human right will match their correlative right. As John Tasioulas acknowledges, when one

¹⁰ Goldman, *A Theory of Human Action* (n 8) 10.

endorses the *Multiple Duty View*, ‘the duties entailed by a right cannot simply be read off ... from the object of the right.’¹¹

Human rights—on the *Multiple Duty View*—must always be more general than their correlative duties. If human rights correlate with multiple changing duties, then they must be broad enough to capture each and all of the duties to which they may correlate. As Frances Kamm notes, ‘[r]ights can be dynamic in this way when the object of the right is more general than the specific duties it generates’.¹² The ‘right against torture’ can nest underneath it duties not to torture, to provide aid to torture victims, to protect people against being tortured, and to investigate incidences of torture. But it is hard to see how the same can be said of ‘the right to have incidences of torture investigated’—if it exists. That right appears capable of correlating *only* to a duty to investigate incidences of torture—rather than to all the other duties not to torture, to provide aid to torture victims, and to protect people against being tortured, as well. If we want each of the duties not to torture, to provide aid to torture victims, to protect people against being tortured, and to investigate incidences of torture to nest under one human right then the right must be broader than any one of its correlative duties. So, to have a multiple duty view of the structure of human rights, we need rights that are always broader than their duties. If this is the case, then, although we can individuate each duty according to the act-type that it makes obligatory, we cannot then individuate each human right according to *the act-type* that its correlative duty makes obligatory. This is because, on the *Multiple Duty View*, each human right has the capacity to correlate with a range of duties, which duties make obligatory various distinct act-types.

The *Multiple Duty View*, then, is forced to rely upon alternative individuation strategies for individuating human rights. It cannot individuate human rights according to the act-type

¹¹ Tasioulas, ‘The Moral Reality of Human Rights’ (n 6) 96.

¹² Kamm (n 4) 484.

which their correlative duties make obligatory. What draws the Individuation Objection to the *Multiple Duty View* is that each of the available alternative individuation strategies carries the potential to obscure the distinction between what may be separate and distinct human rights. I will show this by considering each alternative individuation strategy in turn.

The first alternative individuation strategy involves individuating each human right by reference to the subject matter of its correlative duties or the subject matter of the distinct *set of act-types* which its correlative duties make obligatory.¹³ So, we can individuate the right against torture from the right to physical security on the basis that the former correlates with duties that have something to do with torture—like duties not to torture, to provide aid to torture victims, to protect people against being tortured, and to investigate incidences of torture—whereas the latter correlates with duties that have something to do with physical security—like duties not to interfere with the right-holder’s physical security, to provide aid to right-holders whose physical security has been interfered with, to protect right-holders from intrusions on their physical security, and to investigate incidences of interference with a right-holder’s physical security.

By individuating human rights according to the subject matter of their obligations, we potentially bundle together human rights that are actually quite distinct. While individuating human rights by the subject matter of their correlative duties will allow us to easily mark out a right to physical security from a right to a fair trial, it cannot as easily mark out the difference between a right to have one’s sentence reviewed by a higher court and a right to test the evidence put against you in a criminal trial. The former pair of rights each correlate with duties that concern physical security and fair trials, respectively—and so can be easily marked out from each other—however, the latter pair each correlate with duties that concern fair trials, and so will be bundled together according to the subject matter individuation strategy. To separate

¹³ John Tasioulas and Effy Vayena, ‘The place of human rights and the common good in global health policy’ (2016) 37(4) *Theoretical Medicine and Bioethics* 365, 372.

these rights out we need to be able to individuate them according to the act-type that their duties make obligatory. Because the *Multiple Duty View* denies that each right is correlated with one duty, it cannot allow for the individuation of each human right according to the act-type that its correlative duty makes obligatory, as each human right—on the *Multiple Duty View*—correlates with multiple duties which make multiple act-types obligatory.

Another proposal for individuating human rights that is compatible with the *Multiple Duty View* involves individuating human rights according to their grounds. As Rowan Cruft explains:

[M]y human right to education will entail both a directed duty to educate me, borne by those wealthy enough and appropriately related to me so as to be allocated such a duty, and a strong non-duty reason for my impoverished government to work towards educating me insofar as it can, along with various other normative factors. The individuation of this human right from other human rights will, on this approach, be done by appeal to the justifying value it protects: perhaps the value of my being educated.¹⁴

That is, on the *Dynamic Normative Factor Thesis*, features of the right-holder ground human rights and their duties. Such human rights are then identified by reference to those features. For example, that someone has a human right to education can be worked out from their interest in being educated. The right to education can be individuated on this basis from a human right to physical security, given that the latter will be grounded in the right-holder's interests in bodily autonomy and physical security rather than their interest in being educated.

Something similar can be said about the *Dynamic Duty Thesis*. For Tasioulas, rights are prior to the duties that they ground, and are themselves referable to the interests and inherent dignity of the right-holder. A right to education will exist—on Tasioulas's account—if, in the case of each human being and simply in virtue of their humanity, being educated is *pro tanto* of sufficient importance to justify the imposition of duties on others. So, again, each human right can be individuated by reference to the interest that underlies it.

¹⁴ Rowan Cruft, 'Human rights as rights' in Gerhardt Ernst and Jan-Christoph Heilinger (eds), *The Philosophy of Human Rights: Contemporary Controversies* (De Gruyter 2012) 153.

Shue's account is a little different, as he does not say much about what grounds basic (or human) rights. However, he does take the duties that correlate with such rights to be 'right-grounded' and appears to endorse an interest theory of rights. Evidence for this can be found in Shue's claim that to be able to make a right-backed demand 'is, among other things, for one's situation to fall under the general principles that are good reasons why one's demands ought to be granted'¹⁵ and that '[v]irtually any argument in favor of a right will depend at bottom on emphasizing that the interest to which the right is asserted is genuinely important ...'.¹⁶ If I am correct, and Shue endorses an interest theory of rights, then Shue can individuate basic rights based on their grounds—that is, the right-holder's interests. If I am wrong about this, then it might be that Shue's only individuation strategy is the subject matter one.

However, as with individuating human rights according to the subject matter of their correlative duties, individuating human rights by reference to their grounds will not allow us to distinguish between rights that share the same grounds. Like subject matter individuation, it works well as an individuation strategy where the human rights under consideration are vastly different and plainly have different grounds—as in the case of the right to education and the right to physical security—but there are also many human rights that have identical grounds and which we may want to regard as separate rights. As Cruft notes, when we adopt the *Multiple Duty View* and attempt to individuate human rights according to their grounds, 'blurring occurs when one slips, as if these were the same right, from reference to Joe's human right to education in general to reference to Joe's human right to be taught to write.'¹⁷ Both the right to education and the right to be taught to write have the same ground—the right-holder's interest in education. Given this, if we individuate human rights according to their grounds—as we are

¹⁵ Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton University Press 1980) 13. As Margaret Gilbert notes, '[h]ere [Shue] seems to be thinking of justification': Margaret Gilbert, *Rights and Demands: A Foundational Inquiry* (OUP 2018) 330.

¹⁶ Shue (n 15) 8.

¹⁷ Cruft, 'Human rights as rights' (n 14) 154.

required to do under the *Multiple Duty View*—we cannot say that there are two separate rights here. As both of these human rights have the same ground, the *Multiple Duty View* will only recognise one right here—Joe’s human right to education.

Something similar might be said about the human right to have any criminal charge laid against you proved by the state at a trial and the human right to examine witnesses called in support of any criminal charge laid against you. Although both of these rights may be considered to be part of the right to a fair trial, there may be some circumstances in which we may want to recognise them as independent and separate rights. However, because both rights share the same ground—the interest of the right-holder in having any criminal charge laid against them determined fairly—any attempt to individuate them according to their grounds will be unsuccessful. To the extent that the *Multiple Duty View* is forced to individuate human rights according to their grounds, it will only recognise one right here—the right to a fair trial.

It is this inability—on the *Multiple Duty View*—to individuate each human right according to the act-type that its correlative duty makes obligatory that draws the Individuation Objection. That is, this objection claims that the *Multiple Duty View* is impoverished as a view of the structure of human rights because it leads to the blurring of lines between what may be separate and distinct human rights.

C *Cruft’s response*

Cruft acknowledges the problem that the *Multiple Duty View* encounters in individuating human rights. He notes that sometimes endorsing the *Multiple Duty View* will mean that one cannot differentiate between two clearly different human rights that share the same justificatory source. However, Cruft says this failure to finely individuate human rights causes no real practical difficulties for the *Multiple Duty View*. As he puts it:

Individuating human rights by their ground is not as costly in the case of human rights, when conceived as individualistically justified ... [I]t is not clear that the blurring into one of what might initially have looked like several human rights with the same individualistic justificatory source need be a problem.¹⁸

Cruft gives two key reasons for taking this position.

First, Cruft brushes aside this kind of blurring and slippage in rights-talk as quite common and to-be-expected. He claims that the *Multiple Duty View's* individuation of human rights according to their grounds preserves the distinction between human rights where it matters—in cases like the clearly separate and distinct rights to education, to liberty, and to physical security. Cruft goes on, '[w]here the blurring happens is where it feels right anyway—between things with the very same ground.'¹⁹ However, this response does not really tell us very much about why Cruft is prepared to concede the partial failure of the *Multiple Duty View's* individuation strategy.²⁰ What is it to say that the blurring and attendant failure of individuation 'feels right'? What does it matter if it is quite common? Who is to say that it matters less to individuate Joe's right to education from his right to be taught to write than it does to individuate his right to education from his right to physical security? Even less helpful is Cruft's tautological claim that, '[i]f the non-Hohfeldian individualistic approach is correct, this [kind of blurring together of human rights with the same ground] is to be expected'.²¹ The correctness of the non-Hohfeldian individualistic approach is just what is put into question by its failure to finely individuate human rights.

What Cruft seems to be suggesting is that it is worth giving up on being able to finely individuate human rights in order to endorse the *Multiple Duty View*. That is, for Cruft the *Multiple Duty View* better accommodates our intuitions about how human rights function in

¹⁸ *ibid.*

¹⁹ *ibid.*

²⁰ This might be because Cruft is already disposed towards the Hohfeldian structure of rights. When it comes to rights-in-general he accepts that the Individuation Objection is 'good enough to settle the matter in favour of Hohfeld'. See *ibid.* 150. As I noted in Chapter Two, Cruft seems to have moved closer to the Hohfeldian structure of human rights in later work. See Rowan Cruft, *Human Rights, Ownership, and the Individual* (OUP 2019) 7.

²¹ Cruft, 'Human rights as rights' (n 14) 154.

our world—by allowing us to speak of there being things like human rights to education and healthcare held against impoverished governments, where to require a strictly correlative Hohfeldian duty would be too demanding on duty-bearers²²—even if it cannot always finely individuate those rights. Although, even here Cruft is equivocal. He asks, ‘[i]s the value of saying this worth the cost of muddying the individuation of different human rights with the same grounds?’²³

Second, Cruft claims that the *Multiple Duty View* can ‘sidestep’ the worries that arise from its failure to finely individuate human rights. He says that what matters is not whether we can mark one right out from another, but whether we can mark *one person’s right* out from another’s. That is, what matters is being able to account for the directed nature of human rights—for individual right-holders being let down by the failings of others. Cruft argues that his account can deliver this (at least, partially), because each human right finds its justifying source in the features of an individual and so ‘foregrounds’ that individual as the object of the normative implications that flow from the right. While saying that a right-holder is so foregrounded is not the same as saying that the right correlates with a directed duty—in the strict Hohfeldian sense—or that the right-holder will be wronged if some duty corresponding to the right is not fulfilled, for Cruft this foregrounding preserves our ability to say that a particular person has been ‘let down’ by any failure to discharge the duties correlative to their human rights.²⁴

Cruft’s response is also open to Tasioulas. As with Cruft’s account, the *Dynamic Duty Thesis* foregrounds the right-holder as the source of the interest which is *pro tanto* of sufficient importance to justify the imposition of duties on others. Tasioulas acknowledges this when he

²² For more on this, see Chapter Two.

²³ Cruft, ‘Human rights as rights’ (n 14) 156.

²⁴ *ibid* 152.

states: ‘What the directedness of the right ultimately comes down to, on the interest-based view, is the fact that its counterpart duty has its source exclusively in the interests of the right-holder.’²⁵ Assuming that Shue also endorses an interest theory, it seems he can attempt to vindicate his account via the same claim. But, as discussed above, it is less clear how Shue’s *Tripartite Duty Thesis* can deliver rights that foreground an individual right-holder, given that he has little to say about the grounding of rights.

So, Cruft provides a way to rescue the *Multiple Duty View* from the Individuation Objection. That is, while the *Multiple Duty View* appears to have difficulties in individuating human rights precisely, this—according to Cruft—does not have any serious practical implications, as the *Multiple Duty View* retains the ability to individuate human rights at a moderate level of specificity and to preserve (somewhat) the directed nature of the duties that are entailed by human rights.

D *The problem of individuation and waiver*

I do not think that this is quite right. I will argue that there *are* serious practical implications that flow from the inability of the *Multiple Duty View* to provide for the precise individuation of human rights. These practical implications cannot be avoided by individuating human rights by reference to their grounds or the subject matter of their duties and by merely foregrounding the right-holder. Having established in Chapter Three that (at least some) human rights can be waived, I claim here that cases of waiver bring out the serious practical implications of the *Multiple Duty View*’s inability to finely individuate human rights.

What I will argue in the following sections is that the problems that the *Multiple Duty View* encounters in individuating human rights means that it cannot fully explain what is going on when we waive our human rights. That is, because it does not connect each human right

²⁵ Tasioulas, ‘On the Foundations of Human Rights’ (n 2) 61.

with a single correlative duty, where a right-holder waives a human right that shares a subject matter or a ground with another human right that the right-holder does not want to waive, the *Multiple Duty View* is unable to track properly which rights have been waived and which rights have been retained by the right-holder. Because the rights in play share the same subject matter or ground, the *Multiple Duty View* can only register the existence of one right in such cases, which right is either waived or retained by the right-holder. What this shows then is the *Multiple Duty View's* individuation problem is not just semantic—it has serious practical implications.

Before getting into the waiver problem, it is important to note that the claim that for every human right there are multiple duties equivocates between three further claims:

(1) the *Pure Multiple Duty View*: each human right correlates with multiple different duties, with each duty requiring a different act-type;

(2) the *Multiple Duty-Bearer View*: the duty correlative to each human right is imposed on multiple different duty-bearers, with each of these duties requiring the same act-type but of different duty-bearers; and

(3) the *mixed view*: each human right correlates with multiple different duties requiring different act-types, and each of those duties is imposed on multiple different duty-bearers.

Note that (3) is not inevitable—(1) does not necessarily entail (2), and (2) does not necessarily entail (1). (1) holds that for each human right there are multiple different *duties*. It does not entail that each of those duties has multiple duty-bearers—or (2). One may take each human right to generate multiple duties but hold that for each relation of right there is just one right-holder and one duty-bearer—that is, the multiple duties generated by each right are all imposed on the same duty-bearer. And (2) does not entail (1), because one might hold that each human

right generates a single invariable duty but hold that for each such relation of right there is one right-holder and multiple duty-bearers—that is, the invariable obligation correlative to each right falls on multiple different *duty-bearers*.

To illustrate the difference between these views consider Alati's right not to be assaulted held against Brett, Candice, and Dimitri. If we say that Alati's right against assault correlates with duties on Brett not to assault Alati, to protect Alati against assaults, and to aid Alati when he has been assaulted, this reflects the *Pure Multiple Duty View*. Alati's single right against assault correlates with multiple duties on Brett requiring different act-types. If we say that Alati's right against assault correlates with duties on Brett, Candice, and Dimitri not to assault Alati, this reflects the *Multiple Duty-Bearer View*. Alati's single right against assault here correlates with the same duty held by three different duty-bearers. Finally, if we say that Alati's right against assault correlates with duties not to assault Alati, to protect Alati against assaults, and to aid Alati when he has been assaulted, held by Brett, Candice, and Dimitri, this reflects the *mixed view*. Alati's single right against assault correlates with both multiple duties requiring different act-types, and each of those duties is held by multiple duty-bearers.

The phenomenon of waiver of human rights creates a problem for all three of these views. However, only views of type (1) and (3)—to the extent that (3) incorporates (1)—represent the kind of view which has been the subject of the discussion thus far—that is, the *Multiple Duty View*. (2) is not a variant of the *Multiple Duty View* at all, but instead a multiple duty-bearer view. (1) is the purest version of the *Multiple Duty View*, and (3) is a variant of the *Multiple Duty View* insofar as it includes (1). While my discussion in this thesis focuses on the *(Pure) Multiple Duty View*, I will also show how waiver also presents a problem for the *Multiple Duty-Bearer View*, since Shue, Tasioulas, and Cruft appear disposed to this view as well as to the *Multiple Duty View*.

1 Waiver and the Multiple Duty-Bearer View

Starting with the *Multiple Duty-Bearer View*, to see how waiver causes problems for this view, consider the following scenario:

Spiteful Assassin: Leigh is in the late stages of an incurable illness and has only days left to live. His remaining days will be filled with agony and are not worth living. Leigh asks Odessa to switch off his life-support. Little does Leigh know, his arch-nemesis Henry has gained access to the power supply to his room. Henry is determined to be the one to take Leigh's life and terminates the power supply to Leigh's life support before Odessa can switch it off. Leigh dies shortly after.

I suggest that in *Spiteful Assassin* we should have the sense that Henry has done something wrong—that he has wronged Leigh by taking his life. But why exactly? To begin with, we might take the right in play to be Leigh's human right to life, grounded in Leigh's interest in life. If we take the view that for each human right there are multiple duty-bearers for the duties that correlate with it, we would take Leigh's right to life to correlate with duties on both Odessa and Henry not to deprive Leigh of his life.

Now, when Leigh asks Odessa to switch off his life support, it appears that he releases Odessa from her duty to him not to deprive Leigh of his life. But Leigh does no such thing in respect of Henry—Henry remains bound by a duty not to deprive Leigh of his life. This is why we should have the sense that Henry has wronged Leigh—he has breached his duty to Leigh not to take his life. Had Leigh died as a result of Odessa switching off his life-support we would not have this same sense of wronging. Leigh released Odessa from her duty not to deprive him of his life.

What I have said above says all that we want to say about the situation in terms of the duties in play. But we encounter difficulties when we try to be clear about what happens to

Leigh's right to life. On the view that I set out here, Leigh's right to life is the source of both the duty on Odessa and the duty on Henry—Leigh has just one human right (held against both Odessa and Henry) in play but multiple duties. Leigh's right to life is grounded in his interest in life, and it grounds the duties imposed on Odessa and Henry. If this is the case, what do we say happens to that right when Leigh asks Odessa to end his life? We should want to say that Leigh waives his right to life. What then do we say about what Henry does? We want to be able to say that Henry violates Leigh's right to life by terminating the power supply to Leigh's life support. However, if we take Leigh's right as the source of the duties on *both* Odessa and Henry then it appears that we can *either* say that it is waived or violated—we cannot say both.

If we say that Leigh's right is the source of both Odessa's and Henry's duties not to deprive him of his life, we cannot track Leigh's waiving his right as against Odessa but not as against Henry—there is only one right, but two duties. To be clear about what is going on with Leigh's rights in *Spiteful Assassin* we need to divide Leigh's right to life up into a right against Odessa and a separate right against Henry. However, we cannot do this by reference only to the grounds of the right—Leigh's interest in life cannot do the work of individuating his right to life held against Henry from his right to life held against Odessa. Similarly, the subject matter of the duties on Henry and Odessa—Leigh's life—cannot do this work either. Instead, we would need to endorse the view that for each relation of right there is only one right-holder and one duty-bearer. But this would be to give up the *Multiple Duty-Bearer View*.

Spiteful Assassin, therefore, presents a problem for proponents of views of type (2)—the *Multiple Duty-Bearer View*—and (3)—the *mixed view*—to the extent that (3) also incorporates (2). It is not necessarily a problem for those committed *only* to views of type (1)—which is the central claim that underlies the *Multiple Duty View*. This is because *Spiteful Assassin* involves the same duty (not to deprive Leigh of his life) imposed on different duty-bearers (Odessa and Henry) rather than multiple duties making different act-types obligatory. So, proponents of the

Multiple Duty View that only endorse (1) *and* also recognise separate right-duty pairs for each bearer of a duty correlative to the right-holder's right—for example, in *Spiteful Assassin*, a right held by Leigh which correlates with a duty on Odessa and a separate right held by Leigh which correlates with a duty on Henry—can explain what is going on with Leigh's rights in *Spiteful Assassin*. They can say that Leigh waives his right to life against Odessa and releases her from its correlative duty, while retaining his right to life held against Henry. To the extent that Shue, Tasioulas, and Cruft are committed to a *Multiple Duty-Bearer View* (as well as a *Multiple Duty View*) they will face the problem raised by *Spiteful Assassin*.

2 *Waiver and the Multiple Duty View*

So much for the *Multiple Duty-Bearer View*. Let us turn then to consider how waiver affects views of type (1), or the *Pure Multiple Duty View*, and (3), the mixed view—to the extent that (3) incorporates (1).

