JAKOB WEISSINGER

Content and Competence

Rechtstheorie · Legal Theory
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Mohr Siebeck

Rechtstheorie · Legal Theory

herausgegeben von

Thomas Gutmann, Tatjana Hörnle und Matthias Jestaedt

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A Descriptive Approach to the Concept of Rights

Mohr Siebeck

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Cologne, December 2018 Jakob Weissinger

Content Overview

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I. Methodological Remarks & Clarifications

What is a right? As simple as it may seem at first glance, that is the underlying and overarching question of this thesis. Undoubtedly, we are all familiar from everyday life with the notion of rights. We suppose that we, as human beings, generally have rights, we use them as arguments in normative discourse, we claim them, we argue (sometimes fiercely) about who or what has or ought to have which rights. In short, the language of rights is "pervasive […] in politics, law and morality"[1]. Accordingly, knowing that there are rights as an essential part of our normative practice, at first glance, at least from the point of view of someone inexperienced in legal and moral philosophy, it should not be too hard to clarify what rights actually *are* then. Yet, it is this seemingly straightforward issue upon which philosophers and jurists have failed to reach even a basic agreement literally for ages. Why is that so? Taking a closer look, it is not just the nature of rights, but the nature of the initial question itself that appears problematic. Essentially, we must ask ourselves: does it suffice to confine oneself to the question 'what is a right?' in that form? Are we looking into the nature, the essence of rights then? How can we determine the nature of a normative term like 'rights' anyway? In short, is the epistemological interest specified enough by the initial question to possibly get a clear and meaningful result? Unsurprisingly, to ask this last question is to negate it. The reason for negating it lies not only in the vast amount of literature on the topic itself, sometimes seeming like an impenetrable and dense jungle to any new arrival, but also the fact that in this jungle all sorts of ideas on rights from all sorts of perspectives, scientific disciplines and cultural backgrounds have been lumped in with one another and grown together to make it appear to the interested reader as impermeable as well as opaque.[2] Thus, starting any treatise on rights – arguably, with this topic even more so than in general – it seems absolutely vital to point out very clearly the exact epistemological interest, the aim and method of an endeavour like the one ventured here. To the sophisticated reader with a philosophical background, some of the following remarks might thereby seem self-evident and as such superfluous; yet, hopefully, it can and will be demonstrated that it is flaws and

[1] Tom Campbell, *Rights: A Critical Introduction* (London/New York: Routledge, 2006), 3.

[2] Karl Llewellyn, *The Bramble Bush* (New York: Oceana Publications, 1930), 30: "Rights is a term that drips confusion". Cf. Markus Stepanians, introduction to *Individuelle Rechte* (Paderborn: Mentis, 2007), vii.

inaccuracies in the involvement with these fundamental questions that make quite a lot of current and traditional literature on rights defective. In this respect, to point out the importance of methodological clarity at the beginning of any treatise on rights seems more than just appropriate but actually a vital necessity.

To begin with, the ultimate aim of this thesis will be to formulate a suggestion for a concept of rights which captures the essence of the term and, most importantly, can serve as a common basis for substantive normative debate and theory design due to being *normatively neutral*. We shall look into the meaning of 'normative neutrality' presently. Beforehand, it is important to note that a central aim of this thesis is to thoroughly explore and describe the path which leads to the determination of such a concept. In other words, the goal is not only or primarily to produce an independent concept of rights, but also and especially, to clear the way a bit for future discussions about rights. Hence, this book is supposed to be just as much a work about rights as it is one about the theory of rights. Or, once more figuratively speaking: the main aim is to cut a small swathe through the jungle of rights theory and rights talk. By doing so, this book will at best not only shed a little light on a few of the darker spots in there, but also, by letting some fresh air into some of the denser parts of the forest, let out some heat from a few longstanding debates in the context of rights. Specifically, our interest will be on the debate about the proper concept of rights, focusing on the two major theory families: Interest (or Benefit) Theory and Choice (or Will) Theory.

One more remark before proceeding: The cutting of a swathe straight through a wide range of areas of moral and legal philosophy has the advantage of connecting knowledge that is too often left unconnected, thus enabling us to gain a better theoretical overview. Naturally, it is accompanied by great disadvantages as well, which can only be named and have to be accepted as such. Because the goal is theoretical clarification, synthesis, and exegesis, a number of highly problematic theoretical issues will have to be dealt with throughout this work, and a few self-developed ideas will have to be sketched, most of which cannot be explained to a full or (even vaguely) satisfying extent in a thesis like this. In most parts, highly controversial theoretical issues will be dealt with rather cursorily or even only be touched on *en passant*. Naturally, this might give rise to accusations of superficiality, which are equally naturally hard to rebut. Thus, to a certain degree, I will have to rely on the indulgence of the reader, and especially of all those scholars whose works, though related to the overall topic of rights, I could not incorporate into this thesis.[3] A famous quote ascribed to *Ger-*