Shue's *Tripartite Duty Thesis* faces the biggest problem with waiver of all of the variants of the *Multiple Duty View* that I have discussed. His three broad basic rights to physical security, subsistence, and liberty nest beneath them countless duties which make obligatory many different act-types. When a right-holder releases a duty-bearer from one of the duties correlative to one of these basic rights, it is clear that the particular duty that is the subject of the release is waived, but it is unclear what happens to the broad correlative right.

To take a concrete example, consider:

Tattoo: Avey goes to his local tattoo parlour to get a tattoo. He authorises his tattoo artist, Beku, to apply force to his body in order to give him his chosen tattoo.

In *Tattoo* the right in play is Avey's right to physical security. This right plausibly correlates with duties not to assault, not to torture, and not to murder—at the very least. In this scenario,

by electing to get a tattoo, Avey releases Beku from her duty not to assault Avey, but not from the duties not to murder Avey and not to torture Avey. It would be absurd if such a release from an obligation not to assault also released the relevant duty-bearer from their other correlative obligations not to murder and not to torture the right-holder. We can register this because, by individuating the duties correlative to the right to physical security by reference to the act-types that they make obligatory, we can separate out the duty not to assault from the duties not to murder and not to torture, and register that only the duty not to assault is waived.

How then can the *Tripartite Duty Thesis* account for this in terms of rights? If Shue's account only recognises one right held by Avey—the right to physical security—what happens to that right when Beku's correlative duty not to assault Avey is waived? As I noted in Chapter Three, waiver as a form of consent is a dispensation from compliance with rights and their correlative directed duties. The right-holder suppresses their right to something and releases the duty-bearer from its correlative duty. So, when Avey releases Beku from her duty not to assault him, what right does he suppress? Because the duties not to assault, not to murder, and not to torture each correlate with one right—the right to physical security—there is only one right in play. So, when we use Shue's version of the *Multiple Duty View* to understand what happens to the moral relations between Avey and Beku in *Tattoo*, we are confined to saying either that Avey has waived his right to physical security or, that Avey's right to physical security has been retained. However, neither statement by itself accurately captures what is going on here, and saying both that Avey's right to physical security was waived and retained by him simultaneously would be nonsensical.²⁶

What I suggest is that we want to be able to say that Avey waives *only* his right not to be assaulted, and not his right not to be murdered or his right not to be tortured. This would

²⁶ I consider below the objection that such a claim is not nonsensical if we divide what happens to Avey along a timeline.

allow us to register any murder or torture of Avey by Beku as a rights violation, despite the fact that she has been released from her duty not to assault Avey. But the undifferentiated right to physical security that Shue's *Multiple Duty View* gives us cannot recognise this nuance. Because there is only one right in play it must be either waived or retained by Avey, which will create complications if there is a breach by Beku of some of her duties to Avey that remain on foot. To the extent that Tasioulas and Cruft endorse similarly broad rights, their theses about the structure of human rights face the same challenge of being able to explain what happens to each human right when one of its correlative duties (but not the others) is waived by the right-holder.

There is an easy response here for proponents of the *Multiple Duty View*. They might deny that the *Multiple Duty View* works this way. Proponents of this view might say that, 'the right to physical security is an umbrella right, left open to specification and individuation.'²⁷ Beneath the right to physical security are more specific rights, including against murder, torture, rape, and assault. So, the *Multiple Duty View* does in fact register that Avey waives his right not to be assaulted, but not his rights not to be murdered and not to be tortured.' As I mentioned above, proponents of the *Multiple Duty View* are not bound to endorse only Shue's three basic rights. They can specify and individuate human rights by reference to their grounds or according to the subject matter of the duties to which they correlate.

It is plausible that there are indeed more specific rights that lie beneath the umbrella of Avey's right to physical security—including a right not to be assaulted correlative to a duty not to assault, a right not to be murdered correlative to a duty not to murder, and a right not to be tortured correlative to a duty not to torture. These rights can be individuated from one another by their grounds or subject matter. The right not to be assaulted is likely to have sufficiently different grounds from the right not to be murdered and the right not to be tortured. For

²⁷ I thank Henry Shue for drawing this kind of response to my attention.

example, it is plausible that the former is grounded by the right-holder's interest in physical security, rather than the right-holder's interest in life (which interest may ground the latter two rights). Similarly, the duties correlative to the right not to be assaulted—duties having something to do with assaults—are of a sufficiently different subject matter from the duties that correlate with the right not to be murdered and the right not to be tortured—duties having something to do with murder and torture, respectively—that these rights can be individuated from one another by reference to the subject matter of their correlative duties.

However, this kind of specification and individuation can only get proponents of the *Multiple Duty View* so far and cannot entirely avoid this problem of waiver. At root, the *Multiple Duty View* requires that each human right correlates (or has the potential to correlate) to multiple duties. It denies that any one human right can correlate with one invariable duty only. This sets a limit on how far down the specification chain we can go. A proponent of the *Multiple Duty View*—if they want to maintain their commitment to that view—cannot specify human rights so finely that they correlate with a single duty only. As I highlighted above, *Multiple Duty View* rights must always be broad enough to encompass all of the duties that nest beneath them. To say otherwise is to accept the possibility of the rival position, where each human right correlates with one invariable duty only. Because of this limit on specification, we get a limit on individuation. If we can only specify human rights to the point that they remain correlated with multiple duties, we eventually reach a point at which some human rights begin to share grounds with other human rights or at which the duties that correlate with some human rights share a subject matter with the duties that correlate with other human rights. It is at this point that the problem of waiver arises again.

To take another concrete example, consider:

Fair Trial: After committing a string of burglaries in the state of Utopia, Sasha is arrested and put on trial. She decides to plead guilty at the first committal hearing. After an adjournment of several days, Sasha is sentenced *in absentia* to a lengthy term of imprisonment by the District Court of Utopia in accordance with law.

In *Fair Trial*, following the *Multiple Duty View*, we might take the right in play to be Sasha's right to a fair trial, which correlates with certain duties on the state of Utopia, including a duty to prove at a trial the criminal charge against Sasha and to allow Sasha to attend any hearings in her matter. As I discussed in Chapter Three, by pleading guilty Sasha releases the state of Utopia from some of the duties correlative to her right to a fair trial, but not all of them. Most obviously, her plea of guilty releases Utopia from its duty to prove at a trial the criminal charge against Sasha. However, Sasha's plea of guilty does not obviously release Utopia from its duty to allow Sasha to attend all of the hearings in her matter. Just as in *Tattoo*, the *Multiple Duty View* allows us to register the waiver of the duty to prove at a trial the criminal charge against Sasha and the continuation of the duty to allow Sasha to attend all of the hearings in her matter (which is then violated by Utopia), by individuating these duties based on the act-types that they make obligatory.

However, the same cannot be said for rights. In *Fair Trial*, to match what is said about the duties in play, we want to be able to say that Sasha waives her right that Utopia prove at a trial the criminal charge against her, but that she retains her right to attend all of the hearings in her matter.²⁸ The *Multiple Duty View* does not permit the rights in play to be carved up in this

²⁸ Indeed, the ECtHR has taken exactly this approach. For example, in *Navalnyy and Ofitserov v Russia* App nos 46632/13 and 28671/14 (ECtHR, 23 February 2016) para 100, the ECtHR held: 'Where the effect of plea-bargaining is that a criminal charge against the accused is determined in an accelerated form of judicial examination, this amounts, in substance, to a waiver of a *number of procedural rights*' (emphasis added). Similarly, the Supreme Court of the United States held in *McCarthy v United States*, 394 US 459, 466 (1969): 'A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers.' Again, in *Boykin v Alabama*, 395 US 238, 243 (1969) the Supreme Court of the United States held: 'Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First is the privilege

way. In this kind of scenario, the *Multiple Duty View* will recognise only one right in play—the right to a fair trial. This is because the rights correlative to the duty to prove at a trial the criminal charge against her and the duty to allow Sasha to attend all of the hearings in her matter will have identical grounds—Sasha’s interest in having criminal charges against her proved fairly. Similarly, the duty prove at a trial the criminal charge against Sasha and the duty to allow Sasha to attend all of the hearings in her matter will have the same subject matter—fair trials. As such, neither the grounds of the rights nor the subject matter of the duties to which they correlate can be used to individuate Sasha’s right that Utopia prove at a trial the criminal charge against her from her right to attend all of the hearings in her matter, such that we can say that the former is waived but the latter is not.

A proponent of the *Multiple Duty View* might respond here, ‘But the *Multiple Duty View* can recognise that the part of the right in *Fair Trial* that relates to the duty to prove at a trial the criminal charge against Sasha is waived, while the part about the duty to allow her to attend all hearings in her matter is not.’ However, this response is not going to work—and this is because Shue’s, Tasioulas’s, and Cruft’s accounts do not give us the conceptual resources with which to distinguish between the different parts of each right. The only way to distinguish between the parts of a right that are retained and parts that are waived in the case above is to individuate the former from the latter based on the act-type that the duties correlative to those parts of the right make obligatory. As I have indicated above, the grounds and subject matter individuation strategies cannot do this work in *Fair Trial*. To individuate the parts of a right based on the act-types that their duties make obligatory is—in effect—to give up what makes the *Multiple Duty View* a *multiple* duty view. It involves endorsing the view that for each human right there is one invariable duty that correlates with it and matches it.

against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. ... Second is the right to trial by jury. ... Third is the right to confront one’s accusers. ...’.

A proponent of the *Multiple Duty View* may press, ‘The *Multiple Duty View* can avoid confusion in cases like *Fair Trial* by dividing the rights along a timeline. For example, we can get clarity on what is going on in *Fair Trial* by saying that Sasha’s right to a fair trial is only waived at t^1 when she enters her plea of guilty, but not at t^2 when the District Court of Utopia sentences her. And at t^2 when Sasha is sentenced, her right to a fair trial is violated.’ But this hardly clarifies things. It does not rescue the *Multiple Duty View* from the conceptual murkiness that it creates by correlating each human right to multiple duties. While this strategy allows us to say that Sasha’s right to a fair trial is waived at t^1 but not at t^2 , it still leaves it unclear as to which parts of that right have been waived, returning us to the problem I have set out above.

Alternatively, a proponent of the *Multiple Duty View* may argue, ‘While Shue is committed to multiple duties obtaining at all times, neither Tasioulas nor Cruft is. Both the *Dynamic Duty Thesis* and the *Dynamic Normative Factor Thesis* are perfectly consistent with there being just one duty for every human right that exists, where that duty has a changing content depending on context.’ So, when I have said that Tasioulas and Cruft would take there to be multiple duties in play in the cases above (according to this argument), I have misrepresented their views—they might only recognise the existence of one of the duties I set out.

It is anathema to the projects of Tasioulas and Cruft to take human rights to correlate with one (albeit) changing duty. Indeed, by limiting themselves to one duty per right, but taking that duty to have a changing content based on context, Tasioulas and Cruft are going to move closer—if not all the way—to the Hohfeldian structure of human rights that they want to reject.²⁹ This is because there will be very few circumstances in which one changing correlative duty will capture all of the action that Tasioulas’s and Cruft’s accounts take is necessary to protect

²⁹ See Chapter Two.

the interest or feature of the right-holder that underpins the right. This strategy might work in a state of nature, where we cannot expect anything other than non-interference of duty-bearers, but in modern contexts there will likely be multiple duties in play in any human rights situation. And this will raise the question of how these duties relate to human rights. So, at some point, Tasioulas and Cruft will have to either return to the *Multiple Duty View* (with its problem of individuating human rights) or start individuating human rights based on the act-types that their correlative duties make obligatory.

Cruft has another way out of my objection. He might respond by saying that human rights rarely generate the kind of directed duties that I have been talking about, and which raise the issues that I have identified with waiver. Instead, human rights more-often-than-not generate only non-directed-duty normative factors—such as undirected duties, serious high-weight non-duty reasons, and important goals or aims. These normative factors do not correlate with rights in the same way as directed duties do—they lack the kind of normative arc of obligation that exists between rights and directed duties—and cannot be within the normative control of right-holders (they only foreground the right-holder). This means that the question of waiver is conceptually ruled out.

Again, this is a valid strategy for avoiding my objection, but it comes at a high cost—denying that human rights are (in most cases) really rights properly-so-called at all. It might be true to say that there are some human rights that do not correlate with directed duties—but to other non-duty normative factors—but this seems patently false in the case of something like the right not to be assaulted (or rights against rape, murder, or torture). So, Cruft either has to take the unintuitive line of denying that the human right not to be assaulted correlates with a directed duty, or be faced again with the individuation problem I have posed.

The *Multiple Duty View*, then, faces challenges in individuating human rights from one another when they share grounds or a subject matter. This problem of individuation has serious practical implications. It means that the *Multiple Duty View* cannot fully explain what happens to each human right when one of its correlative duties is waived but not others. Because it does not correlate each human right to a single correlative duty, where a right-holder waives a human right that shares a subject matter or a ground with another right that the right-holder does not want to waive, the *Multiple Duty View* is unable to track properly which rights have been waived and which rights have been retained by the right-holder. Because they share the same subject matter or ground, the *Multiple Duty View* can only register the existence of one right in such cases, which right is either waived or retained by the right-holder.

3 *Limitations on the argument from waiver*

There is an important limitation on the argument above. While the *Multiple Duty View* encounters difficulties in accounting for waiver of human rights, there is also a sense in which all theories of the structure of human rights—including the alternative view that I propose in Chapter Five, the *Individuation View*—might encounter a similar problem of accounting for waiver.

To see this, consider:

Boxing Match: Chris enters into a boxing match with Rob. During the match, Chris quickly gains the upper hand over Rob. Frustrated by the prospect of losing the match, Rob pulls a concealed blade from her glove and non-fatally stabs Chris.

Most rights theorists would say that by agreeing to enter into a boxing match with Rob, Chris has waived her human right not to be assaulted held against Rob and released Rob from her duty not to assault Chris. Most rights theorists would also say that when Rob stabs Chris, Rob violates Chris's right not to be assaulted and breaches her duty not to assault Chris. This analysis

of *Boxing Match* suggests that Chris's right not to be assaulted has been simultaneously waived and violated, and that Rob's duty not to assault Chris has been simultaneously waived and breached, which—as I pointed out in relation to the cases set out in Section B.2—is obfuscating and nonsensical. Conceiving of *Boxing Match* in this way leaves us unable to explain what has happened to Chris's rights and Rob's duties.

What produces the problem in *Boxing Match* is not the adoption of the *Multiple Duty View*. The analysis that I provided of the situation above specifically avoids the *Multiple Duty View* and instead posits that Chris has a right not to be assaulted with a single correlative duty that matches its content. Rather, what produces the problem in *Boxing Match* is a coarse-grained³⁰ individuation of act-types. We are unable to account for what happens to Chris's rights and Rob's duties because we take both the entry into the boxing match and the stabbing to implicate the same undifferentiated act-type of 'assaulting'. As I noted above in Section B.1, duties—on the *Multiple Duty View* and other theories of the structure of human rights—are ordinarily individuated by reference to the act-type that they make obligatory. How finely we can individuate duties will then depend on how we individuate act-types. Similarly, if we reject the *Multiple Duty View* and individuate human rights according to the act-type that their correlative duties make obligatory, how finely we can individuate human rights will depend on how we individuate act-types. If we opt for a coarse-grained individuation of act-types then we will encounter the kind of problem that *Boxing Match* raises.

³⁰ When I refer to the 'coarse-grained individuation of act-types' I do not mean to refer to what has sometimes been called the 'coarse-grained individuation of action'. The latter label is used frequently to describe the account of Donald Davidson of the identity of actions. See Hugh McCann, 'Action Individuation' in Ernie Lepore and Kirk Ludwig (eds), *A Companion to Donald Davidson* (John Wiley & Sons 2013) 51–2. I am not here discussing whether and when the components of an action might be identical to each other—that is, I am not hoping to determine whether A's pulling of the trigger of a rifle, A's shooting B, and A's killing B are identical and one action. I am here concerned with the level of generality or specificity at which we might refer to act-types. For example, we might describe A's beating up B more broadly as 'A's assaulting B' or more specifically as 'A's punching B'.

Adopting a fine-grained³¹ account of the individuation of act-types will resolve the problem of waiver in *Boxing Match*. That is, if we break down ‘assaulting’ into the act-types of ‘punching’ and ‘stabbing’, we can say that Chris has two human rights, a right not to be punched by Rob correlative to a duty on Rob not to punch Chris, and a right not to be stabbed by Rob correlative to a duty on Rob not to stab Chris. This will allow us to say that, by entering into the boxing match, Chris waives her right not to be punched by Rob and releases Rob from her duty not to punch Chris, *and* that Chris retains her right not to be stabbed by Rob and Rob’s duty not to stab Chris remains in force.

It is important to note that the kind of individuation problem raised by *Boxing Match* will appear in only a subset of all cases of waiver. For example, take the case of an accused person who decides not to examine the prosecution’s witnesses at their criminal trial but still wants to put the prosecution to proof at a public hearing. If we individuate each human right according to the act-type that its correlative duty makes obligatory we will ordinarily have no difficulty distinguishing between the rights and duties that have been waived and retained here. It is clear that the right-holder waives their human right to examine witnesses at their criminal trial but retains their human right to be presumed innocent and their human right that the state prove the criminal charge against them at a public trial. The act-type made obligatory by the duty correlative to the former right—namely, not interfering with the right-holder’s examination of witnesses at their criminal trial—is sufficiently different from that required by the duties correlative to the latter rights—namely, not prejudging the guilt of the right-holder and the marshalling of proof that the right-holder committed the relevant offence at a trial which the public can attend—that these two right-duty pairs will be able to be individuated from each

³¹ As in the previous footnote, note that what I call the ‘fine-grained individuation of act-types’ is not the same thing as the ‘fine-gained individuation of action’. Alvin Goldman describes his competitor to Davidson’s account of the individuation of actions as the fine-gained account of the individuation of actions. See *ibid.*

other on any plausible theory of the individuation of act-types. Accounting for waiver in such a case will raise no particular difficulties.

Similarly, consider the case of two adults consenting to sado-masochistic sex. Consenting to sado-masochistic sexual practices may amount to a waiver of the human right not to be assaulted, but it clearly does not involve a waiver of the human right not to be killed. The act-type of assaulting in the course of sado-masochistic sex is sufficiently different from the act-type of killing that we can easily individuate the human right not to be killed from the human right not to be assaulted here, and track that waiver of a human right not to be assaulted does not entail waiver of a human right not to be killed.³²

It should also be noted that the waiver problem affects theories that endorse the *Multiple Duty View* and theories that endorse a one-to-one correspondence between human rights and their correlative duties (such as the *Individuation View*), differently. Resolving the problem presented by *Boxing Match* for any theory of the latter sort requires the adoption of a fine-grained account of the individuation of act-types. However, for theories of the former sort that endorse the *Multiple Duty View*, even if we adopt a fine-grained account of the individuation of act-types, the problem remains of how to explain what happens to Chris's *human rights* in *Boxing Match*. That is, even if we adopt a fine-grained account of the individuation of act-types and state the duties in play more precisely—as a duty on Rob not to punch Chris and a duty on Rob not to stab Chris—the *Multiple Duty View* will take both of Rob's duties to be correlated with a single human right—Chris's right not to be assaulted. If we accept this then—just as in *Fair Trial*—it becomes unclear what happens to Chris's right not to be assaulted when Chris waives Rob's duty not to punch Chris—is Chris's right not to be assaulted waived or retained by him? This returns us to the problem of waiver that I discussed in Section B.2. As

³² See eg *R v Brown* [1994] 1 AC 212, 259 (Lord Mustill).

such, abandoning the *Multiple Duty View* and individuating each human right according to the act-type that its correlative duty makes obligatory restricts the scope of the waiver problem.

Resolving the waiver problem for all theories of the structure of human rights—including my own—then requires a fine-grained theory of the individuation of act-types that will allow us to appropriately track the rights and duties that have been waived and retained in this subset of waiver cases. We need some principled basis for the kind of precise individuation of act-types that I suggest can resolve the uncertainty in *Boxing Match*.

No rights theorist³³ that I know of has provided a theory of how to individuate act-types for the purpose of individuating rights and duties.³⁴ There is a rich and dense literature on the individuation of actions, but this literature is primarily concerned with the question of when actions (or act-tokens) are identical. For example, philosophers of action Donald Davidson and Alvin Goldman disagree as to whether the action sentences ‘Uma pointed the rifle at Bruce’, ‘Uma pulled the trigger of the rifle’, ‘Uma shot Bruce’, and ‘Uma killed Bruce’ describe one action³⁵—the killing of Bruce—or four distinct actions—Uma’s pointing the rifle at Bruce, Uma’s pulling of the trigger of the rifle, Uma’s shooting Bruce, and Uma’s killing Bruce.³⁶ Davidson takes the former position, as he holds that one action will be identical to another if both have the same causes and effects.³⁷ By contrast, Goldman takes the latter position, as he claims that one action will only be identical to another if both have the same agent, act-type,

³³ Michael Moore has attempted to bring some of the literature on the philosophy of action to bear on criminal law theory. See Michael Moore, *Act and Crime: The Philosophy of Action and its Implications for Criminal Law* (OUP 1994). However, Moore has been criticised for his failure to pay attention to many of the details of the former body of work. See eg Jennifer Hornsby, ‘Action and Aberration’ (1994) 142(5) *University of Pennsylvania Law Review* 1719; David Dolinko, ‘Action Theory and Criminal Law’ (1996) 15(3) *Law and Philosophy* 293.