[3] In this respect, I share a general aim, if not necessarily the quality of his work, with the great legal theorist Herbert Lionel Adolphus Hart, who in the preface to his seminal book 'The Concept of Law' noted that one of his goals was to "discourage the belief that a book on legal theory is primarily a book from which one learns what other books contain. So long as this belief is held by those who write, little progress will be made in the subject; and so long as it

trude Stein is: "I like a thing simple but it must be simple through complication. Everything must come into your scheme, otherwise you cannot achieve real simplicity"[4]. This somehow dialectical relation between simplicity and complication appears inevitable for our purposes as well. And albeit the aim of this thesis is to simplify the idea of rights, a mere sense of reality forces us not even to try to explain every problem associated with rights. Even though I am fully aware that this might in parts result in a lack of comprehensiveness, we shall nevertheless try to lunge out as far as possible in terms of investigating theoretical problems/disputes linked with the notion of rights and consequently connect the dots. Such a kind of endeavour, despite its obvious weaknesses, is believed to be able to play a valuable part in this – as in any – debate in legal theory.

1. Approaching Rights

Thus, what exactly is our epistemological interest with regard to 'rights'? And how can we distinguish it from other possible approaches? *G. E. Moore* put it in a nutshell when he wrote that generally "in Ethics, as in all other philosophical studies, the difficulties and disagreements […] are mainly due to a very simple cause: namely to the attempt to answer questions, without first discovering precisely *what* question it is which you desire to answer."[5] If as much is true, we should clarify at first what exactly the question is that we are trying to answer.

a) Conceptual versus Justificatory

Thus, let us dwell on the possible concrete aims of a theory concerning rights. In discussing rights, it is widely acknowledged – and often too uncritically adopted, for that matter – that one can and should distinguish between two kinds of approaches: an analytical, conceptual, or meta-ethical one in search for an answer to the question 'what *are* rights?'; and a justificatory, normative one aiming at a satisfactory answer to the question 'what rights *should* there be?',[6] i. e. how a normative system containing rights should be substantively shaped.

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is held by those who read, the educational value of the subject must remain very small." See H. L. A. Hart, preface to *The Concept of Law*, 3rd ed. (Oxford: Oxford University Press, 2012 [1961]), vii.

[4] As quoted by Robert Haas, afterword to *What Are Masterpieces*, by Gertrude Stein (New York/London: Pitman Publishing, 1970).

[5] George E. Moore, preface to *Principia Ethica* (Cambridge: Cambridge University Press, repr. 1968 [1903]), vii.

[6] See inter alia: William Edmundson, *An Introduction to Rights* (Cambridge: Cambridge University Press, 2004), 119; Joseph Raz, *Practical Reason and Norms* (Oxford: Oxford University Press, repr. 2002 [1975]), 10; Richard Brandt. "The Concept of a Moral Right and its Function," *The Journal of Philosophy* 80 (January 1983): 29; George Rainbolt, *The Concept*

As indicated above, ours is supposed to be a *conceptual inquiry*[7], i. e. in general we are looking for some kind of definition or explanation of the term 'right'. More precisely, we are planning to find and acquire an adequate understanding of the term 'right' – as in statements like 'A has a right to do X', 'A has a right towards B that B not do Y' or similar ones – which ought to make the term compatible with or viable for any conceivable and coherent substantive normative theory. The general goal of a conceptual inquiry thus understood is as basal as it is vital for any theoretical discourse. It is nothing but terminological clarity, i. e. a clear and commonly agreeable understanding of a central term used in a certain field of interest. The idea is to find and define the term in question in a way so that everyone participating in a substantial discourse can *a priori* agree on its basic meaning. Yet, is this the same kind of endeavour that other scholars undertook, who examined the concept, the meaning or the nature of the term 'rights'? Quite clearly not, as there are various ways to approach 'rights' as a social phenomenon. To begin with, one could approach the term from an empirical, descriptive[8] perspective, analysing only the actual usage of the term. Furthermore, one could be interested in the historical dimension, the tradition and genesis of the term, examining the origins of usage and the way the term developed over time. Finally, one could choose a more philosophical approach and try to acquire the best possible understanding of the term 'rights' in a given social context, i. e. a certain linguistic practice of a certain group of speakers, with the main goal of producing a consistent definition. Are the respective products of these approaches all different kinds of 'concepts'? Accordingly, what exactly is meant by 'conceptual' and what is meant by 'justificatory'? However clearly the distinction between conceptual and justificatory approaches is sometimes stated, it is at least as common in theoretical discourse to assume a blurring of lines between the above-mentioned two levels. For instance, both Choice Theory and Interest Theory are regularly believed to function on both levels alike.[9] Thus, it appears advisable to examine the exact relation between

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of Rights (Dordrecht: Springer, 2006), 14; Neil MacCormick, "Rights, Claims and Remedies," *Law and Philosophy* 1 (August 1982): 356; Jules Coleman, *Markets, Morals and Law* (New York: Oxford University Press, 1988): 33–34; Leif Wenar, "Rights," in *Stanford Encyclopaedia of Philosophy*, ed. Edward N. Zalta (Stanford University, 1997–), https://plato.stanford.edu/archives/fall2015/entries/rights/. Critical: Andrew Halpin, *Rights and Law* (Oxford: Hart Publishing, 1997): 19–23.