³⁴ George Rainbolt has noted the need to consider the theory of action in theorising obligations. See George Rainbolt, ‘Perfect and Imperfect Obligations’ (2000) 98(3) *Philosophical Studies* 233, 234–5. Some rights theorists have noted the need for a precise individuation of rights to avoid ‘theoretical muddles’. See Matthew Kramer, ‘Rights Without Trimmings’ in Matthew Kramer, Nigel Simmonds, and Hillel Steiner (eds), *A Debate Over Rights: Philosophical Inquiries* (OUP 1998) 7, 44; George Rainbolt, *The Concept of Rights* (Springer 2006) 142.

³⁵ Donald Davidson, ‘Agency’ in *Essays on Actions and Events: Philosophical Essays* (OUP 2001) 58.

³⁶ Alvin Goldman, *A Theory of Human Action* (n 8) 11.

³⁷ Davidson, ‘Agency’ (n 35) 58.

and were performed at the same time.³⁸ I leave this debate to the side as it is not germane to the question at hand. I am not concerned here with the question of whether some bodily movement can ever be identical to its effects and consequences, but with the basis on which we can finely individuate act-types.

A step towards such an account may be to notice that verbs like ‘assault’ have no in-built means restriction. A person may assault another by adopting various different means—they may punch, kick, tackle, stab, etc the other person. This appears to be what generates the waiver problem in *Boxing Match*. We are left with some uncertainty as to which of Chris’ human rights he has waived and retained because the ‘right not to be assaulted’ does not pick out any particular means of assaulting. To get clarity on the situation we need to nominate the means by which Chris has consented to being assaulted—that is, by punching—and the means by which Chris has *not* consented to being assaulted—that is, by stabbing, kicking, hitting with a bat, etc.

Accordingly, one way to individuate act-types so as to resolve the waiver problem in the subset of cases that I have identified may be by reference to the means by which an act-type may be exemplified.³⁹ We may do this in two ways: (1) by using verbs with in-built means restrictions—such as the verb ‘punch’, which invariably requires some kind of arm motion that

³⁸ Goldman, *A Theory of Human Action* (n 8) 10.

³⁹ What I set out here is just one preliminary gesture towards developing a full account of the individuation of act-types. It is enough to resolve cases of the kind exemplified in *Boxing Match*. However, a fully defensible fine-grained account of the individuation of act-types would (ideally) grapple with all of the different ways in which act-types can be individuated, so as to allow us to clearly identify in all cases the right-duty pair waived where a right-holder consents to some kind of act-type being performed against them but not others. The kind of individuation of act-types by reference to means that I discuss below individuates act-types along a range of act-types—for example, distinguishing between the act-type of assaulting by punching and the act-type of assaulting by stabbing. But there may be some situations where this individuation strategy will not be enough, where resolution of the problem of waiver will require the individuation of act-types along the extent of a particular act-type—for example, distinguishing between touching softly to attract attention and touching roughly to attract attention. Developing an account of how these individuation strategies (and possibly others) fit together would be the work of a fully developed theory of the fine-grained individuation of act-types, which is beyond the scope of the current thesis, involving as it would a program of research that would be a thesis in its own right. I thank an anonymous examiner for drawing to my attention this distinction between individuation along the range of act-types and individuation along the extent of an act-type.

results in physical contact between the agent's fist and something else;⁴⁰ or (2) by using verbs with an external means restriction—such as ‘assault by hitting with a bat’. Taking this approach, we can distinguish between Rob's punching Chris and Rob's stabbing Chris. Punching and stabbing are two distinct act-types on this account because each involves assaulting by a different means—punching involves an arm motion that results in physical contact between the agent's fist and something else, whereas stabbing involves the agent's penetration of the body of someone else using a sharp object. When we individuate the act-types in this way, we can correspondingly individuate the human rights held by Chris into a human right not to be punched by Rob—with a correlative duty on Rob not to punch Chris—and a human right not to be stabbed by Rob—with a correlative duty on Rob not to stab Chris.

What I have set out above is only the first—most tenuous—gesture at a resolution of the problem of waiver for cases like *Boxing Match*. Developing a fully defensible fine-grained account of the individuation of act-types would be a thesis in its own right. What I hope to have shown is that there is much to be gained from thinking seriously about the relationship between the philosophy of rights and obligations on one hand and the philosophy of action on the other, and that bringing these two bodies of work into greater dialogue is likely to be fruitful. That being said, what I set out in Sections B.1 and B.2 puts us in a good position to begin this difficult task. Abandoning the *Multiple Duty View* and opting for individuation of human rights according to the act-types that their duties make obligatory gets us a least part of the way to fully resolving the problem of waiver.

E Conclusion

What I have argued in this chapter is that the *Multiple Duty View* of the structure of human rights (set out in Chapters One and Two) tends to undermine analytical clarity in discussions of

⁴⁰ Judith Jarvis Thomson, *Acts and Other Events* (Cornell University Press 1977) 220–2; Jonathan Bennett, *Events and their Names* (Clarendon 1988) 222–4.

human rights. Although the *Multiple Duty View* is appealing as an elegant and simple claim about the complexity of the types of duties that correlate with each human right, it muddies the conceptual waters when it claims that each and every human right correlates with multiple different duties. By taking each human right to correlate with multiple duties, the *Multiple Duty View* struggles to make sense of cases of waiver, where only conduct in breach of one or two of the multiple duties that correlate with each right is consented to. It can only say of such cases that either the entire human right is waived or that it remains on foot and is breached. It lacks the conceptual resources to track what happens on the duty-side of the equation on the right-side of the equation. In the next chapter, I offer my own replacement conception of the structure of human rights—the *Individuation View*.

5

The *Individuation View*

THE *MULTIPLE DUTY View* of the structure of human rights provides a particular theory of how human rights are structured. It claims that for each human right there are (at least, potentially) many duties that correlate with it, making obligatory many different act-types.¹ So—on the *Multiple Duty View*—my right not to be tortured potentially correlates with duties on others (such as the state) not to torture me, to protect me against torture, and to investigate any acts of torture committed against me—among others.²

In Chapter One, I demonstrated how this view of the structure of human rights has been endorsed in practice by human rights courts and organs—such as the ECtHR and the UN human rights treaty bodies. In Chapter Two I went on to explore some philosophical accounts of human rights that also endorse the *Multiple Duty View*. In Chapter Three I advanced an argument for limited waiver of moral human rights. In Chapter Four I posed a challenge for the *Multiple Duty View*. I argued that taking each human right to correlate with multiple duties means that one cannot clearly identify what is happening when a right-holder waives one of the duties correlative to one of their human rights but not the other duties. Because the *Multiple*

¹ See the discussion in Chapter Four, Section B.1, about the individuation of duties and actions.

² As I noted in the Introduction, this formulation of the right not to be tortured is somewhat simplified for the purposes of economy of expression. I acknowledge that both the moral right not to be tortured and the right found in international human rights law are more complex than this.

Duty View recognises only one right in such cases it is forced to say either that the right-holder waives their right in full or that it is retained in full by the right-holder. Neither of these options reflects what is actually happening to the right-holder's human rights in cases of waiver. In this chapter I present an alternative account of the structure of human rights that avoids this problem of waiver.

My account—what I call the *Individuation View* of human rights—starts from Hohfeld's insight that (when analysed properly) every right correlates with a duty with equivalent content, which duty is owed to the right-holder.³ This is not a novel view about the structure of rights,⁴ but it does challenge what has become orthodoxy in the domain of human rights—that is, the *Multiple Duty View*. While these two views of the structure of human rights will produce similar outcomes in most cases, the *Individuation View* has greater explanatory power in important cases of waiver.

This chapter, then, unfolds in four sections. In Section A I introduce the *Individuation View* and show how it falls naturally from the problems associated with the *Multiple Duty View*. In Section B I outline the key features of the *Individuation View*, including by distinguishing it from some other superficially similar views. In Section C I show how the *Individuation View* brings clarity to the concept of human rights by showing, first, how it deals with the kinds of cases of waiver that I said cause problems for the *Multiple Duty View* and, second, how it deals with cases of socio-economic human rights. In Section D I tie together each of the strands of the argument and conclude.

³ Wesley Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23(1) *Yale Law Journal* 16, 30-2.

⁴ In particular, George Rainbolt defends a view of the structure of rights-in-general that bears similarities to the *Individuation View*. I go into how my view differs from Rainbolt's below.

A *The Individuation View of the structure of human rights*

There is certainly an elegance to the *Multiple Duty View's* simple picture of multiple nuanced duties and general rights. First, the claim that human rights correlate with fairly precise duties, duties that are mutually reinforcing in their protection of the underlying interest and right—such as duties of non-interference, protection, and aid—sits well with our self-understandings about human rights. It chimes with our ordinary concept of human rights to say that, for example, in respect of Aiko's right to subsistence, alongside duties on the state of Utopia not to interfere with Aiko's means of subsistence, there are duties on the state to make sure that there are measures in place to protect against Aiko having her means of subsistence interfered with, and duties to help Aiko if she is ever deprived of her means of subsistence. Second, it also makes good sense to say that human rights duties change according to context—to say that something like the right to healthcare imposes many more duties on wealthy and technologically advanced states than on poor and underdeveloped states. That is, where the *Multiple Duty View* seems to gain traction in understanding moral human rights is in the way that it provides general insights about the interest-protecting nature and dynamic character of human rights obligations.

As I noted in Chapter Four, the *Multiple Duty View's* correlation of multiple duties to each human right sacrifices analytical clarity to achieve this simplicity, neatness, and dynamicity. This sacrifice of analytical clarity has serious practical implications when it comes to cases of waiver. The *Multiple Duty View* cannot track clearly what happens to a right-holder's human right when the right-holder waives one of the multiple duties that correlate with that right but not others. This is because, while the *Multiple Duty View* individuates duties according to the act-type that they make obligatory, it does not permit the same individuation strategy to be used for rights. As it correlates each human right to multiple duties, each human right can only be individuated according to its ground or by reference to the subject matter of its multiple duties, and not according to the act-types that its correlative duties make obligatory. There are under

the *Multiple Duty View* simply too many duties (each requiring different act-types) that correlate with each human right for the latter individuation strategy to make sense.

What I set out in Chapter Four, then, presents a problem for the *Multiple Duty View*. But it also gestures quite strongly at the solution to this problem. We can resolve the waiver problem by taking each human right to be correlated with one duty only, and adopting the same individuation strategy that the *Multiple Duty View* uses for duties and applying it to rights—individuating each right according to the act-type that its correlative duty makes obligatory. I call this view of the structure of human rights the *Individuation View*.

The *Individuation View* takes its inspiration from Hohfeld's insight that (when analysed properly) every right correlates with a duty with equivalent content, which duty is owed to the right-holder.⁵ That is, the *Individuation View* specifically denies the central tenet of the *Multiple Duty View*: it denies that the duties that attach to each human right are multiple and ever-changing. Indeed, it holds that for each human right, there is only one duty that correlates with it, and that duty is fixed as soon as the right comes into existence. In other words, it holds that for every human right that exists there is a single duty that matches it. So, on the *Individuation View*, there is no such thing as 'waves of duties'.⁶ Rights and duties instead come in ascertained and existentially correlative⁷ pairs. The duty that correlates with each human right

⁵ Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (n 3) 30-2. There is resistance in the literature to the use of Hohfeld's table of jural correlatives to understand moral rights, given that Hohfeld expressed his schema to apply to legal rights only. See eg Peter Westen, 'Poor Wesley Hohfeld' (2018) 55 *San Diego Law Review* 449, 467. However, many rights theorists defend the application Hohfeld's schema to moral rights. See eg John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 199; Matthew Kramer, 'Rights Without Trimmings' in Matthew Kramer, Nigel Simmonds, and Hillel Steiner (eds), *A Debate Over Rights: Philosophical Inquiries* (OUP 1998) 7, 8; Leif Wenar, 'The Nature of Rights' (2005) 33(3) *Philosophy & Public Affairs* 223, 224-5; Hallie Liberto, 'The Moral Specification of Rights: A Restricted Account' (2014) 33(2) *Law and Philosophy* 175, 189.

⁶ Jeremy Waldron, 'Rights in Conflict' (1989) 99(3) *Ethics* 503, 509-12.

⁷ David Frydrych, 'Rights Correlativity' in Shyam Balganes, Ted Sichelman, and Henry Smith (eds), *The Legacy of Wesley Hohfeld: Edited Major Works, Select Personal Papers, and Original Commentaries* (CUP Forthcoming) 3.

never changes—its content remains constant and equivalent to the content of the right for the duration of the right’s existence.

Take Jorge’s right not to be tortured as an example. On the *Multiple Duty View*, the right not to be tortured correlates with (at least) duties on the state of Utopia not to torture Jorge, to provide aid to Jorge if he is tortured, to protect Jorge against being tortured, and to investigate incidences of torture committed against Jorge—and possibly other duties too, depending on the context and circumstances. Each of these duties is individuated from the others according to the act-type that it makes obligatory. So, for example, we can distinguish the duty not to torture Jorge from the duty to provide aid to Jorge if he is tortured in virtue of the fact that the former makes the act-type ‘not torturing’ obligatory, whereas the latter makes the act-type ‘providing aid’ obligatory. On the *Multiple Duty View* of the structure of human rights, however, all of these duties are correlated with one right—the right not to be tortured.

On the *Individuation View*, the duties on Utopia in respect of Jorge are individuated the same way as under the *Multiple Duty View*—they are individuated from each other on the basis of the act-type that they make obligatory.⁸ Where the *Individuation View* differs from the *Multiple Duty View* is in its claim that each of the duties on Utopia in respect of Jorge is correlated with a different human right. Each human right is then individuated according to the act-type that its correlative duty makes obligatory. So, rather than one human right not to be tortured and four duties on the state, on the *Individuation View* Jorge has four human rights with matching correlative duties held against the state:

1. *a right not to be tortured, which correlates with a duty on the state of Utopia not to torture Jorge;*

⁸ Assuming, of course, that the *Multiple Duty View* adopts a fine-grained theory of the individuation of act-types. There is good reason for a proponent of the *Multiple Duty View* to adopt such a theory in order to avoid (at least part of) the waiver problem that I discussed in Chapter Four, Section D.3.

2. a right to aid if Jorge is tortured, which correlates with a duty on the state of Utopia to provide aid to Jorge if he is tortured;
3. a right to be protected against being tortured, which correlates with a duty on the state of Utopia to protect Jorge against being tortured; and
4. a right to have incidences of torture committed against him investigated, which correlates with a duty on the state of Utopia to investigate incidences of torture committed against Jorge.

It is important to note here that, as I argued in Chapter Four, fully resolving the waiver problem in all its forms will require the adoption of a fine-grained account of the individuation of act-types. I do not have a fully worked out fine-grained account of the individuation of act-types—such an account will have to await later work. The need for a fine-grained account of the individuation of act-types will only become pressing in a subset of waiver cases, such as the *Boxing Match* case that I discuss in Chapter Four, Section D.3, where the right waived and the rights that have been retained by the right-holder implicate the same broad act-type. In such cases, individuating act-types according to the means by which they may be instantiated or exemplified may be one way to avoid this waiver problem. Such an account of the individuation of act-types may be narrower than we may initially be inclined towards. However, in order to resolve the problem of waiver, the *Individuation View* is committed to such a fine-grained account, and accordingly to a fine-grained individuation of human rights and their correlative duties.

The *Individuation View* is not an entirely novel view of the structure of human rights—there are many proponents of views similar to the *Individuation View* for rights-in-general.⁹

⁹ A sample includes: Kramer, 'Rights Without Trimmings' (n 5); George Rainbolt, 'Rights as Normative Constraints on Others' (1993) 53(1) *Philosophy and Phenomenological Research* 93; George Rainbolt, *The Concept of Rights* (Springer 2006) Ch 5.

One of the foremost examples is Matthew Kramer's interest theory of rights. For Kramer, rights and duties logically and mutually entail each other. Neither one is logically, existentially, or justificational prior to the other. Every claim about rights can be redescribed without loss as a claim about duties—and vice versa.¹⁰ Kramer calls this the 'Correlativity Axiom'.¹¹ Thus, Kramer claims:

If person *X* has a right to be free from any interference by a person *Y* with *X*'s project *P*, then *Y* has a duty to abstain from interfering with *P*; conversely, if *Y* has a duty to abstain from interfering with *P*, then *X* has a right to be free from any such interference by *Y*.¹²

So, Kramer's interest theory divides-up rights and duties in much the same way as the *Individuation View*. For every duty that exists, there will be a separate right that exists and matches its content. Multiple duties do not attach to each right—each duty correlates with its own separate and equivalent right.

George Rainbolt also endorses something like the *Individuation View* as part of his justified-constraint theory of rights. He claims:

Following Hohfeld, the justified-constraint theory individuates rights very finely. On this theory, if one wishes to speak strictly, each relational obligation is a right. Any difference in the subject, object, content, or rule system of an obligation means that it is a distinct obligation.¹³

Again, like Kramer's interest theory, Rainbolt's justified-constraint theory will divide-up rights and duties into pairs. Rights do not give rise to multiple duties but are strictly correlated with a single duty for each right.

Both Kramer and Rainbolt take the pairing of rights and duties as simply an upshot of their endorsement of Hohfeld's framework. Kramer provides no argument for his Correlativity Axiom. He claims that the correlativity of rights and duties is 'a matter of logical necessity' for

¹⁰ Kramer, 'Rights Without Trimmings' (n 5) 26.

¹¹ *ibid* 25.

¹² *ibid* 9.

¹³ Rainbolt, *The Concept of Rights* (n 9) 140.

anyone who accepts Hohfeld's framework of jural relations—as he does.¹⁴ That is, it is 'not something that can be confirmed or confuted through experience. Far from being an inference, the principle of correlativity is a bedrock axiom.'¹⁵ Similarly, like Kramer, Rainbolt provides no substantive argument for his matching of rights and duties in pairs. Rainbolt says only that the justified-constraint theory finely individuates rights 'following Hohfeld'.¹⁶ Furthermore, although both Kramer¹⁷ and Rainbolt¹⁸ are committed to a fine-grained individuation of rights and duties, neither spend any time developing a theory of the individuation of rights and duties or the individuation of action.

These two theories of rights, then, share with the *Individuation View* its correlation of each right with one duty, and its fine-grained individuation of rights. Where the *Individuation View* differs from these accounts is in its focus on human rights and in the route by which it reaches the fine-grained pairing of human rights and their correlative duties. The *Individuation View* does not simply assume a Hohfeldian outlook on human rights but takes this kind of view to have the greatest explanatory power. That is, the pairing of each human right with one correlative duty and the individuation of human rights according to the act-types that their correlative duties make obligatory gives us a way to explain cases of waiver that cannot be explained by the *Multiple Duty View*, while at the same time explaining much of what the *Multiple Duty View* excels at explaining. I discuss this in more detail in Section C.1.

B *Key features of the view*

In what follows I expand on the *Individuation View* of the structure of human rights by outlining some of the key commitments of the view.

¹⁴ Kramer, 'Rights Without Trimmings' (n 5) 30.

¹⁵ *ibid* 30.

¹⁶ Rainbolt, *The Concept of Rights* (n 9) 140.

¹⁷ Kramer, 'Rights Without Trimmings' (n 5) 43.

¹⁸ Rainbolt, *The Concept of Rights* (n 9) 140.

1 *Equivalence in content, not form*

As I said above, what differentiates the *Individuation View* from the *Multiple Duty View* is its claim that each human right is correlated with a duty that matches its content. On this view, to say that the state of Utopia owes a duty to Jorge not to deprive him of his life arbitrarily is just to say that Jorge has a right against the state of Utopia that he not be deprived of his life arbitrarily. ‘But surely’, you might think, ‘human rights do not match their duties as closely as this. Rights and obligations can be framed in myriad ways, thanks to the looseness of language. It is surely a serious drawback of the *Individuation View* to be committed to such a precise correspondence between each human right and its correlative duty.’

This point is well taken but it ultimately rests on an ambiguity in the way that I framed the *Individuation View*. On the *Individuation View* human rights need not match their correlative duties quite as precisely and closely as this. The *Individuation View* is not committed to a precise and formal identification between each human right and its correlative duty. To take an example, there need not be a precise and formal correspondence between each of the rights and duties flowing from Jorge’s interest in not being tortured. Each of the rights and duties can be described in different terms but without there being any loss in correspondence between each right and its correlative duty. For example, (1) could be redescribed as Jorge’s right against being tortured, which correlates with a duty on Utopia to refrain from torturing Jorge, or (3) could be redescribed as Jorge’s right to the setting up of institutions that are directed towards preventing torture, which correlates with a duty on the state of Utopia to make sure mechanisms are in place to prevent Jorge from being tortured.

The key point to note here is that in each of the redescriptions there remains only one right and one duty, and the content of the right and duty remains matched despite being described differently. As Kramer notes in presenting a similar view, where this kind of

correspondence is preserved, ‘the potential for redescription ... is utterly harmless’—and probably to be expected.¹⁹

What this is meant to show is that the *Individuation View* is not committed to the claim that there is one *unique* way in which to frame each human right-duty pair. It is only committed to the claim that for each human right there is a single duty to which it is correlated, that each human right is individuated from every other another based on the act-type that its correlative duty makes obligatory, and that there is correspondence in substance between each human right and its correlative duty—but not necessarily exact identification in form.

2 *Dynamicity and universality done differently*

I noted above that it is one of the central features of the *Individuation View* that it denies that the duties that correlate with each human right are multiple and ever-changing. On the *Individuation View* human rights and their correlative duties come in ascertained and fine-grained pairs. What this means is that, once in existence, neither the right nor the duty that forms part of a right-duty pair will change during the period of its existence. New right-duty pairs with different content may come into existence—once generated by the fundamental interests of the right-holder—and some right-duty pairs may fall out of existence with the occurrence of countervailing circumstances. However, once in existence, the content of a right-duty pair remains constant. That is, the *Individuation View* denies a Razian-style dynamicity of human rights.

This is not to say that the *Individuation View* denies the dynamicity of human rights *tout court*. As I noted above, human rights and their correlative duties remain dynamic on the *Individuation View* in the sense that the fundamental interests of a right-holder always retain the capacity to generate new and different right-duty pairs depending on the circumstances in

¹⁹ Kramer, ‘Rights Without Trimmings’ (n 5) 16–17 fn 6.

which the right-holder finds themselves. However, on the *Individuation View* both rights and duties will fall in and out of existence at the same time. The *Individuation View* denies that human rights themselves generate duties, and that a particular human right can generate new correlative duties depending on the circumstances.

The upshot of this is that the *Individuation View* encounters difficulties in explaining the universality of human rights, or the quality of human rights as those rights that are possessed by all humans at all times and places simply in virtue of their humanity.²⁰ By taking each human right to be the ground of its correlative duties, which duties are not specifiable once and for all but vary according to context, the *Multiple Duty View* can account for the universality of human rights. It allows human rights to remain constant and to be universally held by all humans at all times and places while their correlative duties change with context. On the *Individuation View*, however, human rights and their correlative duties come in matching and specific fine-grained pairs. The content of many of these rights will make reference to particular times and places—for example, Pitor’s human right to have his internet privacy respected correlative to a duty on the state of Utopia to respect the internet privacy of Pitor—and so cannot be taken to be universally held by all humans at all times and places.

However, the *Individuation View* is not alone in having problems explaining the universality of human rights, taken in this strict sense. In fact, some version of this problem arises for most theories of human rights.²¹ Even without the *Individuation View’s* fine-grained individuation of human rights and their correlative duties, on most accounts of human rights

²⁰ John Tasioulas, ‘Human Rights, Universality and the Values of Personhood: Retracing Griffin’s Steps’ (2002) 10(1) *European Journal of Philosophy* 79, 86; James Griffin, *On Human Rights* (OUP 2008) 48; James Nickel, ‘Human Rights’, *The Stanford Encyclopedia of Philosophy* (Summer edn, 2019) <<https://plato.stanford.edu/archives/sum2019/entries/rights-human/>> accessed 1 July 2020.

²¹ There is an extensive literature on what it means for human rights to be ‘universal’. See eg Louis Henkin, ‘The Universality of the Concept of Human Rights’ (1989) 506 *Annals of the American Academy of Political and Social Science* 10; Michael Goodhart, ‘Origins and Universality in the Human Rights Debates: Cultural Essentialism and the Challenge of Globalization’ (2003) 25(4) *Human Rights Quarterly* 935; Jack Donnelly, ‘The Relative Universality of Human Rights’ (2007) 29(2) *Human Rights Quarterly* 281.

there are some rights that cannot plausibly have been held by all humans at all times and places.

John Tasioulas puts the problem thus:

It is plausible that in some social contexts individuals do not have, for example, the sort of personhood interests that would justify the ascription to them of a right to free speech (where the kind of speech in question is, centrally, *public* speech). This is either because they do not have the requisite interest in free speech or their interest lacks the weight needed to justify the imposition of corresponding duties on others ...²²

What Tasioulas suggests is that, unless we want to make the implausible claim that all humans at all times and places have held the same rights that we have now—including distinctly modern rights like the human right to freedom of speech—then we need to qualify this strict requirement of universality across time and place.

James Griffin has attempted resist this move to temper the strictness of the universality requirement. He posits the existence of some ‘basic human rights’—which include a right to autonomy, a right to minimum provision, and a right to liberty—from which more specific modern rights are derived in context—which he calls ‘applied or derived human rights’.²³ For Griffin it is the high-level basic human rights that satisfy the requirement of universality—they have been held by all humans at all times and places—while the rights that are derived from them are the human rights that we find emerging in different times and at different places—such as the right to freedom of speech. As he puts it, ‘[w]e should claim only that universality is there at the higher levels.’²⁴

However, one may wonder whether Griffin’s basic human rights are really rights at all. Griffin’s basic human rights appear not to be functionally different from the abstract interests of

²² Tasioulas, ‘Human Rights, Universality and the Values of Personhood’ (n 20) 87 (emphasis added).

²³ Griffin (n 20) 50. These ‘basic rights’ will not necessarily be the same ‘basic rights’ that Henry Shue speaks of. Carl Wellman, Matthew Kramer, and Jeremy Waldron make a similar claim to Griffin. See Carl Wellman, *The Moral Dimensions of Human Rights* (OUP 2010) Ch 3; Kramer, ‘Rights Without Trimmings’ (n 9) 41-3; Jeremy Waldron, *The Right to Private Property* (OUP 1988) 85.

²⁴ Griffin (n 20) 50.

right-holders that generate human rights in context.²⁵ To say that Alison has an abstract human right to autonomy from which her right to freedom of speech can be derived in the circumstances of modernity seems equivalent to saying that her interest in autonomy generates in modern conditions a right to freedom of speech. It is hard to see how Alison's basic right to autonomy can perform the kind of normative role that we associate with rights and duties—namely, the licensing of claims by a right-holder on determinate duty-bearers and the generation of protected reasons for action for duty-bearers in respect of the right-holder. Such abstract rights lack the kind of determinateness that is necessary for a right and its correlative duty to perform this normative role.

Accordingly, many philosophers of human rights have qualified the strict requirement of universality.²⁶ As I explained in Chapter Two, Section B.1, Tasioulas argues that human rights need only meet a condition of 'temporally constrained universality'.²⁷ That is, 'the question of which human rights exist can only be answered within some specified historical context.'²⁸ So, for Tasioulas, human rights can pass in and out of existence over time, according to whether in a given historical context having the object of the right advances an interest of the right-holder, and whether any circumstances obtain in that period that make realising the right unfeasible. According to the requirement of temporally constrained universality a right can be a universal human right, even if it has not been held by all human beings at all times and places, so long as it is a right that is held by *all humans in a given historical context*.²⁹

²⁵ For a similar claim see Joseph Raz, 'Human Rights in the Emerging World Order' in Rowan Cruft, S Matthew Liao, and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 225.

²⁶ See Nickel, 'Human Rights' (n 20); Charles Beitz, 'The Force of Subsistence Rights' in Rowan Cruft, S Matthew Liao, and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 540; *ibid.*

²⁷ John Tasioulas, 'The Moral Reality of Human Rights' in Thomas Pogge (ed), *Freedom from Poverty as a Human Right: Who owes what to the very poor?* (OUP 2007) 76-7. See also Tasioulas, 'Human Rights, Universality and the Values of Personhood' (n 20) 87.

²⁸ *ibid.*

²⁹ John Tasioulas, 'On the Foundations of Human Rights' in Rowan Cruft, S Matthew Liao, and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 50.

The fine-grained human rights posited by the *Individuation View* will sometimes fail to meet even this watered-down requirement of temporally constrained universality. For example, let us say that in the same historical period state A has the infrastructure to provide free primary education to all its citizens, whereas state B lacks the infrastructure to provide free primary education to all its citizens. The *Individuation View* will say that citizens of state A and state B have different human rights. The citizens of state A will have a human right to free primary education correlative to a duty on state A to provide right-holders with free primary education, whereas the citizens of state B will have a human right that state B take all reasonable steps to provide them with free primary education correlative to a duty on state B to take all reasonable steps to provide right-holders with free primary education.

Despite this, it might be questioned why we should draw the line of constraining universality at rights held by all humans in a given *historical period*. If we are willing to constrain the requirement of universality to acknowledge that changes in the development of societies over time may produce different human rights—in order to recognise that such rights are no less human rights for their being generated by changed social conditions, such as the conditions of modernity—why should we not also be willing to constrain universality to allow for some variance in human rights according to place within particular historical periods? As Raffael Fasel notes, even if we do not take the fine-grained approach to individuating human rights of the *Individuation View*, ‘it is somewhat questionable whether all human rights could be said to have a comparable content throughout modernity’.³⁰ There appears, then, to be no principled basis on which stop our constraining of the requirement of universality at particular historical periods—apart from as an ad hoc measure to rescue the notion that human rights are the rights that are in some sense held by all humans simply in virtue of their humanity. The reasons for

³⁰ Raffael Fasel, “‘Simply in virtue of being human’? A critical appraisal of a human rights common place’ (2018) 9(3) *Jurisprudence* 461, 474.

admitting rights grounded in fundamental human interests that arise in particular historical periods to the class of human rights apply equally to admitting rights grounded in fundamental human interests that arise in particular places to that same class.

Putting this point to the side, even if we endorse the *Individuation View* of the structure of human rights there is still some sense in which we can say that human rights are at least temporally universal. That is, because all such rights are grounded in fundamental human interests that are universally held by all humans in a particular historical period. That is, the rights posited by the *Individuation View* may be said to be universal human rights because they are generated by fundamental human interests that are held by all human beings in a particular historical period—interests in life, education, privacy, autonomy, etc. This point will not satisfy all proponents of the requirement of universality, but it does preserve one sense in which we can say that even on the *Individuation View*, human rights are universal rights.

This then raises the question of what the rights set out in human rights instruments are, given that they do not take the precisely individuated shape that the *Individuation View* says human rights take. However, as in the rest of this thesis, my claims here have been claims about moral human rights. I leave to the side—at least in this project—the question of how we analyse international human rights law.

3 *The Individuation View and other Hohfeldian incidents*

So far, I have talked a lot about human rights and their correlative duties but I have not yet said anything about other Hohfeldian relations. Hohfeld famously identified four jural relations typically associated with rights.³¹ *First*, there are claim-rights that correlate with (directed) duties—which are the kinds of things that have been the subject of the discussion so far. Claim-rights identify certain conduct that is expected of the duty-bearer in respect of the right-holder

³¹ Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (n 3) 30.

and make that conduct obligatory.³² *Second*, there are powers, which entitle the power-holder to modify the normative situation of themselves or of another. That is, a power enables its holder to change the their own Hohfeldian incidents or those of others. Correlative to a power is a liability on the part of the person against whom the power is held.³³ *Third*, there are also privileges (or liberties).³⁴ A privilege is an entitlement by the privilege-holder to act or not act as they please within the domain of the privilege, which correlates with a no-right on others. A privilege and its correlative no-right signals the absence of claim rights held by the bearers of the no-right, and the absence of a duty on the privilege-holder, that the privilege-holder do or not to something within the domain of the privilege.³⁵ *Fourth*, there are immunities. An immunity entitles its holder to resist compulsion by others—it denotes the absence of a power held against its holder, and correlates with a disability.³⁶

Now, you might be wondering what the Individuation View has to say about these other jural relations. You might think that, just as the *Individuation View* carves up claim-rights and duties into individuated pairs, so it will also carve up these other jural relations in the same way—that is, it will individuate each power and liability into a pair, each privilege and no-right, and each immunity and disability. You might also think that the *Individuation View* does not stop here—that it will also individuate each of these pairs from each other. That is, you might think that endorsing the *Individuation View* commits one to the view that each jural relation exists independently of every other—that it denies Hohfeld’s claim that rights are made up of a complex array of these jural relations, rather than just one or other of them.³⁷ Once you reach

³² Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (n 3) 32.

³³ *ibid* 44.

³⁴ ‘Privilege’ is the original terminology adopted by Hohfeld. Some modern exponents of the Hohfeldian orthodoxy have used ‘liberty’ to describe this kind of jural relation. See eg Hillel Steiner, *An Essay on Rights* (Blackwell 1994) 59–60.

³⁵ Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (n 3) 32.

³⁶ *ibid* 55.

³⁷ Wesley Hohfeld, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1917) 26(8) *Yale Law Journal* 710, 746.

this point you might again worry that the *Individuation View* is seriously compromised, as it makes little sense to say that Hohfeldian incidents of rights exist only individually—especially when one is talking about human rights.

However, this is not a logical consequence of endorsing the *Individuation View*. My claim here does not deny that human rights can have multiple Hohfeldian incidents. What the *Individuation View* claims is that each human right-duty pair should be individuated from every other that makes obligatory a different act-type. Each human right-duty pair so individuated might—as well as being made up of a bundle of specific right-duty pairs—include multiple Hohfeldian incidents. To be more concrete, Anika’s human right not to be assaulted held against Bunta might give rise to a claim-right held by Anika—in that Anika can demand of Bunta that he not assault her and Bunta has a duty to not assault Anika. Anika’s human right not to be assaulted might also include a power—in that Anika can choose whether or not she decides to waive her right against assault and Bunta’s duty not to assault her in order to play contact sport with him, and Bunta has a liability to his normative situation being modified in this way.

So, the *Individuation View* is perfectly consistent with human rights being complex ‘aggregates’³⁸ of two or more jural relations or as having a ‘molecular’³⁹ structure.

4 *Single duties and single duty-bearers*

As I discussed in Chapter Four, Section D.1, waiver of human rights presents a problem for both the *Multiple Duty View* and the *Multiple Duty-Bearer View*—or the view that the duty correlative to each human right is imposed on multiple different duty-bearers, with each of these duties requiring the same act-type but of different duty-bearers.⁴⁰ I have already outlined how the *Individuation View* rejects the key commitment of the *Multiple Duty View*—the

³⁸ Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (n 3) 22.

³⁹ Wenar, ‘The Nature of Rights’ (n 5) 234.

⁴⁰ See Chapter Four, Section D.1.

correlation of each human right to multiple duties—in order to resolve the problem that the *Multiple Duty View* has in accounting for waiver. The *Individuation View* also denies the central thesis of the *Multiple Duty-Bearer View*—that for each human right there are multiple bearers of the duties that correlate with it.

That is, according to the *Individuation View*, each human right-duty pair has only one right-holder and one duty-bearer. One then multiples these right-duty pairs for all of the bearers of a particular duty which makes a particular act-type obligatory. To see how this works, consider again:

Spiteful Assassin: Leigh is in the late stages of an incurable illness and has only days left to live. His remaining days will be filled with agony and are not worth living. Leigh asks Odessa to switch off his life-support. Little does Leigh know, his arch-nemesis Henry has gained access to the power supply to his room. Henry is determined to be the one to take Leigh's life and terminates the power supply to Leigh's life support before Odessa can switch it off. Leigh dies shortly after.

As I discussed in Chapter Four, in this case, the *Multiple Duty-Bearer View* recognises the existence of only one right—Leigh's right to life. Leigh's right to life is then the source or ground of separate duties on Henry and Odessa not to deprive Leigh of his life. This is where I said the problems begin. If there is only one human right of Leigh's in play then it is unclear what happens to this right when Leigh purports to release Odessa—but not Henry—from her duty not to deprive Leigh of his life.

The *Individuation View*, by contrast, recognises two rights here—one right to life held by Leigh which correlates with a duty on Odessa not to deprive Leigh of his life, and one right to life held by Leigh which correlates with a duty on Henry not to deprive Leigh of his life. It is the former right-duty pair that is waived by Leigh and the latter that is retained by him in

Spiteful Assassin. Thus, the *Individuation View*, by positing the existence of separate rights for every bearer of a directed duty owed to the right-holder, is not compromised by the instance of waiver in *Spiteful Assassin*.⁴¹

5 *How does the Individuation View differ from moral specificationism?*

As I have explained above, the central feature of the *Individuation View* is its correlation of each human right to a single duty that matches its content. Each human right is then individuated from every other human right according to the act-type that its correlative duty makes obligatory and according to the bearer of its correlative duty.

Taking this view will often mean that each human right will have to be specified quite closely—especially if we are to entirely avoid the waiver problem discussed in Chapter Four, Section D.3. That is, in order to get one duty per human right, we will have to be quite precise about what exactly each human right is a right to, and what each duty requires of the duty-bearer. For example, the *Individuation View* commits its holder to the existence of a human right to have instances of torture investigated, where there exists a directed duty to investigate instances of torture. If the *Individuation View* requires this kind of specification of each human right, then, how does it differ from moral specificationism?

There is a long-running debate between moral specificationists and moral generalists about how rights work in practical reasoning. The debate is sometimes framed around a particular scenario of rights conflict first set out by Judith Jarvis Thomson:

Tank: Asta wants to kill Vanessa. She has told Vanessa that if she gets hold of a tank, she is going to use it to run Vanessa down. Asta has now got hold of a tank and is speeding towards Vanessa. Because she is on an open plain, Vanessa has nowhere to hide. Her

⁴¹ It should be noted that both Kramer's and Rainbolt's accounts deny the Multiple Duty-Bearer View, as well. See Kramer, 'Rights Without Trimmings' (n 5) 9; Rainbolt, *The Concept of Rights* (n 9) 140.

only means of defence is to fire at Asta with the anti-tank rifle she has slung over her shoulder.⁴²

Thomson notes that, in the circumstances of *Tank*, we should think that it is morally permissible for Vanessa to kill Asta in exercise of her right to life. A puzzle arises when we notice that Asta—being a human being—also has a right to life. How can it be permissible for Vanessa to kill Asta when Asta too has a right to life?

Moral specificationism provides a particular view of how puzzles of this sort should be resolved.⁴³ Moral specificationists take rights to state conclusions in practical reasoning, or all-things-considered judgments. That is, rights represent end points in practical reasoning—they cannot be overridden or defeated. Another way of putting this is that moral specificationists are internalists about the exceptions to rights—all of the possible exceptions to a right come already built into it, so that as long as none of the excepting conditions obtain the right is absolute and has conclusory moral force. So, according to moral specificationists, in *Tank* Vanessa can kill Asta in the exercise of her right to life because both Vanessa and Asta only ever had a right not to be killed so long as they do not unjustly threaten the life another—rather than a general right to life. As Asta is unjustly threatening the life of Vanessa, one of the exceptions to her right to life is present and it is morally permissible for Vanessa to kill Asta.

Moral generalism represents the other side in the debate on how rights work in practical reasoning.⁴⁴ Like moral specificationists, moral generalists agree that in situations like *Tank* it is morally permissible for Vanessa to kill Asta. However, they reach this conclusion not by taking rights to state all-things-considered judgments but by taking rights to be reasons, reasons that

⁴² This is an adaption of the actual case presented by Judith Jarvis Thomson. See Judith Jarvis Thomson, 'Self-Defense and Rights' in *Rights, Restitution, and Risk* (William Parent (ed), HUP 1986) 33.

⁴³ Moral specificationists include: John Oberdiek, 'Lost in Moral Space: On the Infringing/Violating Distinction and its Place in the Theory of Rights' (2004) 23(4) *Law and Philosophy* 325; John Oberdiek, 'Specifying Rights Out of Necessity' (2008) 28(1) *Oxford Journal of Legal Studies* 127; Liberto (n 5).

⁴⁴ Moral generalists include: Thomson (n 40) 33; Andrew Botterell, 'In Defence of Infringement' (2008) 27(3) *Law and Philosophy* 269; Philip Montague, 'Specification and Moral Rights' (2015) 34(3) *Law and Philosophy* 241.

can form part of an all-things-considered judgment in favour of the right or which can be overridden or defeated. To this end they draw a distinction between infringing and violating rights. A rights infringement involves any action that is contrary to a right—that action may turn out to be permissible, but if it is against what is required by the right it remains an infringement. A rights violation involves any action that is contrary to a right and is also all-things-considered wrongful or morally impermissible.⁴⁵ So, every rights violation will also be a rights infringement but not all rights infringements will be rights violations. Only a rights infringement that is wrongful is also a rights violation.

Moral generalists are externalists about the exceptions to rights. Rights do not come with all of their exceptions encoded into the statement of the right. A right may be expressed to contain no exceptions and yet be overridden or defeated by certain countervailing considerations external to it. According to moral generalists, then, in *Tank Asta* has a right to life which gives Vanessa a reason why she should not kill Asta. However, that reason is then defeated by countervailing considerations—including that Asta made an attempt on Vanessa’s life, and that Vanessa also has a right to life—such that it is permissible for Vanessa to kill Asta. When Asta is killed by Vanessa, her right to life is infringed but not violated—no wrong is done to her.⁴⁶

⁴⁵ Thomson (n 40) 51.