[7] The term 'conceptual analysis' is consciously avoided here, because our aim shall not be a mere *analysis* of the term 'rights', i. e. a decomposition of the factual usage of the term. This thought will be clarified presently. See also below sec. I, fn. 19.

[8] Descriptive in the sense of 'referring to facts', not in the sense of 'normatively neutral', see presently sec. b), aa).

[9] Edmundson, *Rights*, 119 ff. Cf. also Matthew Kramer, "Rights without Trimmings," in *A Debate over Rights*, ed. Matthew Kramer, Nigel Simmonds, and Hillel Steiner (Oxford: Clarendon, 1998), 91 (hereafter cited as *RWT*). Here Kramer claims that every concept of rights at least has some 'thin evaluative stance' to it.

these two levels – the conceptual and the justificatory – and the two respective epistemological questions as a first step.

aa) Definitions: Some Introductory Remarks

Preliminarily, a few brief, and I suppose for philosophers of language unnervingly shallow remarks about definitions or specification of linguistic terms in general appear necessary. Some introductory thoughts, again based on classical remarks by *G. E. Moore*, shall lead the way. In his seminal work 'Principia Ethica' he described three different ways of defining a term:[10] the arbitrary verbal definition, the verbal definition proper and a third one, which he gives no specific name. The arbitrary verbal definition is purely stipulative, not (necessarily) taking into account the actual usage of a term. An example is, 'I define a table as a piece of furniture with a flat top and three legs'. Given the relativity of language, such a definition is possible, of course, but in effect it is more or less senseless. It can be regarded as common sense that language is alive, that it is generally developable, and thus improvable, but also that it is a mere social fact. A definition which entirely loses its reference to the actual usage of the term that is being defined is bound to fail. On the other hand, the aim of a strict verbal definition proper is to describe *only* the actual usage of a term, like in the sentence: "All English speaking persons understand a 'table' as being X." A subset of this kind of definition is the dictionary definition; in our example the Oxford Dictionary defines a table as "a piece of furniture with a flat top and one or more legs, providing a level surface for eating, writing, or working at"[11]. As we can already see in comparison to the arbitrary definition above, this kind of approach bears the advantage that it is properly linked with language as a factual phenomenon. For example, we all know tables with just one leg, which no one under normal circumstances would deny the quality of being a table. However, from mere experience we know that the common usage of a term can often be irregular, by times inconsistent.[12] So, taken for granted that a general aim (if not *the* general aim) of philosophical enquiries is to reduce and at best eliminate inconsistencies in language usage, this kind of definition is not conclusively helpful either, as it only refers to facts irrespective of the correctness or cogen-

[10] Moore, *Principia Ethica*, 8; William Ross, *The Right and The Good* (Oxford: Clarendon, repr. 1973 [1930]), 1.

[11] *Oxford Dictionary*, s. v. "table," accessed December 28, 2016, http://en.oxforddictionaries.com/definition/table.

[12] It appears almost trivial to state that, even with a relatively clear example like this one, there will always be marginal cases. How high does an object have to be to still be qualified as a table? How large does the surface have to be? One does not unduly have to stress his or her imagination to come up with examples in which people could and would most probably disagree about the table-quality of an object. However, these are problems of interpretation of a general definition, not so much of correctness of the definition as such.

cy of a certain concept. In other words, if we simply analyse the factual usage of a term, we may work out certain common features, but we are unable to determine whether the usage was or is sensible in the first place. Finally, *Moore* continues by explaining a third way of defining a term. With this one "we may mean that a certain object, which we all of us know, is composed in a certain manner: (…)."[13] Thus, if we understand this statement correctly, an ideal definition of a term would be equivalent to a conclusive list of all elements (including their interdependent relations) of a certain object – their 'defining' features. Yet, this kind of precision can in practice hardly ever be expected. There will always be objects which could fall under a term but need not necessarily do so. There will always be marginal cases.[14] Once more, not *all* elements of a definition are a matter of controversy. In our example, there are elements in the definition of a table which, I presume, are undisputed amongst all members of a linguistic community. Such 'core features' of a table could for instance be 'an object with a flat top and at least one leg for people to stand or sit at'. So, it is presumed that, when various speakers discuss the features of a table, they might disagree on some features, e. g. the height or the number of legs, whilst they would most probably all agree on the features object, flat top, leg(s) and standing or sitting opportunity.[15] Thus, it appears sensible to divide the definition process into two separate steps: First, one can work out *factual minimum requirements* which the investigated term has to meet, i. e. such conditions which every reasonable speaker of a certain language would still agree upon, leaving aside those conditions that cause or could cause disagreement between different speakers within the same community. If these minimal conditions are found, we have found what we shall henceforth call the *scope*[16] of a term. As an intensional definition[17] the scope is as such not viable for practical usage. For a start, it is merely

[13] Moore, *Principia Ethica*, 8.