⁴⁶ It should also be noted that some philosophers have provided accounts that seek to accommodate both moral specificationism and moral generalism.

Ronald Dworkin draws a distinction between ‘abstract rights’ and ‘concrete rights’. An abstract right is a general political aim whose weight is left open and does not contain any indication of its specific normative force. By contrast, a concrete right is a political aim which expresses more definitely its normative force relative to other considerations. But both have a role in practical reasoning. As Dworkin explains, ‘[a]bstract rights ... provide arguments for concrete rights’. See Ronald Dworkin, *Taking Rights Seriously* (HUP 1977) 81, 93-5.

Similarly, Charlie Webb distinguishes between C-rights and R-rights. C-rights are conclusory—they settle the question of what they duty-bearer ought do and express concrete claims and duties that are final and cannot be overridden. Accordingly, they represent an all-things-considered judgment. R-rights by contrast operate as considerations (reasons) that may be weighed in favour or against the recognition of certain concrete claims and duties. Again, for Webb, both have a role in practical reasoning, as R-rights provide reasons which may in a given context give rise to certain C-rights. See Charlie Webb, ‘Three Concepts of Rights, Two of Property’ (2018) 38(2) *Oxford Journal of Legal Studies* 246, 252-5.

Now, you might think that the *Individuation View* is just moral specificationism by another name. That is, because it requires human rights to be finely individuated and closely specified, the *Individuation View* seems to be doing the same thing as moral specificationism. However, the two are quite distinct ideas in the theory of human rights.

As John Oberdiek explains, according to moral specificationism, ‘the point of individuating ... rights narrowly is to preserve their normative force in whatever circumstances may arise, such that its presence entails the all-things-considered permissibility of whatever it is that the right is a right to.’⁴⁷ It is opposed to the view that rights function as reasons that may be overridden in the process of reasoning to an all-things-considered judgment—or, moral generalism. By contrast, according to the *Individuation View*, the point of individuating human rights and their duties is to achieve an equivalence between them, so that there is a one-to-one relationship between each human right and its duty, which preserves conceptual clarity. The *Individuation View* separates each right-duty pair out like this so that it can account for things like the waiver of a very particular right by a right-holder but not others—something that the *Multiple Duty View*, with its claim that there may be multiple duties attached to each human right, struggles to do.

Even so—you might think—the *Individuation View*’s close specification of human rights means that a proponent of the *Individuation View* is necessarily committed to moral specificationism. However, a commitment to moral specificationism is not entailed by a commitment to the *Individuation View*. At the risk of belabouring the point, the *Individuation View* simply takes each human right to correlate with one duty that matches its content. This kind of view is perfectly consistent either with human rights operating as all-things-considered judgments about what is required in respect of a right-holder in a particular context (moral

⁴⁷ Oberdiek, ‘Specifying Rights Out of Necessity’ (n 40) 137.

specificationism), or with the idea that human rights provide reasons for action, which reasons can be overridden by countervailing considerations in context (moral generalism).

For example, a proponent of the *Individuation View* will say that, where there are duties on Ruth not to assault Sam and to provide aid to Sam if he is assaulted, each of these duties is correlated with a different right held by Sam—rather than being correlated with a single human right to physical security. So, Sam will have two human rights:

1. *a right not to be assaulted, which correlates with a duty on Ruth not to assault Sam;*
and
2. *a right to aid if Sam is assaulted, which correlates with a duty on Ruth to provide aid to Sam if he is assaulted.*

Let us say, then, that Sam and Ruth get into a quarrel and Sam makes to strike Ruth. And, there is no way for Ruth to avoid Sam's attack other than by punching him in the stomach and winding him. It seems that it is morally permissible in these circumstances for Ruth to punch Sam to thwart his attack. After all, she—like Sam—has a right not to be assaulted which correlates with a duty on Sam not to assault her. However, the *Individuation View* does not require that the permissibility of Ruth's action be explained in terms of moral specificationism.

Taking the view that Sam has two rights—a right not to be assaulted and a right to aid if assaulted—leaves it open whether Sam's rights operate as all-things-considered judgments or as reasons that may be overridden. We might say that Sam's right not to be assaulted is actually a right not to be assaulted unless Sam unjustly attacks another, and that Sam's attack on Ruth makes it the case that his right not to be assaulted unless Sam unjustly attacks another is not violated by Ruth's self-defence. Alternatively, we may say that Sam's right not to be assaulted provides Ruth with a reason not to assault him, which reason is in the end outweighed by

considerations of Ruth's own right not to be assaulted and the fact of Sam's unjust attack on Ruth.

What this should show is that endorsing the *Individuation View* does not necessarily commit one to endorsing moral specificationism as well. The *Individuation View* is perfectly consistent with both moral generalism and moral specificationism.⁴⁸

C *The Individuation View's explanatory power*

I have endeavoured to set out the key tenets of the *Individuation View* of the structure of human rights. In what remains of this chapter I show how the *Individuation View* brings analytical clarity to problems of human rights by applying it to a few common problems in the literature on the philosophy of human rights. That is, I show that the difference between the *Individuation View* and the *Multiple Duty View* is not just a semantic difference.

1 *Cases of waiver*

As I discussed in Chapter Four, Section D.2, the *Multiple Duty View* cannot properly account for cases of waiver of human rights. Because the *Multiple Duty View* takes each human right to connect with potentially many different changing duties, the *Multiple Duty View* cannot individuate rights by reference to the act-type made obligatory by its correlative duty—it can only individuate each human right by reference to its grounds or the subject matter of its duties. This has serious practical implications when we consider cases of waiver of human rights where the right-holder wants to waive one of the duties held by a duty-bearer but not all of them. Consider again:

Fair Trial: After committing a string of burglaries in the state of Utopia, Sasha is arrested and put on trial. She decides to plead guilty at the first committal hearing. After an

⁴⁸ The *Individuation View* is equally consistent with those accounts which attempt to reconcile moral specificationism and moral generalism, such as those of Dworkin and Webb. See n 44.

adjournment of several days, Sasha is sentenced *in absentia* to a lengthy term of imprisonment by the District Court of Utopia in accordance with law.

As I suggested in Chapter Four, what we want to say of *Fair Trial* is that Sasha waives her human right that Utopia prove at a trial the criminal charge against her by entering her guilty plea but that she retains her right to attend all of the hearings in her matter—which right is then violated by Utopia when she is sentenced *in absentia*. The *Multiple Duty View* cannot deliver this account of the situation. While the *Multiple Duty View* can say that Utopia is released from the duty to prove at a trial the criminal charge against Sasha, while remaining bound by the duty to allow Sasha to attend all hearings in her matter, it cannot register a corresponding division of Sasha's rights. It recognises only a right to a fair trial, held by Sasha, which correlates with these two duties on Utopia. This is because the two rights in play—Sasha's right that Utopia prove at a trial the criminal charge against her and her right to attend all of the hearings in her matter—have the same ground (Sasha's interest in autonomy) and their correlative duties share a subject matter (fair trials). So, these rights cannot—under the *Multiple Duty View*—be individuated from one another by reference to their grounds or the subject matter of their duties. This means that the *Multiple Duty View* cannot, in *Fair Trial*, register Sasha's waiver of one right and retention of the other. It recognises only one right to a fair trial that is either retained or waived by Sasha.

Because the *Individuation View* correlates each human right with one duty only, and individuates each human right from every other on the basis of the act-type that its correlative duty makes obligatory, it can register this nuance. On the *Individuation View* Sasha has two rights in *Fair Trial*—a right that Utopia prove at a trial the criminal charge against her and a right to attend all of the hearings in her matter—as each of their correlative duties make different act-types obligatory—marshalling proof at a trial that Sasha is guilty of the offence she has been charged with and not interfering with Sasha's attendance at her hearings, respectively.

Accordingly, using the *Individuation View*, we can say that Sasha waives the former right and releases Utopia from its correlative duty when she enters her guilty plea, but retains the latter right and Utopia remains bound by its correlative duty. This is exactly what we want to be able to say of the matter.

The *Individuation View*, then, avoids exactly the kind of practical problems that the *Multiple Duty View* encounters in cases of waiver. It brings analytical clarity to cases where a right-holder seeks to waive some but not all of the duties held by a duty-bearer.

2 *Socio-economic human rights*

The *Individuation View* can also bring analytical clarity to other challenging human rights scenarios. In this section I turn to consider the application of the *Individuation View* to one of the situations most commonly invoked in favour of the *Multiple Duty View*—the case of socio-economic human rights.

I noted in Chapter Two that one of the things proponents of the *Multiple Duty View* say that view of the structure of human rights has going for it is its ability to explain what is going on in cases of socio-economic human rights. The worry about socio-economic human rights stems from Onora O’Neill’s famous challenge to the existence of socio-economic rights—her Claimability Objection.⁴⁹ What O’Neill says is that socio-economic rights cannot be universal moral human rights properly-so-called. For her, a human right properly-so-called must be claimable—it entails a directed duty with the same content as the right and with an identifiable and determinate duty-bearer against whom the right can be claimed.⁵⁰ Accordingly, a *universal* human right properly-so-called is a right held by everyone that correlates with duties

⁴⁹ Onora O’Neill, *Towards justice and virtue: A constructive account of practical reasoning* (CUP 1996) 128–136; Onora O’Neill, *Bounds of Justice* (CUP 2000) 132–136; Onora O’Neill, ‘The dark side of human rights’ (2005) 81(2) *International Affairs* 427; Onora O’Neill, ‘Response to John Tasioulas’ in Rowan Cruft, S Matthew Liao, and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 71.

⁵⁰ *ibid.*

on all others with the same content as the right. What O’Neill says is that, in the case of human rights like the right to food, it is extremely unclear before the intervention of institutions (1) what duties attach to each right, and (2) who exactly bears those duties. This is because of the burdensome nature of such duties. They use up scarce resources and cannot be borne by everyone.⁵¹ It is true that there are some people or institutions that could bear such duties, and that certain lesser obligations can be expected of a wider class of people, but from the bare moral right it is unclear exactly who should be the duty-bearers and what the content of such duties ought to be. O’Neill concludes that universal moral socio-economic rights are not claimable and so are not human rights—properly-so-called. Socio-economic rights—for her—can only exist in institutional form—once particular institutions have specified the duties entailed by these kinds of human rights and allocated them to identifiable and determinate duty-bearers.⁵²

If we take O’Neill’s objection seriously—which I think we should—then it appears that we have to deny that the citizens of impoverished states hold human rights against their state to anything but non-intervention. That is, we have to deny that citizens of impoverished states hold rights against their state to things like food, housing, and healthcare, because such states cannot comply with such putative duties to provide food, housing, and healthcare.⁵³

The *Multiple Duty View* is supposed to rescue human rights from this dilemma. As Tasioulas and Cruft claim,⁵⁴ once we reject a one-to-one correlation between human rights and their duties, we can say that citizens of impoverished states hold rights to food, housing, and healthcare against their state, but that these rights correlate only to what duties are feasible in

⁵¹ *ibid.*

⁵² *ibid.*

⁵³ Rowan Cruft, ‘Human rights as rights’ in Gerhardt Ernst and Jan-Christoph Heilinger (eds), *The Philosophy of Human Rights: Contemporary Controversies* (De Gruyter 2012) 138-9.

⁵⁴ See Chapter Two.

the circumstances. Even if a particular right does not generate a duty that matches its content, as long as there is some duty that attaches to it, the existence of the right can be affirmed.

Take an example:

Food Shortage: Conrad lives in the state of Utopia, which has an agrarian-based economy. He lacks sufficient food to provide for his own subsistence and is incapable of securing more food. But Conrad's position is not unique. Around 60 per cent of all citizens of Utopia lack sufficient food and are incapable of securing more. Utopia has just emerged from a devastating drought, and only has the resources to provide food to 40 per cent of its citizens.

Food Shortage is exactly the kind of case which triggers O'Neill's Claimability Objection. It is impossible for the state to fulfil putative duties to provide food to all affected citizens. So, citizens like Conrad lack a right to food held against Utopia. Proponents of the *Multiple Duty View* deny this—they say that Conrad in fact has this human right. What they go on to say is that Conrad's right to food does not correlate with a duty on the state of Utopia to provide food. Such a putative duty is too demanding in the circumstances. Conrad's right to food instead generates something like a duty to take steps to provide food to Conrad, or a duty to take steps to provide Conrad with food—or the equivalent.⁵⁵

This might seem like a good work-around. It allows us to say that Conrad retains a human right to food against Utopia, but it does not force us to recognise demanding putative duties on the state. However, I think this approach works a conceptual sleight-of-hand. While the *Multiple Duty View* allows us to affirm the existence of a right to food in cases like *Food Shortage*, Conrad's right to food is not operating as a right to food at all—it is operating as a

⁵⁵ For duties to try, see John Gardner, 'The Wrongdoing That Gets Results' (2004) 18(1) *Philosophical Perspectives* 53.

right that Utopia take steps to provide him with food. So, Conrad's human right is not really doing what it says on the box. It is doing something lesser—entitling him only to demand that Utopia take steps to provide him with food.

The *Individuation View* does not give us a way to resolve the Claimability Objection. It will not recognise the existence of a right to food in *Food Shortage*—because recognition of such a right would involve recognising a correlative duty to provide food, which Utopia cannot fulfil in the aggregate. However, the *Individuation View* does make it clear exactly what rights are at stake in this kind of scenario. While it will not recognise a right to food here, it will say that Conrad has a right that Utopia take steps to provide him with food. This right is not universal—given that there may be other right-holders who hold a right to be provided with food correlative to a duty to be provided with food—but it is determinate.⁵⁶

In this way, the *Individuation View* provides a clearer account of the rights at play in situations of socio-economic human rights. It recognises the existence of human rights which match the content of whatever right-based duties are feasible in the circumstances. Such an approach is a much more conceptually honest and clear account of the normative relations that obtain in situations like *Food Shortage* between Conrad (and his compatriots) and Utopia than that provided by the *Multiple Duty View*. It makes it abundantly clear what kinds of claims Conrad can make on Utopia—his right is now doing what it says on the box. It works no conceptual sleight-of-hand.

Not only does the *Individuation View* avoid the problems of accounting for waiver that the *Multiple Duty View* encounters, it also provides a more conceptually clear account of the rights at play in situations of socio-economic human rights.

⁵⁶ For a proposal for how to fill out such a right, see Stephanie Collins, 'The Claims and Duties of Socioeconomic Human Rights' (2016) 66(265) *Philosophical Quarterly* 701, 710-11.

D Conclusion

In this chapter, I have put forward an account of the structure of human rights that avoids the problems encountered by the *Multiple Duty View* in cases of waiver. I suggested that what is wrong about the *Multiple Duty View* is not its drawing of distinctions between human-rights-based duties, but its failure to draw matching distinctions in terms of rights. So, rather than taking each human right to generate (potentially) multiple duties which require different act-types, the view I set out—what I call the *Individuation View*—pairs each human right with a single duty, so that both human rights and their duties are individuated according to the act-type that they make obligatory.

I explained that what underlies the *Individuation View* is a commitment to the pairing of each human right with one correlative duty, and the individuation of each human right from every other according to the act-type that its correlative duty makes obligatory. Under this view, where there exist several right-based duties that are individuated from each other according to the act-type that they make obligatory, each of those duties is correlated with a separate human right which licences a distinct demand for the performance of an act-type by the duty-bearer. This is what it means to be committed to the *Individuation View*.

While the *Individuation View* rejects the central tenet of the *Multiple Duty View*—that each human right correlates with potentially many different duties—it retains many of the features which are usually invoked in support of the *Multiple Duty View*. While it rejects a Razian-style dynamicity of rights, on the *Individuation View* human rights continue to be dynamic in the sense that fundamental interests of right-holders can always generate new right-duty pairs in response to changing circumstances. Although the *Individuation View* takes each right to correlate with a single duty, the *Individuation View* is perfectly compatible with such right-duty pairs being bundled with other Hohfeldian relations to make up complex ‘molecular

rights'. It does not require the individuation of *all* jural relations into distinct pairs—only rights and duties.

The *Individuation View* also enhances clarity in discussions of human rights by rejecting the *Multiple Duty-Bearer View*. It takes each human right to correlate with one duty, and for there to be a single duty-bearer for each such relation of right.

The *Individuation View* is also agnostic about the role that rights play in practical reasoning. The *Individuation View* is compatible with both moral specificationism and moral generalism. The human right-duty pairs to which it gives rise can operate either as reasons to be weighed for or against some action, or as all-things-considered judgments about what ought to be done in respect of a particular person in a particular context.

Aside from these features, the *Individuation View* offers gains over the *Multiple Duty View* in explaining cases of waiver and situations of socio-economic human rights. The *Multiple Duty View* runs into trouble in accounting for cases of waiver because it cannot individuate human rights by reference to the act-type that its correlative duties make obligatory. Because it takes each right to correlate with multiple duties, where a right-holder wants to waive one of the duties that correlates with a right, but not the others, this can be tracked on the duty-side but not the right-side of the equation. By contrast, as the *Individuation View* correlates each human-rights-based duty to a separate right, when a right-holder releases a duty-bearer from a particular duty, this release is accompanied on the right-side of the equation by a giving up of a matching right.

The *Individuation View* also makes it clearer exactly what our entitlements to are. While the *Multiple Duty View* can allow us to affirm the existence of socio-economic human rights—like the right to food—because it allows that such a right will generate whatever duties are feasible in the circumstances, such an approach works a conceptual sleight-of-hand. There is a

jarring disjunction between human rights and their duties on such a picture. It is an advantage of the *Individuation View* that in such cases it will produce rights and duties with matching content. Such an approach is more conceptually honest and analytically clear. In the next chapter I continue my discussion of the *Individuation View* by considering some objections to it.

6

Some doubts and responses

IN THE PREVIOUS chapter I set out the *Individuation View* of the structure of human rights and claimed that taking each human right to be correlated with one duty, and individuating each human right according to the act-type that its correlative duty makes obligatory, provides greater precision in analysing human rights situations. It allows us to track which human rights and duties are in play at any one time and account for situations of waiver, in which only one human right among a group of related human rights is waived but the others are retained.

In this Chapter I present and attempt to allay some concerns about how the *Individuation View* works. I consider three key doubts about the *Individuation View* as a view of the structure of human rights: (1) that it is impoverished as a view of the structure of human rights because it departs from human rights practice; (2) that it generates an implausible proliferation of human rights; (3) that it sets up a false symmetry between human rights and their duties, and misses an underlying asymmetry which makes the *Multiple Duty View* a better fit as a theory of the structure of human rights; and (4) that it commits its holder to a conservative approach to the interpretation of human rights instruments. In what follows, I set out each of these doubts and offer responses in turn.

A *Fidelity to practice*

The first doubt about the *Individuation View* relates to its conformity with human rights practice. It might be claimed that the picture that the *Individuation View* draws of human rights—as rights which are correlated with single duties that match their content—is inconsistent with the view of human rights reflected in the human rights practice outlined in Chapter One.

As I set out in Chapter One, human rights organs and courts generally take each human right to correlate with multiple duties. They do not think that for every human right there is just one duty that correlates with it and which matches its content. That is, human rights bodies appear to endorse the *Multiple Duty View* rather than the *Individuation View*.

In addition, the *Individuation View* sits uncomfortably with the framing of important human rights instruments. As I noted in Chapter One, instruments like the *International Covenant on Civil and Political Rights (ICCPR)*¹ and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*² enshrine only a small number of human rights, and the rights that they enshrine are (in general) framed at a high level of generality. The combination of the small number of rights enshrined in these instruments and their generality means that, if these rights are to provide the kind of strong and comprehensive protection of right-holders' interests that human rights are supposed to provide, they must correspond to many different and more specific duties. They do not appear to give rise to specific right-duty pairs.

This is particularly the case for progressively realisable human rights, like Art 13, *ICESCR*. Article 13 provides that:

1. The States Parties to the present Covenant recognize the right of everyone to education. ...

¹ International Covenant on Civil and Political Rights (New York, 16 Dec. 1966) 999 U.N.T.S. 171 and 1057 U.N.T.S. 407, *entered into force* 23 Mar. 1976 preamble para 1.

² International Covenant on Economic, Social and Cultural Rights (New York, 16 Dec. 1966) 993 U.N.T.S. 3, *entered into force* 3 Jan. 1976 preamble para 1.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

- (a) Primary education shall be compulsory and available free to all;
- (b) Secondary education in its different forms ... shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
- (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
- (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
- (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.³

Human rights like the right enshrined in Art 13 are not straightforwardly reducible to single right-duty pairs. Even if we break up the broad right to education into its more specific counterparts, these counterparts are not readily reducible to right-duty pairs. For example, the Art 13(1)(b) right to free secondary education does not appear to correlate with a duty to provide free secondary education, but something weaker, like a duty on states to work towards making free secondary generally available.

This break with human rights practice is a problem for the *Individuation View*, because, any plausible theory of human rights should fit (at least, roughly) the prevailing view of human rights reflected in the practice. If the *Individuation View* is at odds with the practice of human rights by human rights organs and courts, then it is seriously impoverished as a theory of the structure of human rights.