[14] Whether something falls under a definition is a matter of interpretation then, a normative task. See esp.: H. L. A. Hart, "Problems of the Philosophy of Law," in *Essays in jurisprudence and philosophy* (New York: Oxford University Press, 1983), 89; John Finnis, *Natural Law and Natural Rights (*Oxford: Clarendon, 1980), 9 ff. Cf. also Timothy Endicott, "The Irony of Law," *Oxford Legal Studies Research Paper* No. 42 (2012), https://ssrn.com/abstract=2091043, 1–3.

[15] As such it is not far from the dictionary definition, see above fn. 11. Even if they were equivalent in this case it would not ruin the more general point, though. In that case the dictionary definition would simply restate the core elements; that is, it would somewhat *incidentally* be just as wide as the scope of the term 'table'.

[16] What is called the scope of a term here should by no means be confused with the similar notion of a prototype, see e. g. Eric Margolis and Stephen Laurence, "Concepts," in *Stanford Encyclopaedia of Philosophy*, ed. Edward N. Zalta (Stanford University, 1997–), https://plato.stanford.edu/archives/spr2014/entries/concepts/, sec. 2.2. A regular dinner table with four legs would for example most probably be called a prototype of a table (as everyone would agree on the table quality of the object), which does not imply that all tables need to have four legs. The minimal definition is wider. It includes all *possible* understandings of a term.

[17] Cf. Anil Gupta, "Definitions," in *Stanford Encyclopaedia of Philosophy*, ed. Edward

equivalent to the widest *possible* understanding in a given linguistic context, i. e. within a certain group of speakers. Methodologically, we use pure analysis in order to gain the scope. Hence, the scope does not have to rely on any value judgements. It is purely descriptive. As a second, consecutive step we are now able to gain a proper *concept* by evaluating the scope with respect to such quality features that might make it a good – that is, valuable and viable – concept. Thereby we might find additional definitional features for the term in question. Yet, importantly, a concept in this sense does not necessarily have to be narrower than its scope with regard to cases of application. That is, the second evaluative step should not be confused with a critical evaluation of those definitional features which are or could become a matter of controversy or with a decision in these controversies either way. To do as much would mean stipulation. Yet, a concept as presented here merely *can* be stipulative – it does not have to be. In other words, although a concept can be just as wide as the scope and consist of only its necessary core features, there need to be good reasons (or at least *a* good reason) for such a wide concept. Thus, the difference between scope and concept lies not in critical or marginal cases, which, as one may assume, could be excluded by the former and somewhat included by the other, but rather in the way each of the two is won. The scope is won by means of a pure, descriptive analysis of actual language use. It represents the smallest common denominator of various, possibly divergent ways in which a certain term is actually used. Whether this scope makes a good concept is an entirely different matter. In order for something to be a good concept there have to be reasons for why we should apply this concept and not some other one. In case of the scope applied as a concept, it has to be at the very least the pragmatic reason that speakers do not have to adjust their usage of the term (or at least reduce necessary adjustments to a minimum).[18] However, there might be different reasons why another, narrower concept could be preferable. What these reasons are in particular with respect to a concept of rights shall be investigated in much detail in sec. III, 2., e). For now, we shall just establish that the task of gaining a practically viable concept should be divided into two steps: a purely descriptive analysis with the result of gaining the scope of a term, and a subsequent (evaluative) decision for or against a concept, which can but does not have to be congruent with the scope depending on the significance of the reasons voting in favour of the respective concept. The advantages of such a two-step conceptual inquiry[19] as

N. Zalta (Stanford University, 1997–), https://plato.stanford.edu/archives/sum2015/entries/definitions/.

[18] With respect to quality features of a concept of rights this reason represents the feature 'practical adequacy', cf. below sec. II, 2., e), cc), (1).

[19] Cf. above fn. 7. The common term 'conceptual *analysis*' is purposefully not used, because what is proposed is just not a plain analysis, but a methodological approach which is in search of the best possible term to be used as a basis for further (substantive) inquiries. Only to

just described are supposedly evident: It combines positive aspects of both of the first two approaches concerning definitions described by *Moore*. It is evaluative and thus (at least possibly) stipulative, i. e. it is aimed at a somewhat good or better language, and it is not just a delineative inventory. However, due to the prior descriptive, analytical step it is thus only to an extent where inconsistencies and irregularities in language use are ruled out, and the concept still meets the fundamental understanding of a term in everyday usage, i. e. of all relevant speakers involved. Hence, the concept is regenerated with language as a factual phenomenon. Such a bipartite kind of conceptual inquiry takes into account not only the contingency of language, but also its actual existence as an undeniable social fact to cope with.