Response

It is true that there is a disconnection between what the *Individuation View* says about the structure of moral human rights and what was said in Chapters One and Two about how human rights practitioners and some human rights theorists think human rights are structured. But this

³ *ibid* Art 13.

is not necessarily fatal to the success of the *Individuation View* as an account of the structure of human rights.

It is important to first get clear on what exactly is meant by ‘human rights practice’. There is little discipline among theorists in their use of the term ‘human rights practice’. Most often it is used to refer to human rights law—both the provisions of human rights instruments and the decisions of human rights courts.⁴ But as James Nickel suggests, human rights practice is not limited to this. Nickel’s definition of ‘human rights practice’ includes: (1) ethical beliefs and attitudes; (2) action and activism; (3) law; (4) political practice; and (5) journalistic and scholarly work.⁵

Any theory of human rights—even theories of moral human rights—should show some fit with existing practice conceived in this way. The requirement of fidelity to practice is not one that is just applied to theories offering descriptive claims about particular bodies of human rights law. It applies equally to theories of moral human rights.

Many philosophers deny the strict separation between law and morality that purportedly gives us two domains of human rights—legal human rights and moral human rights. Legal positivists accept that what is law (and what legal rights exist) is determined by the practice of institutions and other non-moral social facts.⁶ So, for positivists something’s qualifying as law in any legal system depends on its sources rather than on its merits as being good or bad, consistent

⁴ Adam Etinson, ‘On Being Faithful to the “Practice”’ in Adam Etinson (ed), *Human Rights: Moral or Political?* (OUP 2018) 164.

⁵ James Nickel, ‘What Future for Human Rights?’ (2014) 28(2) *Ethics & International Affairs* 213, 214–16.

⁶ There are some legal positivists that allow for morality to have some bearing on the content of the law where it has been assigned that role by institutional action. This kind of view is often referred to as ‘inclusive legal positivism’. See eg Jules Coleman, ‘Negative and Positive Positivism’ (1982) 11(1) *Journal of Legal Studies* 139; Wilfrid Waluchow, *Inclusive Legal Positivism* (Clarendon 1994); Matthew Kramer, *In Defense of Legal Positivism: Law Without Trimmings* (Clarendon 1999); Kenneth Einar Himma, *Morality and the Nature of Law* (OUP 2019). Other legal positivists maintain that institutional action and social facts exclusively determine the content of the law. This kind of view is often called ‘exclusive legal positivism’. See eg Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (rev edn, Clarendon 2001).

with morality or inconsistent with morality.⁷ Law and morality, on this picture, make up two distinct normative domains, and a fairly strict division can be drawn between legal rights and moral rights. However, such a strict division between law and morality is denied by anti-positivists. For example, Ronald Dworkin claims that law and legal rights are a subset of morality.⁸ Rather than the content of the law and legal rights being determined by institutional and social facts alone, anti-positivists maintain instead that both moral facts and institutional and social facts—such as legal practice—are among the determinants of the content of the law and legal rights.⁹ Thus, if one endorses an anti-positivist conception of law, legal and moral rights cannot be neatly separated. If anti-positivists are right that law and morality do not make up two distinct domains of normativity, but that law is just a department of morality, then we cannot rule out that the practice of human rights law may have some bearing on moral human rights and should be accommodated (at least somewhat) by any theory of those rights.

In addition, much of our thinking about our ordinary concept of human rights—including our moral concept of human rights—occurs in the context of human rights practice, and particularly human rights law instruments like the *Universal Declaration of Human Rights (UDHR)*,¹⁰ the *ICCPR*, the *ICESCR*, and the European Convention on Human Rights (*ECHR*).¹¹ This is evident in the way that we tend to think of rights not included in these instruments as not being human rights at all. For example, few would accept that we have a moral human right not to be insulted, but the right to life—enshrined in art 3, *UDHR*; art 6, *ICCPR*; and art 2, *ECHR*—is incontrovertibly both a legal and moral human right. What this

⁷ John Gardner, 'Legal Positivism: 5½ Myths' (2001) 46(1) *American Journal of Jurisprudence* 199, 201.

⁸ Ronald Dworkin, *Justice for Hedgehogs* (HUP 2011) 405–6.

⁹ Nicos Stavropoulos, 'Legal Interpretivism', *The Stanford Encyclopedia of Philosophy* (Summer edn, 2014) <<https://plato.stanford.edu/entries/law-interpretivist/>> accessed 31 March 2020; Mark Greenberg, 'The Moral Impact Theory of Law' (2014) 123(5) *Yale Law Journal* 1288.

¹⁰ Universal Declaration of Human Rights (10 Dec. 1948), U.N.G.A. Res. 217 A (III) (1948) preamble, para 1.

¹¹ European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 Nov. 1950), 312 E.T.S. 5, as amended by Protocol No. 3, E.T.S. 45; Protocol No. 5, E.T.S. 55; Protocol No. 8, E.T.S. 118; and Protocol No. 11, E.T.S. 155; entered into force 3 Sept. 1953 (Protocol No. 3 on 21 Sept. 1970, Protocol No. 5 on 20 Dec. 1971, Protocol No. 8 on 1 Jan 1990, Protocol 11 on 11 Jan 1998).

suggests is that our thinking about human rights—even moral human rights—is conditioned by what we find in human rights instruments and human rights practice in general. As Adam Etinson notes:

[T]he ordinary concept of human rights ... seems largely conditioned by the practice itself—that is, by the specific lists of individual rights that are proclaimed as human rights in various areas of law, by the likely (or publicly stated) consequences of respecting or violating human rights norms in various contexts, and by key pieces of rhetoric (e.g. in preambles, political discourse, judicial decisions) that publicly announce the purposes and values served by such rights, etc.¹²

And if it is the case that our thinking about even moral human rights is conditioned by human rights practice, then a theory of moral human rights will have to show some fit with human rights practice, or else risk being taken as a theory of something other than human rights—perhaps just a theory of some other category of moral rights.¹³ Human rights practice is then, as James Griffin suggests, used ‘to test whether what is derivable from ... highly abstract moral principles are human rights and all human rights.’¹⁴

That fidelity to practice is a theoretical virtue of any theory of moral human rights does not mean that the fit between a theory of moral human rights and human rights practice must be absolute. What is required for a theory to be faithful to practice is that it *sufficiently* or *adequately* fits that practice.¹⁵ Some divergence from the practice is permissible, as long as it is not total or very substantial. This is because there are various aspects of human rights practice that a theory of moral human rights might be faithful to, including,

... modelling, in theoretical terms: (a) the international consequences of compliance or non-compliance with the norms of human rights practice, as Beitz, Rawls, and Raz do; (b) the various ends secured by these norms when they are complied with; (c) the important ends secured by them, such as human welfare, dignity, freedom, etc.; and/or (d) any shared ends that they all secure, such as protecting universal human interests (Tasioulas) or normative agency (Griffin).¹⁶

¹² Etinson (n 4) 167.

¹³ John Tasioulas, ‘Philosophizing the Real World of Human Rights’ in in Adam Etinson (ed), *Human Rights: Moral or Political?* (OUP 2018) 90.

¹⁴ James Griffin, *On Human Rights* (OUP 2008) 29.

¹⁵ Etinson (n 4) 169.

¹⁶ *ibid* 169–70 (footnotes omitted).

Fidelity to practice also does not mean that any theory of moral human rights must have a substantial fit with *all* of the dimensions of practice that I noted are included within the notion of ‘human rights practice’. A theory might have a better fit with some aspects of the practice than others—for example, a strong fit with ethical beliefs and activism, but a weaker fit with law and political practice—and still have a substantial fit with human rights practice overall.

It might be argued, then, that the objection above is mistaken, and that the *Individuation View* can satisfy this qualified requirement of fidelity to practice. While the *Individuation View* shows a weak fit with law and scholarly work on the question of the structure of human rights, it maintains a strong fit with all elements of the practice on questions like the various ends secured by human rights when they are complied with, the important ends secured by human rights, and any shared ends that human rights all secure.¹⁷

My objector might insist that, despite the *Individuation View’s* fit with some elements of human rights practice, its departure from practice on the question of the structure of human rights is so substantial that it cannot meet the threshold of substantial overall fit. Even so, one might question whether this is fatal to the *Individuation View’s* success as a theory of the structure of human rights. A substantial fit with existing practice is undoubtedly important when we are talking about matters like the rights that a theory of moral human rights recognises as

¹⁷ There is another way in which this objection may be resisted. We might interpret the sources of practice described in Chapter One as simply general statements of human rights. Beneath these general human rights then lie more specific human rights, which specific rights may be used to resolve defined human rights controversies. (Note that such a distinction between general rights and specific rights is part of Matthew Kramer’s interest theory of rights. See Matthew Kramer, ‘Rights Without Trimmings’ in Matthew Kramer, Nigel Simmonds, and Hillel Steiner (eds), *A Debate Over Rights: Philosophical Inquiries* (OUP 1998) 41–43.) If we take this approach, we might say that the *Multiple Duty View* offers a structure of the general human rights contained in human rights instruments, whereas the *Individuation View* offers a structure of the more specific human rights that are applied to resolve defined human rights controversies. This approach allows both the *Individuation View* and the *Multiple Duty View* to coexist as providing conceptions of different phenomena. However, I think this kind of move should be approached with caution. To characterise human rights law as containing only general statements of human rights threatens to strip human rights law—and particularly human rights instruments—of their normative force. As it is the specific human rights that underlie these general human rights that guide the resolution of defined human rights controversies, this leaves the general rights that are contained in human rights law with little normative work to do. It reduces human rights law to merely setting out general rights that supply useful summaries of the more complex array of specific rights that underlie them. I thank an anonymous examiner for drawing this response to my attention.

‘human rights’. That a theory of moral human rights picks out as ‘human rights’ completely different rights to those taken to be ‘human rights’ by human rights practice—like, for example, a right not to be lied to and a right not to be insulted—may well give us good reason to reject that theory as a successful theory of human rights. However, the position is less clear when it comes to technical matters like the structure of human rights that depend on reflection on how human rights work and aid us in our practical reasoning. It is less clear that human rights practice can be taken to be absolutely right on such matters, and accordingly less clear that a theory’s departure from practice on such a matter should be taken as fatal to it.

Accordingly, that the *Individuation View* departs substantially from human rights practice (as summarised in Chapters One and Two) in how it conceives of the structure of moral human rights should not be taken to be fatal to it as a theory of the structure of moral human rights. Fidelity to practice is just one factor to be taken into account when choosing between different theories of the structure of moral human rights, and it needs to be kept in mind that practice carries the potential to be wrong on this technical issue. In addition, despite the fact that the *Individuation View* departs significantly from human rights practice it brings significant advantages in being able to explain properly cases of waiver.

B *A proliferation of rights*

One of the most important doubts about the *Individuation View* is that it gives rise to a proliferation of human rights. That is, because of the way that the *Individuation View* finely divides up human rights and their duties based on the act-type that they make obligatory—so that each human right is paired with a single duty that matches its content—it naturally gives rise to more human rights than the *Multiple Duty View*. To take an example from Chapter Four, on the *Multiple Duty View* something like Jorge’s right not to be tortured held against the state of Utopia correlates with (at least) duties on Utopia not to torture Jorge, to provide aid

to Jorge if he is tortured, to protect Jorge against being tortured, and to investigate incidences of torture committed against Jorge. On the *Individuation View*, each of these duties is correlated with a different human right. Rather than one human right not to be tortured and four duties on the state, Jorge has four human rights with four matching correlative duties:

1. *a right not to be tortured, which correlates with a duty on Utopia not to torture Jorge;*
2. *a right to aid if Jorge is tortured, which correlates with a duty on Utopia to provide aid to Jorge if he is tortured;*
3. *a right to be protected against being tortured, which correlates with a duty on Utopia to protect Jorge against being tortured; and*
4. *a right to have incidences of torture committed against Jorge investigated, which correlates with a duty on Utopia to investigate incidences of torture committed against Jorge.*

What we have here is the *Individuation View* turning what was one human right on the *Multiple Duty View* into four human rights. Let us call this ‘rights-proliferation-by-content’.

There also is a second way in which the *Individuation View* might be thought to proliferate human rights—this time based on the identity of the duty-bearer. On the Multiple Duty Bearer View—but not necessarily on the *Multiple Duty View*¹⁸—where an individual has a human right with a particular content, that one right is held against all bearers of the duty to which it correlates. Something like Xavier’s right to bodily integrity will on this view be held against all bearers of the duty not to interfere with Xavier’s bodily integrity—duty-bearers like Yanni, Zadie, and potentially, everyone in the world. Xavier has one human right to bodily integrity which correlates with duties not to interfere with his bodily integrity held by numerous

¹⁸ As I noted in Chapter Three, this kind of view is only directly inconsistent with the *Multiple Duty-Bearers View*. One can be a proponent of the *Multiple Duty View* and accept this aspect of the *Individuation View*.

individuals, rather than one right to bodily integrity held against Yanni, another against Zadie, and others against the other duty-bearers. By contrast, on the *Individuation View*, not only does each human right correlate with a single matching duty, but each relation of right between a right-holder and duty-bearer gives rise to a separate right-duty pair. As Heidi Hurd and Michael Moore explain of Hohfeld's scheme (which reflects the *Individuation View's* approach here):

... People thus literally don't have a 'right to bodily integrity' in any but an abbreviatory sense. Rather (insofar as this is, in part, a claim-right), one particular person ('X') has a claim-right of a certain content against another particular person ('Y'). There is thus not just one right, as the phrase 'a right to bodily integrity' would suggest; there are as many rights as there are individual people holding them multiplied by the number of individual people against whom they are held.¹⁹

On the *Individuation View*, Xavier holds a right to bodily integrity against Yanni, a separate right to bodily integrity against Zadie, and further separate rights to bodily integrity against every other individual bearer of the duty not to interfere with his bodily integrity—many more human rights than under the *Multiple Duty-Bearer View*. Let us call this 'rights-proliferation-by-duty-bearer'.

There are then two ways in which the *Individuation View* might be thought to generate a proliferation of human rights: (1) by correlating each human right to a single duty that matches its content (rights-proliferation-by-content); and (2) by taking each human right to correlate with a duty held by a single duty-bearer (rights-proliferation-by-duty-bearer). But what exactly does it mean to worry about a *proliferation* of human rights?

One might think that human rights proliferation becomes a problem when that proliferation occurs because people are increasingly making rights-claims to things that do not properly come within the purview of human rights. That is, the proliferation of human rights is problematic when many of what are claimed to be a human rights are not really human rights at all—because the things to which the label 'human right' is being applied do not meet the

¹⁹ Heidi Hurd and Michael S Moore, 'The Hohfeldian Analysis of Rights' (2018) 63(2) *American Journal of Jurisprudence* 295, 315.

existence conditions for a human right (for example, being grounded by an important human interest, being a feasible claim on others, etc). This is the sort of worry has been expressed by LW Sumner: ‘Like the arms race the escalation of rights rhetoric is out of control. In the liberal democracies of the West, and especially in the United States, public issues are now routinely phrased in the language of rights.’²⁰ Similarly, Hillel Steiner notes, ‘[m]uch recent discussion of rights begins by reporting—and deploring—a proliferation of demands for rights of every imaginable sort.’²¹

Philip Alston gives an example of this kind of rights proliferation when he complains of the invocation of the ‘right to tourism’ ‘through frivolous claims such as that put forward by the World Tourism Organization (an intergovernmental body) that “tourism has become increasingly a basic need, a social necessity, and a human right.”’²² A more troubling example is what has been claimed to be the human right (of involuntarily celibate—or ‘incel’—men) to have sex (with women).²³ If the implausibility of such a rights-claim is not already obvious on its face, Rebecca Solnit captures it nicely when she states, ‘you don’t get to have sex with someone unless they want to have sex with you’.²⁴ Given that rights make categorical demands on duty-bearers—that is, the kind of demands that do not depend on the disposition of the

²⁰ LW Sumner, *The Moral Foundation of Rights* (OUP 1987) 1.

²¹ Hillel Steiner, *An Essay on Rights* (Blackwell 1994) 55.

²² Philip Alston, ‘Conjuring up New Human Rights: A Proposal for Quality Control’ (1984) 78(3) *American Journal of International Law* 607, 611.

²³ It is unclear whether anyone has in fact made any claim to such a right. However, as Amia Srinivasan notes, ‘[t]alk of people who are unjustly sexually marginalised or excluded can pave the way to the thought that these people have a right to sex, a right that is being violated by those who refuse to have sex with them’. See Amia Srinivasan, ‘Does anyone have the right to sex?’ (*London Review of Books*, 22 March 2018) <<https://www.lrb.co.uk/v40/n06/amia-srinivasan/does-anyone-have-the-right-to-sex>> accessed 13 September 2019. See also Owen Bowcott, ‘English judge says man having sex with wife is “fundamental human right”’ *The Guardian UK* (London, 3 April 2019) <<https://www.theguardian.com/law/2019/apr/03/english-judge-says-man-having-sex-with-wife-is-fundamental-human-right>> accessed 2 April 2020; Lauren Rosewarne, ‘Is sex a human right? Ummm, yes ... no ... maybe ... it depends on what you mean by sex really’ (*The Conversation*, 30 November 2011) <<http://theconversation.com/is-sex-a-human-right-ummm-yes-no-maybe-it-depends-on-what-you-mean-by-sex-really-4491>> accessed 2 April 2020.

²⁴ Rebecca Solnit, ‘Men Explain *Lolita* to Me’ (*Literary Hub*, 17 December 2015) <<https://lithub.com/men-explain-lolita-to-me/>> accessed 13 September 2019.

duty-bearer to do what is being demanded of them²⁵—how could anyone have a right to sex when sex is something that can be freely given and refused at the will of the participants?²⁶

As I indicated above, this kind of proliferation is problematic primarily because the purported human rights that are asserted do not in fact exist. There is no such thing as a right to tourism and there is no such thing as a right to sex. There is also a subsidiary problem. This kind of proliferation of human rights makes it increasingly difficult to distinguish genuine human rights from human rights-in-label-only. When one cannot distinguish genuine rights from the counterfeit ones, one will find it increasingly difficult to determine which rights-claims deserve serious attention and action and which do not.²⁷ How do we weed out the right to sex as a counterfeit human rights-claim from other legitimate rights-claims like the right to sexual autonomy and the right to express one's sexuality?²⁸ The more rights-claims there are, and the more spurious right-claims make up a large percentage of total rights-claims, the more difficult this process of triage becomes. The more difficult this triage becomes, the more people are likely to routinely ignore human rights-claims in order to avoid mistakenly acting on one that is illegitimate. One might expect this to eventually lead to people to stop making human rights-claims altogether (or, at least, to think twice about making a rights-claim) in order to resort to some other concept that is more likely to get them listened to. Put differently, Alston says that such proliferation is 'likely to contribute to a serious devaluation of the human rights currency'.²⁹

²⁵ John Gardner and Timothy Macklem, 'Reasons' in Jules Coleman, Kenneth Himma, and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004) 466.

²⁶ This is not to deny that there may be plenty of other sex-related rights—even human rights—like the right to sexual autonomy, the right to perform sex work, and the right to decide whether to have children (whatever the contours of these rights might be).

²⁷ Sumner, *The Moral Foundations of Rights* (n 20) 4.

²⁸ John Gardner and Stephen Shute, 'The Wrongness of Rape' in Jeremy Horder (ed), *Oxford Essays in Jurisprudence, Fourth Series* (OUP 2000) 193.

²⁹ Alston, 'Conjuring up Human Rights' (n 22) 611.

Is this kind of proliferation a problem that the *Individuation View* itself gives rise to? The short answer is ‘no’. And here is why. As George Rainbolt observes in respect of the rights proliferation his own fine-grained theory of the individuation of rights gives rise to:

[T]he justified-constraint theory of the individuation of rights does not cause the sort of proliferation that worries those who worry about rights proliferation. The worry is not that analysis will reveal that a more fine-grained individuation of rights will cause there to be numerically more rights. The worry is that people are asserting that they have rights to do things that they did not previously assert.³⁰

Rainbolt is correct. His proposal does not give rise to the same kind of proliferation that Sumner and Steiner write about. Rainbolt’s proposal gives rise to a larger number of rights because of its fine-grained individuation of rights, not because it says that people have rights that they actually do not have. Something similar can be said about both the *Individuation View’s* rights-proliferation-by-content and rights-proliferation-by-duty-bearer.

The *Individuation View* makes claims about how to individuate human rights and their correlative duties. It does not say anything about what kinds of human rights are feasible or justifiable or ought to exist. The *Individuation View* is equally agnostic about the existence of a human right to bodily integrity as about a human right to sex or a human right to tourism. It simply shows how human rights and their correlative duties are to be individuated once paired with a theory about the grounding of human rights—such as the interest theory or the will theory. That is, when paired with a theory of grounding, the *Individuation View* will say how the human rights produced by that theory can be individuated—based on the act-types that the duties correlative to those rights make obligatory and the identity of the duty-bearer(s)—and it will generally give rise to more human rights than the *Multiple Duty View* because of its theory of individuation. However, the *Individuation View* is not committed to the existence of any particular human right with a certain content and will not necessarily produce spurious human rights.