Importantly, the foregoing remarks do not imply that one should in any case proceed the way proposed here when examining a certain term. It is simply the way we shall proceed in this context. Undoubtedly, there are other possible theoretical designs, other kinds of analyses.[20] Ours is the project of finding a concept which shall serve a specific purpose, namely to structure and linguistically harmonise the debate about rights but without losing connection to language as a factual phenomenon. As such it is presumably most closely linked to *Haslanger*'s notion of an *ameliorative analysis*, combining strictly analytical and evaluative elements.[21] Thereby it is neither strictly descriptive, nor historical, albeit it does not per se disregard historical aspects nor such aspects regarding the term's factual usage.[22] Also it should not be mistaken with the goal of the 'philosophical' approach sketched earlier, in search for a consistent usage of the term, for the best possible understanding in a given context. Such a 'concept' would not have to rely on any kind of evaluative judgement, which represents a decisive difference in comparison to our approach. That is, if consistency were the only criterion to mark the quality of a 'concept', we could reach our goal simply by means of (pure) analysis.[23] Apart from these rather crude explanations, the cogency of the idea of a combination of purely descriptive and evaluative elements in order to reach the goal proposed earlier will have to be axiomatically presupposed for the ensuing work. Unfortunately, a further development of this matter is not possible in this context.

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the degree of implying step (1.1) is this endeavour truly analytical. Beyond that it is evaluative and thereby possibly – even though not necessarily – stipulative.

[20] See e. g. Sally Haslanger, "What Good Are Our Intuitions? Philosophical Analysis and Social Kinds," *The Aristotelian Society* 80 (June 2006). http://www.mit.edu/~shaslang/papers/HaslangerWGOI.pdf, 6 ff. Page reference refers to the online version.

[21] Ibid, 7.

[22] Cf. below sec. III, 2., e), cc).

[23] We shall return to this thought much later, in sec. III, 2., e), dd), when actually making a decision between the merits of Choice Theory and Interest Theory.

bb) The Scope of Rights

Let us transfer the foregoing ideas about the kind of 'concept' we are looking for to our problematic initial question, 'what is a right?' To begin with, we ought to determine the scope of the term 'rights'. In order to do so we need to ask ourselves: What out of all things could possibly be called a right? Like in the example above, we cannot rely on mere prototypes or typical examples.[24] A table with one leg can be a table just as well as one with six or eight legs. Accordingly, we have to examine all the relevant ways in which the term is used and consequently derive the core features by method of elimination. To start with, here are a series of statements containing the notion of 'a right', all of which I presume are most common and recognisable from everyday usage of the term.[25]

(I) I have a right to bodily integrity.
(II) My friend Q has a right not to be insulted by you.
(III) Babies have a right not to be abused or harmed in any way.
(IV) A has a right to claim the money out of a sales contract with B.
(V) C has a right to attend demonstrations and express his opinion on the government.

As our aim is to find those features that every reasonable speaker[26] would agree upon, we can now continue asking: Which possible features of rights can already, only from investigating these examples, be excluded from the scope? Given the statements above were all commonly accepted we can infer:

(1) Rights are not necessarily only active, i. e. regarding one's own actions, see (IV) and (V), but possibly also passive, i. e. regarding the actions of others, see (II) and (III).

(2) The ability to have rights is not necessarily linked with the ability to make one's own decisions, i. e. with moral or legal agency, see (III).

(3) Rights do not even necessarily have to be associated with a certain action, see (II) – (IV), but they can also be abstract, see (I).

What is then left to positively extrapolate from the five rights statements above are three core features, all of which I believe would be agreed upon by

[24] It is questionable whether there are any prototypes for 'rights' at all. Show people a regular dinner table and they will happily agree that they are standing in front of a table. Show them even the most basic statement containing information about a right or rights and they are probably going to argue about it.

[25] Surely, it is possible that singular speakers could disagree at this point. It is impossible ever to exclude this possibility entirely. Our aim is therefore to name certain general and generally accepted cases of applications, which can be regarded as overall accepted and understandable.

[26] Despite its obviously problematic implications, the idea of 'reasonable' speakers will have to be presupposed at this point in order to deduce the respective core features.

both Interest and Choice theorists as well as proponents of any other theory concerning the nature of rights. Essentially, rights are normative, they are generally advantageous[27], and they are appendant, i. e. they are bound to specific entities.[28] In detail:

(1) Rights are an essentially normative phenomenon. This first point is supposedly indisputable.[29] The fact that rights are a (possibly integral) element of normativity[30], which is to say that that their nature cannot ever be fully captured

[27] Arguably, one could also refer to this feature of rights as being 'beneficial'. Yet, the notion of 'beneficence' appears to be too strongly pre-shaped by substantive theories; especially, it evokes associations with consequentialist theories, not least with the substantive tradition of interest/*benefit* theories of rights, see therefore below sec. III, 2., e), bb). Due to our goal of producing a normatively neutral concept, such associations shall be avoided by using the supposedly more neutral terms 'advantage', 'advantageous', 'advantageousness' henceforth. For a more detailed exposition of this point cf. below sec. III, fn. 183.

[28] Undoubtedly, the choice of example-statements determines the result with regard to the features of the scope. Thus, the objection lies at hand that they were chosen just in order to produce this result. In other words, the (allegedly) purely descriptive nature of the scope might nevertheless have a covert, evaluative stance to it due to the conscious selection of only a few, certain examples and not all actual manifestations of a term. On the contrary, I assume that it is impossible to actually find example-statements that could foil the result found here. The three features are constant and could only be refuted by means of pure stipulation, i. e. by claiming "There is a non-personal right to peace", "For A to have rights is detrimental for her" or even "I ride my right to work". These propositions would surely not be generally agreed upon.

[29] Cf. Brian Orend, *Human Rights: Concept and Context* (Ontario: Broadview Press, 2002), 17–19.

[30] The much debated notion of normativity arguably asks for some clarifications at this point: First, it is supposed there is a fundamental difference between the normative as referring to reasons (see therefore in more detail presently in sec. I, 1., b), aa)) and the descriptive as referring to fact. Implied is the common idea of a strict separation of 'is' and 'ought', at least to the extent that one cannot derive any normative conclusions merely from a set of facts. For the origin of considering the is-ought-relation as a problem, which is related to, but ought to be clearly distinguished from Moore's commonly known (and terminologically misleading) notion of a "naturalistic fallacy" (Moore, *Principia Ethica*, 13), see David Hume, *A Treatise of Human Nature* (Oxford: Oxford University Press, repr. 2009 [1738]), 302. Cf. also: Hans Kelsen, *Hauptprobleme der Staatsrechtslehre*, 2nd ed. (Reinheim: Scientia Aalen, 1960 [1923]), 6–10; id, *Reine Rechtslehre*, 2nd rev. and extended ed. (Wien: Verlag Österreich, 2000 [1960]), 196. Secondly, especially legal theory is often concerned with the notion of normativity, namely with what is often regarded as the 'problem of normativity' of the law in contrast to the normativity of morality. For introductions on this problem (with further references) see: Torben Spaak, "Kelsen and Hart on the Normativity of Law," in *Perspectives on Jurisprudence: Essays in Honour of Jes Bjarup*, ed. Peter Wahlgren (Stockholm: Stockholm Institute for Scandinavian Law, 2005), esp. 398–401; id, "Legal Positivism, Law's Normativity, and the Normative Force of Legal Justification," *Ratio Juris* 16 (December 2003): 478–481; Andrei Marmor and Alexander Sarch, "The Nature of Law," in *Stanford Encyclopaedia of Philosophy*, ed. Edward N. Zalta (Stanford University, 1997–), https://plato.stanford.edu/archives/fall2015/entries/lawphil-nature/, sec. 1.2. Even though hardly sufficient to match the level of sophistication of the debate, a few arguments for why the normativity of law should not be regarded as a problem at all, i. e. why we should not deny the undoubtedly normative nature of legal rules (therewith denying structural differences between legal and moral rules), will be laid out below in sec. II, 5., d).

only in an empirical, descriptive fashion, will be presupposed as common sense at this point.

(2) What does it mean 'to be a normative concept' though? It is not just 'to be' and be described as such, but rather it necessarily entails 'to be or to exist *for or against* something/somebody'. It means having a normative significance[31], positive or negative.[32] 'Right', for that matter, in any way the term is used, bears a positive connotation, a certain advantageous normative thrust – a certain impact existing or functioning *in favour of* a certain entity.[33] In which way rights exactly exist or function, what their modus of existence is – e. g. mainly as protected choices or as protected interests – does not have to interest us right now. Already we can state, though: Rights, in any way the term is used, are something advantageous for the entity they belong to or are ascribed to.[34]

(3) And thus the third and last requirement has already been forestalled: Rights are essentially appendant to (or associated with) a specific entity. That is, a right must belong to or be conferred *to* somebody or something. There is an on-going and fierce argument in the relevant literature about the scope of suitable 'right-holders', i. e. regarding the question which entities qualify as capable of holding a right.[35] It is not my intention to engage in this (however important) dispute here. At this stage, it is sufficient to point out the fact that rights cannot be understood as entirely detached from the entity they are appendant to, i. e. the mere fact that there has to be a right-*holder* in the first place. In other words, if there is a right, there is always an entity (someone or possibly something) who *has* this right.

Now, even if we suppose the above made assumptions about the scope are correct, there is still (at least) one question jumping right at us: What is actually gained from such a way of proceeding? We seem to be in danger of ending up with a redundant, circular definition. Precisely, it appears as if all we did was

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[31] A normative *weight* possibly, see below the discussion about the importance of principles in sec. II, 4.

[32] Obviously, the term 'positive' is not to be understood in terms of legal positivism, positive rules or related notions – yet another reason why the term *advantageous* appears preferable.

[33] For the Interest (or *Benefit*) Theory of Rights, this seems self-evident, but even choice theorists would have to declare their agreement on rights being 'advantageous' in this most basic sense, as for them not just choices/decisions, but legally (or morally) *protected* decisions qualify as rights. Cf. below secs. III, 2., a) and c).