³⁰ George Rainbolt, *The Concept of Rights* (Springer 2006) 142.

However, this is not the end of the worry about human rights proliferation. There are at least four other ways in which the *Individuation View's* rights-proliferation-by-content and rights-proliferation-by-duty-bearer might be regarded as problematic. I will outline each in turn and offer some responses. Except where otherwise indicated, my replies will be directed at both the *Individuation View's* rights-proliferation-by-content and rights-proliferation-by-duty-bearer.

1 *Proliferation of human rights as counter-intuitive*

We might see the *Individuation View's* generation of numerous specific human rights—or, rights-proliferation-by-content—as being counter-intuitive, or contrary to our ordinary understanding of human rights. That is, when we think about how people ordinarily use human rights, they do not tend to couch their rights-claims in the way that the *Individuation View* frames human rights. They do not normally claim to have a human right against the state to be protected against assaults—they, rather, take themselves as having a human right against assault that imposes obligations not to assault the right-holder and to protect the right-holder against assaults.

Similarly, taking a right-holder to have as many human rights as there are bearers of the duties to which they correlate—or, rights-proliferation-by-duty-bearer—might also be seen as counter-intuitive. Right-holders do not generally take themselves as being in a separate relation of right with each bearer of the duty that correlates with each of their human rights, but think of each of their human rights as being held against the world at large.

Stephen Hudson and Douglas Husak gesture in the direction of this worry when they claim of Hohfeld's scheme, '[t]o think that rights must be stated in this way [as correlated with a single unchanging duty with one bearer] is to be guilty of an error that shows one's failure to

appreciate the subtleties of discourse about rights.’³¹ That is—as the worry goes—to take each human right as correlating to a single unchanging duty would be to fail to appreciate the way that each human right can give rise to a number of different obligations. Similarly, to take each relation of right to obtain between one right-holder and one duty-bearer only ignores the way in which each human right is held against the world. That is, the *Individuation View* distorts our ordinary understanding of human rights by dividing up our human rights up too finely.

Response

Before getting to the substance of my response to this first form of the proliferation doubt about the *Individuation View*, it is worth noting that there are two distinct claims that someone who believes a theory to be counter-intuitive might be making. First, one might say that a theory is counter-intuitive because the theory is a surprising or unexpected one, or contrary to how we ordinarily understand the phenomenon. Second, one might claim that a theory is counter-intuitive because the theory produces absurd outcomes. These two claims will often overlap. A theory might be thought to be contrary to our ordinary understanding of a phenomenon *because* it produces absurd outcomes. But only the second claim of counter-intuitiveness will always be objectionable. The first claim of counter-intuitiveness can only be a *pro tanto* objection.

The importance of ordinary understandings of a phenomenon—or, put differently, of the self-understandings of those subject to the phenomenon—can hardly be doubted. As Julie Dickson notes in the context of doing legal philosophy, ‘legal philosophy is constrained in the character of the explanations it gives: it must seek to elucidate law in a way which does adequate justice to how it is already understood, and is understood to feature in, the lives of those who create, administer, and are subject to it.’³² This is not to say that just any self-understandings will

³¹ Stephen Hudson and Douglas Husak, ‘Legal Rights: How Useful is Hohfeldian Analysis’ (1980) 37(1) *Philosophical Studies* 45, 51.

³² Julie Dickson, ‘Ours is a Broad Church: Indirectly Evaluative Legal Philosophy as a Facet of Jurisprudential Inquiry’ (2015) 6(2) *Jurisprudence* 207, 226.

do. There will be some self-understandings that are conflicting and some that are obviously wrong, and there needs to be some discrimination between the kinds of self-understandings that need to be accounted for in any theory of a phenomenon and those that need not. As Dickson observes—again in the context of doing legal philosophy:

[T]he theorist herself has to be able to discriminate between and make evaluative judgments about participants' self-understandings in order to pick out which are most relevant in understanding law's important and significant features. Some self-understandings of the participants may be confused, mistaken, insufficiently focussed or vague. Moreover, some self-understandings will be more important and significant than others.³³

As Dickson claims, not all self-understandings of a particular phenomenon need to be accounted for in a theory of that phenomenon—only those that are deemed illuminating and helpful to elucidating the significant and important features of the phenomenon and which are free from misunderstandings and serious vagueness. This is why claims of the first sort of counter-intuitiveness should not be taken to be fatal to a theory. That a theory is counter-intuitive because it is not an obvious explanation of a phenomenon, or is contrary to our self-understanding of that phenomenon, is consistent with the self-understandings of the phenomenon on which that claim is based being misguided, erroneous, or insufficiently focussed.

As I framed it, the first form of the proliferation doubt claims that the *Individuation View* is counter-intuitive because its rights-proliferation-by-content and rights-proliferation-by-duty-bearer means that it is at odds with our ordinary understanding of human rights. It is not a claim about the *Individuation View* producing absurd results. As I endeavoured to show in Chapters Four and Five, the *Individuation View* should actually correct the absurd results produced by the *Multiple Duty View* by making clear what happens to a right-holder's rights in cases where they release a duty-bearer from one of their obligations to the right-holder only.

³³ Julie Dickson, 'Who's Afraid of transnational legal theory? Dangers and desiderata' (2015) 6(3-4) *Transnational Legal Theory* 565, 580.

The objection above alleges counter-intuitiveness of the first kind and, as such, the remarks I made above apply equally to theories of moral human rights. Any theory of the structure of moral human rights should align with our self-understandings of those rights. However, the kinds of self-understandings that need to be reflected in any theory of moral human rights are those that help in understanding the important features of those rights and which are not afflicted by misunderstandings or serious vagueness.

We might not give much weight to a claim that the *Individuation View*—as a theory of the structure of human rights—does not align with our ordinary understanding of human rights. As many theorists and practitioners agree, rights-talk is loose.³⁴ Users of rights are frequently imprecise in the way that they make rights claims, and one does not need to be a semantic hygienist to agree that the way we use rights is often inconsistent and sometimes careless. As Leif Wenar explains, this is not so much the product of defect in the language of rights as it is

... a defect in the speaker's understanding of the various meanings of the word "right." Ordinary rights-talk can be entirely rigorous and error-free provided that speakers understand how assertions of rights map onto the Hohfeldian incidents.³⁵

Given the technical nature of the inquiry into the structure of human rights, we should not be too ready to tie a theory of the structure of those rights to the self-understandings of ordinary people (or even human rights practitioners). Few ordinary people will have thought deeply about how the rights they claim and are bound by are structured. So, such self-understandings carry a greater risk of being afflicted by vagueness or mistakes about how human rights are structured and are unlikely to be particularly illuminating. In short, that the *Individuation View* is at odds with our ordinary understanding of human rights by causing rights-proliferation-by-

³⁴ Etinson (n 4) 169; Jason Varuhas, *Damages and Human Rights* (Hart 2016) 204; Griffin (n 14) 14; Leif Wenar, 'The Nature of Rights' (2005) 33(3) *Philosophy & Public Affairs* 223, 236.

³⁵ Wenar, 'The Nature of Rights' (n 34) 236.

content and rights-proliferation-by-duty-bearer ought not be regarded as fatal the success of that view.

2 *Sheer numerical proliferation*

Related to the worry about proliferation that Sumner and Steiner share—but more targeted at the specific brand of rights proliferation generated by the *Individuation View*—is a concern that with more human rights comes a devaluation of the currency of those rights because it will be harder to distinguish human rights which state fundamental precepts for the treatment of all humans from those which state more trivial iterations of those precepts.

The worry here is that the existence of many finely individuated human rights will devalue the currency of human rights, not because any of these rights is spurious—as I said earlier, the *Individuation View* does not necessarily give rise to such spurious rights—but because important human rights will be mixed in with comparatively trivial ones, and (due to the sheer number of finely individuated human rights that the *Individuation View* generates) determining which is which will be a little like trying to pick out the unblemished tomatoes from a crate of farm seconds. Mary Ann Glendon puts the objection thus:

If some rights are more important than others, and if a rather small group of rights is of especially high importance, then an everexpanding list of rights may well trivialize this essential core³⁶

It is already hard to work out a hierarchy of human rights, especially when attempting to balance one against the other³⁷ or work out their relative stringency and importance.³⁸ The

³⁶ Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (Free Press 1991) 16.

³⁷ See eg Jeremy Waldron, 'Security and Liberty: The Image of Balance' (2003) 11(2) *Journal of Political Philosophy* 191.

³⁸ See eg Judith Jarvis Thomson, 'Self-Defense and Rights' in *Rights, Restitution, and Risk* (William Parent (ed), HUP 1986) 43; David Rodin, 'The Reciprocity Theory of Rights' (2014) 33(3) *Law and Philosophy* 281, 301. Victor Tadros draws an important distinction between the stringency of a right and its importance: 'Stringency and importance are different dimensions of rights, and they must not be confused. The stringency of a duty is a function of the costs on the duty-bearer that must be borne to fulfil the duty. The importance of a duty is a function of the value that will be set back if the duty is not fulfilled'. See Victor Tadros, 'Rights and Security for Human Rights Sceptics' in Rowan Cruft, S Matthew Liao, and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 451.

Individuation View makes this problem worse through the sheer number of human rights it generates.

As might be clear from the way that I have framed this worry, it relates primarily to the *Individuation View's* rights-proliferation-by-content. It is this kind of rights proliferation that raises the concern about being able to sort human rights that express fundamental precepts about how humans should be treated from comparatively trivial human rights. But rights-proliferation-by-duty-bearer might generate a similar concern. It might be thought that the currency of human rights will be cheapened if we take each relation of right to obtain only between a single right-holder and a single duty-bearer. It will dilute the notion that each human right is held against the world at large—forcing us to engage in pairwise comparison when considering human rights controversies—thereby devaluing the currency of human rights as things of universal import or of concern to everyone.

Response

Contrary to the doubt that I set out above, both the *Individuation View's* rights-proliferation-by-content and rights-proliferation-by-duty-bearer should actually work to maintain the currency of human rights. First, as indicated above, the *Individuation View* will not recognise spurious human rights and duties, like the right not to be tripped by a rope or the right not to be insulted. It will recognise only those duties that are recognised by the *Multiple Duty View*.³⁹ What this means is, while the *Individuation View* will recognise many more human rights than the *Multiple Duty View*—that is, an individuated human right for each individuated duty that the *Multiple Duty View* recognises—it will not proliferate rights outside of the range of duties

³⁹ The range of duties recognised by the *Multiple Duty View* will include—to the extent that proponents of that view want to avoid the broader problem of waiver that I identify in Chapter 4, Section D.3—duties that are individuated according to the specific means by which someone may perform some act.

recognised by the *Multiple Duty View*. Accordingly, it will not lead to any devaluation of the currency of human rights to which the *Multiple Duty View* does not already give rise.

Second, by individuating human rights into single right-duty pairs based on the act-type that their correlative duties make obligatory, the *Individuation View* allows each human right to be taken separately and assessed for its stringency and importance. As Thomas Pogge notes, once human rights are individuated in this way, '[o]ne might then ask about each of these candidate rights whether it exists at all and, if so, against whom it is held, in what formulation, and with what stringency.'⁴⁰ That is, adopting the *Individuation View* means that one does not have to work out the relationship between the right and the duties that attach to it as one does on the *Multiple Duty View*—asking whether a particular duty is a primary duty or secondary to some other duty attached to the right—before assessing the stringency and importance of the right. Instead, by separating each human right into a single right-duty pair, it allows one to go straight to the questions of stringency and importance. So, while there might be many more human rights under the *Individuation View* than under the *Multiple Duty View*, this need not radically devalue the currency of human rights, as it allows for a more precise working out of the stringency of each right-duty pair, as each right-duty pair can be taken as an individual object of assessment.

Similarly, the *Individuation View's* rights-proliferation-by-duty-bearer need not weaken the currency of human rights. Just because the *Individuation View* takes a separate relation of right to exist between each right-holder and bearer of a particular duty—such that there are as many rights held by a right-holder as there are bearers of a particular duty owed to that right-holder—does not mean that we lose the universal import of human rights. As I discussed in Chapter Five, although the *Individuation View* will not produce rights held by all humans

⁴⁰ Thomas Pogge, 'Shue on Rights and Duties' in Charles R. Beitz and Robert E. Goodin (eds), *Global Basic Rights* (OUP 2011) 128.

(given their specificity), human rights are still grounded by fundamental interests of right-holders that are of universal importance—at least within a specific historical period. That is, that each right-duty pair held by a particular right-holder against a particular duty-bearer can be traced back to some fundamental interest that is held by all humans may work to preserve the universal import of human rights. What this should show then is that the second form of the proliferation doubt is misplaced. Adopting the *Individuation View* will not radically devalue the currency of human rights.

3 *Rights proliferation as frustrating the guidance of action*

A third way in which the *Individuation View*'s proliferation of human rights might be a problem is through the way it might affect the ability of human rights to guide action. As the *Individuation View* carves up human rights into matching right-duty pairs, it generates quite precise human-right duty pairs, and many more human rights than under the *Multiple Duty View*. The number of human rights generated by the *Individuation View* is only increased further by the way it takes a right-holder to have as many human rights as there are bearers of the duties to which they correlate. This means that there will be many more human rights that have to be factored into agents' practical reasoning when entering into relations with one another. Given the precision of each of these human rights—generated by the *Individuation View*'s commitment to a fine-grained individuation of act-types—this may make the task of practical reasoning one that requires the reconciliation of hundreds, or even thousands, of human rights.

Response

This third form of the proliferation doubt rests on a misunderstanding of the role of rights in practical reasoning. Practical reasoning is made no more difficult by adopting the *Individuation View* than it is by embracing the *Multiple Duty View*. This is because, although there will

certainly be more human rights under the *Individuation View*, as I said in Chapter Three, Section B.1(b), the existence of a human right (largely) does not generate reasons for action. The reason-giving force of rights is parasitic on the existence of a duty. It is the existence of a duty that gives the duty-bearer (and sometimes others⁴¹) reasons for action—reasons to do as the duty requires, and not act on reasons against doing what the duty requires. Rights only add to those reasons by marking the right-holder out as the person in respect of whom the action required by the duty must be taken.

In addition, on the *Individuation View* there will be just as many duties (but not more) as there are on the *Multiple Duty View*. As I outlined in Chapters Four and Five, both the *Individuation View* and the *Multiple Duty View* individuate the duties correlative to human rights according to the act-type that they make obligatory. Assuming that all rights theorists will want to adopt a fine-grained theory of the individuation of act-types in order to resolve the waiver problem that I discuss in Chapter Four, Section D.3, the *Individuation View* will posit the existence of no more duties than the *Multiple Duty View*. The *Individuation View's* rights-proliferation-by-content and rights-proliferation-by-duty-bearer, then, will not make practical reasoning any more difficult than it is under the *Multiple Duty View*. In fact, as I argued in Chapter Four, the *Individuation View* will make practical reasoning more precise. The *Individuation View's* fine-grained individuation of human rights and matching of each human right with one correlative duty only allows it to explain cases of waiver that the *Multiple Duty View* cannot because of its linking of multiple duties to one right.

4 *The loss of theoretical virtue*

Ultimately, the *Individuation View* is presented as an alternative conception of the structure of human rights to that provided by the *Multiple Duty View*—an alternative that is claimed to

⁴¹ For example, a third party to a relation of right may in virtue of the existence of the duty on the duty-bearer have a reason not to frustrate the discharge of that duty.

avoid the deficiencies identified in the *Multiple Duty View*. But just pointing out that the *Multiple Duty View* has some deficiencies is not enough to make the *Individuation View* the best explanation of the structure of human rights. As Brian Leiter notes in another context, ‘for what we need to know is what makes one explanation of the phenomenon better than another, not simply that one account (arguably) has some deficiencies.’⁴² To work out whether the *Individuation View* or the *Multiple Duty View* provides a better explanation of the structure of human rights, we need to consider the desiderata for an explanation.

While at base a good explanation ‘helps us “understand” or “make sense” of some data’, there are three more specific theoretical virtues that are often invoked in discussions of theory choice:⁴³

Consilience: A theory’s consilience is its capacity to explain. A theory is more conciliant the more it explains, and less conciliant the less it explains. *Ceteris paribus*, a theory that is more conciliant is to be preferred to a theory that is less so.⁴⁴

Simplicity: There are two distinct parts to simplicity as a theoretical virtue. The first—syntactic simplicity or elegance—is a function of the number and complexity of the hypotheses that make up the theory. A theory is simpler to the extent that it contains fewer and less complex hypotheses than another theory. The second—ontological simplicity or parsimony—is a function of the entities that it postulates to explain a phenomenon. A theory is simpler to the extent that it postulates fewer entities than

⁴² Brian Leiter, ‘Explaining Theoretical Disagreement’ (2009) 76(3) *University of Chicago Law Review* 1215, 1239.

⁴³ Much of the literature on theory choice comes from philosophy of science. See eg Paul Thagard, ‘The Best Explanation: Criteria for Theory Choice’ (1978) 75(2) *Journal of Philosophy* 76. However, these theoretical desiderata are relevant to all kinds of theory choice and have been applied in the selection of moral and legal theories. See eg Leiter (n 42) 1239; David Enoch, *Taking Morality Seriously: A Defense of Robust Realism* (OUP 2011) 194 fn 27.

⁴⁴ Leiter (n 42) 1239.

another. Again, *ceteris paribus*, a simpler theory is to be preferred to a more complex one.⁴⁵

Conservatism: Whether a theory is conservative or not depends on how disruptive it is of other well-established theories and beliefs. A theory that leaves intact more well-established beliefs than another theory is more conservative, and a theory that leaves intact fewer well-established beliefs than another theory is less conservative. *Ceteris paribus*, a theory that is more conservative in this way is to be preferred to a less conservative one.⁴⁶

The *Individuation View*'s proliferation of human rights (both by content and by duty-bearer) might be thought to make it less attractive as an explanation of the structure of human rights than the *Multiple Duty View*. This is because—so the argument goes—the *Individuation View* postulates the existence of more human rights than the *Multiple Duty View* and the *Multiple Duty-Bearer View* do—a human right for each human rights duty that exists and a human right for each human rights duty-bearer that exists. It might be claimed that the *Individuation View* is less simple than the *Multiple Duty View* and the *Multiple Duty-Bearer View*. By taking each human right to correspond to a single duty, the *Individuation View* is less ontologically parsimonious than the *Multiple Duty View*. That ontological parsimony is further undermined by the *Individuation View*'s taking each right-holder to have as many human rights as there are bearers of the duties to which they correlate. Thus, the *Individuation View* lacks an important theoretical virtue. It replaces ontological simplicity with complexity.

Moreover, through its rights-proliferation-by-content and rights-proliferation-by-duty-bearer, the *Individuation View* may also be seen as less conserving than the *Multiple Duty View*

⁴⁵ Alan Baker, 'Simplicity', *The Stanford Encyclopedia of Philosophy* (Winter edn, 2016) <<https://plato.stanford.edu/entries/simplicity/>> accessed 30 September 2019.

⁴⁶ Lawrence Sklar, 'Methodological Conservatism' (1975) 84(3) *Philosophical Review* 374.

of human rights. As I discussed above, the *Individuation View's* breaking of human rights up into more specific right-duty pairs is at odds with the view taken of the structure of human rights in practice. That is, by positing the existence of more human rights than human rights practice recognises, the *Individuation View* disrupts well-established beliefs about the structure of human rights.

Added to this—it might be said—is the fact that the *Individuation View* sacrifices simplicity and conservatism to explain something that is a marginal phenomenon, at best. That is, the phenomenon that the *Individuation View* purports to explain better than the *Multiple Duty View*—the waiver of human rights—is a problem of low incidence. In the ordinary run of cases, the *Multiple Duty View* does just fine at explaining how human rights work. It is even able to explain most cases of waiver. Those cases of waiver that the *Multiple Duty View* struggles to explain—those involving the waiver of human rights sharing the same ground—are only penumbral cases that do not cause serious embarrassment for that view.⁴⁷ To borrow an expression from Leiter, in my argument for the *Individuation View* ‘[t]hat [the *Multiple Duty View*] makes happy sense of *the overwhelming majority of [human rights-related] phenomena* appears to count for naught.’⁴⁸ While the *Individuation View* might be able to explain certain cases of waiver better than the *Multiple Duty View*—by postulating the existence of more human rights—this ignores the fact that these kinds of cases of waiver are infrequent and that the *Multiple Duty View* explains more common phenomena perfectly well. It might be thought, therefore, that the *Individuation View* increases ontological complexity and reduces conservatism only to deal with something that is marginal or penumbral, at best.

⁴⁷ I thank Henry Shue for mentioning this kind of response.

⁴⁸ Leiter (n 42) 1228 (emphasis in original).