[34] Carl Wellman, *Real Rights* (New York: Oxford University Press, 1995), 7. Whether advantageous has to mean 'invariably advantageous' or merely "normally advantageous" (Kramer, *RWT*, 93) can be left undetermined at this point. It is a question worthy of consideration, though, which we will attend to later in sec. III, 1., b), aa).

[35] Cf. only this respective miscellany: Carl Wellman (ed.), *Rights and Duties, Vol. 3, Possible Bearers of Rights and Duties* (London: Routledge, 2002). For a short outline of the discussion see Kenneth Campbell, "Legal Rights," in *Stanford Encyclopaedia of Philosophy*, ed. Edward N. Zalta (Stanford University, 1997–), https://plato.stanford.edu/archives/win2016/entries/legal-rights/, sec. 3.

point out what all existing theories have in common in order to then come up with the spectacular idea that they have something in common – as if we intended to define what a right was, only to then use this very definition as a standard to falsify other definitions. That would, however, only be objectionable if the aim was to conclusively define the term 'right' at this point. Once more, what we *are* in fact concerned with in this first step is not to produce a concept of rights in the sense of a conclusive bipartite, descriptive-evaluative definition or a viable concept in the sense of an *evaluated* scope (see above), but simply to determine the scope of the term. Accordingly, we cannot acquire a suitable answer to our initial question (1) 'what is a right?' because that would have to comprise consecutive answers to *both* of the following questions:

(1.1) Out of all things, which *could* we call a right?
(1.2) Out of these, which *should* we call a right?[36]

All we did so far was engage in (1.1). Only in combination – (1.1) and (1.2) – we can actually gain a viable concept. Still, both these (conceptual) questions can, of course, be distinguished from a third question, which is usually associated with the justificatory level of investigation:

(2) What rights exactly should there be?

Having identified these questions, we may now examine how different self-professed conceptual approaches to rights (explicitly or implicitly) integrate these questions into their theoretical framework. In other words, we are now able to analyse exactly how the distinction between descriptive and normative jurisprudence as the most common methodological approaches in legal theory relates to the distinction between conceptual and justificatory accounts of rights as well as to the central epistemological questions just sketched.

[36] The idea developed here, the methodological distinction between purely descriptive scope and in parts evaluative concept, is seemingly similar to the methodological approach developed by Jules Coleman and Jody Kraus in "Rethinking the Theory of Legal Rights," *The Yale Law Journal* 95 (June 1986): esp. 1341: "What is the correct analysis of rights? Theories of the correct analysis of rights typically […] conflate two distinct questions concerning the proper analysis of rights. A correct analysis of rights distinguishes between the *logical form* and the *content* of rights." Their approach is at best superficially similar to ours, though. The ensuing idea of rights as 'conceptual markers' (ibid, 1342) does not clarify the boundary between pure analysis and evaluative conceptualisation, which our theory presumably is capable of. For critical reassessments of the article see Jeremy Waldron, "Criticizing the Economic Analysis of Law," *The Yale Law Journal* 99 (April 1990); Charles Barzun, "Legal Rights and the Limits of Conceptual Analysis: A Case Study," *University of Virginia Public Law and Legal Theory Working Paper Series* 43 (2011), http://ssrn.com/abstract=1959403, 8–28.

b) Descriptive Jurisprudence versus Normative Jurisprudence

Evidently, the methodological questions discussed so far in the context of rights are very closely related to a more general and contentious theoretical dispute: the so-called methodology debate in jurisprudence[37], also referred to as the 'Hart/Dworkin-debate'[38]. It is often described as a controversy between two academic factions: those promoting normative jurisprudence and (allegedly opposed to the former) those in favour of descriptive jurisprudence.[39] Roughly, the two sides can be characterised as follows: Descriptive jurisprudence rests on a claim which *Perry* aptly describes as *methodical legal positivism,* namely "the view that legal theory can and should offer a normatively neutral description of […] law".[40] In other words, it is the view that a concept of law can be developed without recourse to substantive normative argument. This position was famously established, and has since been defended, by *H. L. A. Hart* and his followers.[41] On the other hand, central to normative jurisprudence, as represented by *Dworkin*[42], *Perry*[43], *Waldron*[44], and others, is the claim that law as an interpretive or argumentative practice can only be grasped with reference to and in connection to the fundamental values and therefore normative notions which lie at its very core. Accordingly, jurisprudence, when concerned with finding out about the nature of law, not merely about the law of a specific community, is held to be an essentially normative endeavour. Hence, at the core of the debate lies the question of whether an adequate understanding or a 'concept' of law (as such) can be found without reference to or inclusion of substantive normative considerations or moral judgements, but solely on the basis of social fact.[45] Without actually entering into the debate and all its argumentative

[37] For an introductory article on this debate see only Julie Dickson, "Methodology in Jurisprudence," *Legal Theory* 10 (September 2004): 117–156.