Response

The first thing to note about the objection above is that ontological parsimony and conservatism are *pro tanto* theoretical virtues *only*, rather than an all-things-considered theoretical virtues. That a theory postulates fewer entities than another to explain some phenomenon does not automatically make it the best explanation of that phenomenon. As John Tasioulas notes, ‘we should be careful not to confuse parsimony with intellectual rigour, so that fewer is even presumptively equated with better.’⁴⁹ As I outlined above, whether an ontologically parsimonious theory is better than another also depends on how that theory measures up against other theoretical values. To make ontological parsimony an all-things-considered virtue would be, as David Braybrooke notes,

... to take for real the tidy consequences that would be features of social life if men’s actions and institutions fulfilled certain ideals of logical economy. In truth the corresponding features, not just of social life, but even of the concepts with which we carry on that life and interpret it, are untidy—redundant in some respects, indefinite in others.⁵⁰

Put differently, our moral and social worlds are messy. And to prefer a simple theory above all else is to risk missing the messy details of the way things actually work.

An example of an ontologically parsimonious but (as it turns out on further investigation) oversimplified theory is Aristotle’s theory of chemistry. Aristotle’s theory claims that all substances on earth are made up of four elements—Fire, Water, Air, and Earth.⁵¹ Given that it posits the existence of only four elements that combine to make up all other substances, Aristotle’s theory is considerably more ontologically parsimonious than modern theories of chemistry based on the periodic table of elements, which posit the existence of some 118

⁴⁹ John Tasioulas, ‘Towards a Philosophy of Human Rights’ (2012) 65(1) *Current Legal Problems* 1, 5.

⁵⁰ David Braybrooke, ‘The Firm but Untidy Correlativity of Rights and Obligations’ (1972) 1(3) *Canadian Journal of Philosophy* 351, 352.

⁵¹ Aristotle, ‘On Generation and Corruption (De Generatione et Corruptione)’, in *The Complete Works of Aristotle, Volume 1* (J Barnes (ed), Princeton University Press 1984) 540 II.3, 330a30–330b5.

elements, including 92 naturally occurring elements.⁵² Despite their ontological complexity, it is hardly supposed now that Aristotle's theory should be preferred to modern theories of chemistry based on the periodic table of elements. And, this is because ontological parsimony is a *pro tanto* theoretical virtue only.

Something similar can be said about conservatism. More conserving theories should be preferred over less conserving theories, all other things being equal. However, conservatism should not be used as a straitjacket for our understanding of the world, binding our theories of phenomena to a particular time and place. We should be alive to the possibility that mainstream theories are not adequate to resolve the problems that confront us in the modern world or to capture changes in the features of our interactions with one another.⁵³ As Neil Levy puts it, '[p]erhaps methodological conservatism is some kind of virtue, but it should not blind us to the need to revise our theories, and to follow them where they lead.'⁵⁴

Furthermore, conservatism—as a theoretical virtue—can come in degrees—it is not scalar. A theory may be more or less conservative. The theoretical virtue of conservatism does not require that a theory disrupt no well-established beliefs or theories. As WV Quine and JS Ullian note, there may sometimes be theories available that disrupt no prior beliefs and '[c]onservatism usually prevails in such a case; one is not apt to be tempted by a hypothesis that upsets prior beliefs when there is no need to resort to one.'⁵⁵ But, in general, conservatism just requires that such disruptions be minimised: 'Conservatism ... sacrifices as little as possible of

⁵² Michael Weisberg, Paul Needham, and Robin Hendry, 'Philosophy of Chemistry', *The Stanford Encyclopedia of Philosophy* (Spring edn, 2019) <<https://plato.stanford.edu/entries/chemistry/>> accessed 6 October 2019.

⁵³ This point is made by Helen Longino, who proposes the endorsement of a theoretical virtue of novelty. See Helen Longino, 'Gender, Politics, and the Theoretical Virtues' (1995) 104(3) *Synthese* 383, 387.

⁵⁴ Neil Levy, 'Methodological Conservatism and the Epistemic Condition' in Philip Robichaud and Jan Willem Wieland (eds), *Responsibility: The Epistemic Condition* (OUP 2017) 252, 264.

⁵⁵ WV Quine and JS Ullian, *The Web of Belief* (2nd edn, McGraw-Hill 1978) 67.

the evidential support, whatever that may have been, that our overall system of beliefs has hitherto been enjoying.⁵⁶

Taking these points into account, even though the *Individuation View* is less ontologically parsimonious and less conserving than the *Multiple Duty View* and the *Multiple Duty-Bearer View*, it is still a better explanation of the structure of human rights than the *Multiple Duty View* and the *Multiple Duty-Bearer View*. While it is disruptive of existing beliefs and theories in human rights practice, this is confined to beliefs and theories about the structure of human rights. As I discussed in Chapter Five, the *Individuation View* will reach the same conclusions as the *Multiple Duty View* and *Multiple Duty-Bearer View* in most cases, and it is consistent with the same grounding claims and claims about the nature of human rights that proponents of the *Multiple Duty View* and *Multiple Duty-Bearer View* make. The *Individuation View* does not unseat any fundamental or bedrock principles of human rights. Accordingly, its impact on the web of belief is minimal.

The *Individuation View*'s disruption of these prior beliefs and theories also allows it to achieve greater consilience. As I discussed in Chapters Four and Five, the *Individuation View* can explain something that the *Multiple Duty View* and the *Multiple Duty-Bearer View* cannot—what happens to a right-holder's rights when they waive one duty owed to them but not others. Furthermore, the capacity of the *Individuation View* to explain other human-rights-related and rights-related phenomena is no less than—and possibly greater than—that of the *Multiple Duty View* and *Multiple Duty-Bearer View*. Accordingly, the *Individuation View* can explain more than the *Multiple Duty View* and the *Multiple Duty-Bearer View* can.

What of the claim that *Individuation View* gives up ontological parsimony to explain a human-rights-related phenomenon of low incidence—the waiver of human rights sharing the

⁵⁶ *ibid.*

same ground? Two points can be made in response to this claim. First, whether or not the waiver of human rights sharing the same ground is frequent or infrequent, it is certainly an important human-rights-related phenomenon. As I argued in Chapter Three, waiver of human rights tracks the ability of right-holders to exercise their autonomy and self-determination. It marks out the boundary between permissible and impermissible intervention to enforce rights, given that a permissible intervention is one where the right-holder has not waived any claims to protection that they have against the duty-bearer. As such, waiver of human rights is something which any adequate theory of human rights should be able to explain in full, regardless of the frequency of its occurrence.

Second, despite the last point, it is not immediately clear that the kind of waiver of human rights that the *Multiple Duty View* cannot account for—the waiver of a human right sharing the same ground as another—is as infrequent as this doubt makes out. While it is up for empirical investigation exactly how often these kinds of cases of waiver occur, given the frequency of guilty pleas and hunger strikes—which are cases involving the waiver of one right but not others that share the same ground—they might occur more frequently than this fourth form of the proliferation doubt would have us believe. The *Individuation View* undoubtedly posits a greater number of human rights than does the *Multiple Duty View* and the *Multiple Duty-Bearer View*. But, as I have endeavoured to show above, this proliferation of human rights is not problematic.

C *An overlooked asymmetry between human rights and their duties*

The *Individuation View* makes each human right symmetrical with the duty to which it correlates. According to this view of the structure of human rights, each human right strictly correlates with a duty that matches its content. It might be argued that the *Individuation View*

is wrong to pair human rights and duties in this way. Doing so is to miss a latent asymmetry between human rights and their duties.

A proponent of the *Multiple Duty View* might argue that there is an asymmetry between human rights and their duties that makes it the case that they cannot be strictly correlated in the way that the *Individuation View* suggests. It might be claimed—as John Tasioulas does—that each human right (which is grounded in the important human interests and dignity of the right-holder) also operates as a ground for its duties. If we accept that human rights ground their correlative duties, then it becomes the case that each human right may correspond to multiple duties, since each right will generate whatever duties will protect the interest that grounds it and which are feasible in the circumstances.

Response

It is true that taking human rights as the ground of their correlative duties might make it the case that each human right corresponds to multiple duties. However, because each human right is itself grounded in important human interests (or other features of the right-holder) this threatens to collapse the distinction between human rights and the interests (or other features) of the right-holder that ground them. As Carlos Nino notes of Joseph Raz's interest theory of rights:

[T]here is ambiguity in Raz's formulation. Whereas sometimes he speaks of a right as a basis or reason for a duty, at other times, as his explicit definition emphasizes, it is the interest protected by the right and not the right itself which is the ground of the duty.⁵⁷

This creates a problem, because if each human right is grounded in interests (or other features) of the right-holder and also serves as the ground for its corresponding duties, it is hard to see what kind of normative role each human right has that is distinct from the normative role that right-grounding interests have. Human rights appear at base on this view just to be the interests

⁵⁷ Carlos Nino, *The Ethics of Human Rights* (Clarendon 1991) 30.

that underpin them. As Nigel Simmonds puts it, '[i]t is difficult to see, on this analysis, how the assertion of a general right differs from the assertion of an important interest.'⁵⁸ Jesse Tomalty makes a similar point, when she says of Tasioulas's account:

[T]he affirmed right does exactly the same normative work as the value that grounds it. This is because the inference that there is reason to hold some yet-to-be-specified agents to have the relevant duties can be drawn directly from the value for all humans of having secure access to the means for subsistence.⁵⁹

So, taking human rights as the grounds of duties cannot preserve a distinctive normative role for human rights. They become mere rearticulations of the underlying important interests (and other features) of the right-holder that ground them. For this reason, I think we should resist any move that takes human rights as the grounds of their duties.

By contrast, the *Individuation View* is particularly well suited to capturing the distinctive normative role of human rights. By taking the content of each human right to correspond to the content of its correlative duty, and by taking a separate relation of right to obtain between each right-holder and each bearer of a specific duty, the *Individuation View* captures the way that each human right vests its holder with a particular normative authority in relation to a particular duty-bearer—the particular moral authority to hold the bearer of the correlative duty accountable for the performance of that duty.⁶⁰ That is, the *Individuation View's* precision in linking up human rights and duties makes it clear that the normative authority of the right-holder is in respect of a particular person and in respect of the performance of a particular act-type. This symmetry between rights and duties that the *Individuation View* sets up is simply an 'existential symmetry'—namely, that human rights and their correlative duties co-obtain. The *Individuation View* leaves it open as to where the justificatory source of each right is to be found. As such, it avoids the problem that the *Multiple Duty View* encounters of confusing

⁵⁸ Nigel Simmonds, 'Rights at the Cutting Edge' in Matthew Kramer, Nigel Simmonds, and Hillel Steiner (eds), *A Debate Over Rights: Philosophical Inquiries* (OUP 1998) 113, 151. See also Jesse Tomalty, 'The force of the claimability objection to the human right to subsistence' (2014) 44(1) *Canadian Journal of Philosophy* 1, 5.

⁵⁹ Tomalty (n 58) 5.

⁶⁰ Rowan Cruft, *Human Rights, Ownership, and the Individual* (OUP 2019) 62-7.

rights and their underlying interests.⁶¹ Accordingly, the symmetry that the *Individuation View* sets up between rights and duties then is not an embarrassment for the theory.

D *A conservative approach to human rights instruments*

As I have discussed above, the *Individuation View* marks a departure from much of what I set out in Chapters One and Two. In particular, it abandons the view that human rights come as dynamic entities that ground changing waves of duties. Instead, it takes the position that human rights and their correlative duties come in ascertained pairs.

One might worry that this creates some potential to reinforce conservative approaches to the interpretation of human rights instruments.⁶² That is, you might think that adopting the *Individuation View* means that the rights enshrined in human rights instruments cannot be expanded to accommodate changing circumstances but must be fixed as whatever right-duty pair was enshrined by the drafters of the instrument.

Response

It has not been the intention of this thesis to present a view of the structure of human rights that supports such a conservative approach. In fact, I think such a conservative approach is ultimately wrong. Furthermore, what I have been talking about over the course of this thesis has been *moral* human rights rather than human rights law. I leave it as an open question whether the *Individuation View* is something that is or ought to be embraced in human rights law. What I claim here is that moral human rights come in ascertained, and precisely individuated, pairs. This does not in and of itself deny that human rights can change with changed circumstances. As I discussed in Chapter Five, Section B.2, on the *Individuation View*, different finely

⁶¹ I am indebted to an anonymous examiner for the phrase ‘existential symmetry’, and for this characterisation of the position of the *Individuation View*.

⁶² I thank John Tobin for pointing out this worry.

individuated right-duty pairs may be generated by the fundamental interests of human agents in different social and political circumstances. Accordingly, that the *Individuation View* denies a Razian-style dynamicity of rights does not mean that it requires that human rights instruments be interpreted in a conservative fashion.

E Conclusion

In this chapter I have attempted to provide some responses to what may be thought to be some pressing objections to the *Individuation View* of the structure of human rights. First, while the *Individuation View* departs from human rights practice, this is not fatal to its success as a theory of human rights. This is because the structure of human rights is a technical matter that depends on reflection on how human rights work and aid us in our practical reasoning. Human rights practice might not be expected to be right on such matters, and accordingly we should not necessarily be surprised when a theory of moral human rights departs from practice on such a matter. Second, that the *Individuation View* produces more rights than the *Multiple Duty View* does not necessarily make it problematic as a theory of the structure of moral human rights. Though it causes a proliferation of human rights, it retains intuitive appeal by disciplining and bringing precision to rights-talk. The *Individuation View's* proliferation of human rights will not necessarily radically devalue the currency of human rights. By finely individuating human rights into specific right-duty pairs, the *Individuation View* will allow each relation of right to be considered separately for its importance and stringency. This will go at least some way to preserving the currency of human rights. Despite producing many more rights than the *Multiple Duty View*, the *Individuation View* makes the guidance of action by human rights no more difficult than under the *Multiple Duty View*, as it produces no more duties than that view. Indeed, the *Individuation View* makes practical reasoning more precise by correlating each human right to a duty of equivalent content. Although the *Individuation View*—by proliferating human rights—is less ontologically parsimonious and conserving than the *Multiple Duty View*,

it has greater explanatory power. Third, the asymmetry between human rights and their duties in their grounding role does not necessarily make the *Multiple Duty View* a better fit as a theory of the structure of human rights. Taking human rights to be the ground of their duties blurs the distinction between rights and their grounds, and—at any rate—the *Individuation View* is better able to capture the distinctive authority-grounding role of each human right as well as the reason-giving nature of human rights duties by positing separate human rights for each correlative duty. Finally, although the *Individuation View* denies a Razian-style dynamicity of rights, this does not necessarily mean that it commits its holders to a conservative approach to the interpretation of human rights instruments. The *Individuation View* is a claim about moral human rights which leaves open how human rights instruments ought to be interpreted.

Conclusion

THE CENTRAL THEME of this thesis has been the relationship between human rights and their correlative duties. In the Introduction, I posed several questions for inquiry:

- 1. Why is it that something like the human right not to be tortured correlates with three duties rather than one?*
- 2. Can the duties that the Multiple Duty View says correlate with each human right instead each be correlated with separate human rights?*
- 3. Is there anything that the Multiple Duty View cannot explain that the Individuation View can explain?*

In Chapters One and Two I offered some answers to the first question. Chapter One explored the view of the structure of human rights that has been adopted in human rights practice. Through an examination of the jurisprudence of authoritative human rights bodies—including the United Nations Human Rights Committee (UNHRC), the United Nations Committee on Economic, Social and Cultural Rights (UNCESCR), the European Court of Human Rights (ECtHR), and the Inter-American Court of Human Rights (IACtHR)—I demonstrated that the *Multiple Duty View* has been influential in human rights practice.

Chapter One offered two reasons for the endorsement of the *Multiple Duty View* by authoritative human rights bodies: (1) that failing to recognise that human rights correspond to multiple duties leaves those rights open to frustration and makes them into ineffective instruments for vindicating the fundamental interests of their holders; and (2) that the *Multiple Duty View* appears to make the best sense of the abstract framing of the rights and duties in key human rights instruments.

Chapter Two turned to consider some philosophical accounts of human rights that endorse the *Multiple Duty View*. I examined in detail the versions of the *Multiple Duty View* developed by Henry Shue, John Tasioulas, and Rowan Cruft. Two reasons for the endorsement of the *Multiple Duty View* arise from those accounts. First, Shue suggests that no human right correlates with one duty only, as all human rights—in order to be effectively enjoyed—require that duty-bearers comply with duties of non-deprivation, protection, and aid. Something like the right to physical security, which correlates with a duty not to deprive the right-holder of their physical security—for Shue—is only meaningful when it is also correlated with a duty to protect the right-holder against those who might deprive them of their physical security and a duty to aid the right-holder when they have been deprived of their physical security. Second, Tasioulas and Cruft argue that it is only when we take human rights to correlate with multiple changing duties that we can make sense of human rights (and particularly socio-economic rights) being held universally, and particularly against weak states. For example, according to Tasioulas and Cruft, by taking the right to food to correlate with multiple changing duties, we can affirm that that right is held against both strong and weak states, as it will correlate with different duties in respect of each—more rigorous duties in respect of strong states, and weaker duties in respect of weak states.

Having examined the contours of the *Multiple Duty View*, and the reasons offered by its proponents for its adoption, I turned in Chapters Three and Four to present a challenge to

it—offering an answer to part of the third question above: that there are somethings that the *Multiple Duty View* cannot explain. Chapter Three advanced an argument for limited waiver of human rights, based on personal autonomy, and Chapter Four argued that the *Multiple Duty View* struggles to explain even common cases of waiver of human rights, such as guilty pleas. Because the *Multiple Duty View* takes each human right to be correlated with multiple changing duties, it cannot individuate human rights according to the act-types that their correlative duties make obligatory. To accommodate the multiple duties to which it correlates, each human right must be broader than its duties. Because of this, the *Multiple Duty View* can only individuate human rights according to their grounds or the subject matter of their duties and will not recognise the separateness of human rights sharing the same ground or that correlate with duties with the same subject matter. This individuation problem means that when a right-holder releases a duty-bearer from some (but not all) of their duties correlative to that same human right, it is unclear what happens to the right-holder's human right. Because the *Multiple Duty View* takes the duty that has been waived as well as other duties to correlate with one human right, it can only say either that that right is waived or retained. It does not have the resources to say that part of the right is waived (so as to match the duty that has been waived) and part is retained, since it cannot individuate human rights according to the act-types that their correlative duties make obligatory.

In Chapter Five I argued that the *Individuation View* of the structure of human rights—which takes each human right to be correlated with a single duty that matches its content—can explain these cases of waiver. Because the *Individuation View* takes each human right to correlate with one duty only, it can individuate human rights according to the action that their correlative duties make obligatory. And this means that when a right-holder releases a duty-bearer from one of their directed duties, this is matched by a giving up of the correlative human right. Chapter Six went on to consider and provide some responses to some objections to the

Individuation View. I concluded that, though the *Individuation View* breaks step with practice and offers a less ontologically parsimonious account of the structure of human rights than the *Multiple Duty View*, by being able to explain cases of waiver it has greater explanatory power, which eclipses these deficiencies. In presenting this case for the *Individuation View*, I offered answers to the second and third questions above.

The central contribution of this thesis, then, has been to explore the structure of human rights and advance the dialogue on this important topic. I have examined and presented a *pro tanto* challenge to the *Multiple Duty View* and proposed an alternative view of the structure of human rights—the *Individuation View*. I have argued that the *Individuation View* has greater explanatory power than the *Multiple Duty View* because of its ability to explain cases of waiver of human rights. My discussion of the problem of waiver is not meant to provide a knock-down argument against the *Multiple Duty View* (and I doubt that I have one), and neither does this thesis hold the *Individuation View* up as *the* correct theory of the structure of human rights. Much remains to be done to fully defend the *Individuation View*, but I hope to have shown some of its strengths as a theory of the structure of human rights—including being able to account for which parts of a right-holder’s human right have been retained and which have been waived in situations of waiver.

This thesis has also made some contributions on other important themes, one of which being waiver of human rights. Waiver remains an underexplored part of rights theory—and in particular the theory of human rights. Much has been written on the topic of consent-in-general, but little time has been devoted by philosophers of rights to exploring the specific contours of waiver. Waiver raises important and interesting questions about how rights work. And one of the contributions of this thesis is my attempt in Chapter Three to bring together and fill out some patchy discussion of what it means to waive a right. I put forward a suppression theory of

waiver; however, much work remains to be done to completely vindicate that account of how waiver of rights works.

Another theme which is picked up on but left underdeveloped by this thesis is the connection between rights theory and the philosophy of action. In Chapters Four and Five I made the beginnings of bringing these two bodies of work into dialogue with one another. However, my discussion of the connection between the individuation of rights, duties, and act-types involved little more than starting the conversation. As I note in Chapter Five, a complete theory of the structure of human rights, and a full solution to the problem of waiver, requires developing a theory of the individuation of act-types. This is a significant task that I have only been able to start in this thesis. Its completion will have to await future work.

What I hope to have shown in this thesis is that the structure of human rights is a topic worth discussing and worth investigating further. Its implications are not just semantic. It affects how human rights work in our world and how they aid our practical reasoning. Although the *Multiple Duty View* offers an elegant way of understanding human rights and their correlative duties, this elegance should not blind us to the difficulties its adoption may present to us in being absolutely clear about our normative entitlements from one time to another. The *Individuation View* offers a way of being more precise about how our human rights work and relate to their correlative duties. However, there are undoubtedly more refinements to be made before we get to a fully satisfying account of the structure of human rights.

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