[38] Brian Leiter, "Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence," *American Journal of Jurisprudence* 48 (2003). Leiter's article provides a rather accurate introduction to the debate. Cf. also Scott Shapiro, "The 'Hart-Dworkin' Debate: A Short Guide for the Perplexed," *University of Michigan Public Law Working Papers* No. 77, http://ssrn.com/abstract=968657.

[39] For an instructive overview over both sides' central arguments see Jules Coleman, *The Practice of Principle* (Oxford/New York: Oxford University Press, 2001), 151 ff.

[40] Stephen Perry, "Hart's Methodological Positivism," *Legal Theory* 4 (December 1998): 427.

[41] Most importantly in his seminal work: Hart, *Concept of Law*.

[42] Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1991 [1977]), esp. 'The Model of Rules I and II' (hereafter cited as *TRS*). See also id, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986).

[43] Perry, "Methodological Positivism," 427.

[44] Cf. Jeremy Waldron, "Normative (or Ethical) Positivism," in *Hart's Postscript*, ed. Jules Coleman (Oxford: Oxford University Press, 2001).

[45] Precisely, Hart regards his theory as descriptive to the extent "that it is morally neutral and has no justificatory aims" (Hart, *Concept of Law*, 240). Cf. in this context: Perry, "Methodological Positivism," 428 ff.; Brian Leiter, "Legal Realism, Hard Positivism, and the Limits

depth, we may already assert that the terms 'descriptive' and 'normative' are essentially ambiguous. 'Descriptive' in a strict sense can mean 'with reference to facts alone, i. e. without reference to reasons', whereas in a wider sense it could mean 'without reference to substantive, moral considerations'. Accordingly, the notion of 'normativity' may in a wider sense refer to all kinds of reasons in contrast to facts, i. e. as the opposite to 'descriptive' s. str. On the other hand, it may in a stricter sense apply only to 'moral or legal reasons' as a special type of reasons, thus representing the opposite to 'descriptive' in a wider sense. Presumably, these thoughts are in need of further clarifications, i. e. before trying to make a stand in the methodology debate in subsection bb), we need to clarify which meaning of 'normative' and 'descriptive' is referred to in this debate. Precisely, we need to clarify what exactly is meant by 'normative neutrality' or how a conceptual approach has to be designed in order to meet this criterion.

aa) Different Types of Reasons

Most generally, normativity represents the realm of evaluation and reasons – in contrast to the simple description of facts. Yet, as indicated, there are at least two possible understandings of both correlative terms: Normative reasons s. str. are those which tell people the (overall or relatively) right thing to do. These are moral reasons and supposedly also legal reasons.[46] Apart from that, one could imagine a wider understanding of normativity, which comprises all kinds of reasons, and which would then also include aesthetic, prudential, instrumental reasons etc. By investigating 'normative systems', throughout this book we will restrict ourselves to normativity in the former, stricter sense, i. e. to legal and/or moral systems. Yet, at this point it is important to note that generally there is a great variety of different types of reasons, because this insight helps us to clarify to which degree a conceptual approach like ours can indeed refer to *reasons* without losing its 'normative neutrality' in the stricter sense. Precisely, a conceptual approach remains descriptive or normatively neutral as long as it re-

of Conceptual Analysis," in *Hart's Postscript*, ed. Jules Coleman (Oxford: Oxford University Press, 2001), 356–357; Tom Campbell, *The Legal Theory of Ethical Positivism* (Aldershot: Dartmouth Publishing, 1996), 69. Cf. also: Julie Dickson, *Evaluation and Legal Theory* (Portland, OR: Oxford Publishing, 2001); Andrei Marmor, "Legal Positivism: Still Descriptive and Morally Neutral," *Oxford Journal of Legal Studies* 26 (2006). Marmor – in defence of Hart's theory – ventures doubt about whether the actual problem, the nature of legal positivism, is accurately framed only by reference to the dichotomy between moral judgements and social facts. Marmor's arguments in this respect are somewhat appealing. Unfortunately, a meaningful examination – neither of the debate in general, nor of Marmor's account in particular – cannot be adequately conducted in this context.

[46] Even though surely not unproblematic, the fact that 'legal systems' generally belong to the above-mentioned category of 'normative systems' will be also be axiomatically presupposed for now and will concern us once more in sec. II, 5., d), where we shall aim for (nothing more than) a heuristic attempt to define the relation or the difference between legal and other kinds of systems. Cf. above fn. 30.

mains agnostic with regard to substantive legal or moral reasons. Therefore, we do not preclude the necessity to refer to other kinds of reasons at some point in order to develop a proper concept. More precisely, in order to define a concept of rights we need to make a judgement, namely by answering question (1.2): 'out of these, which should we call a right?' And, obviously, we need recourse to reasons in order to do so. Yet, the reasons for making this decision do not (necessarily) imply any moral or legal judgements or predicaments as they are purely *conceptual reasons*, i. e. they represent quality features of a meta-theoretical or pre-substantive concept of rights.[47] In other words, if 'descriptive' were to be understood as 'lacking any practical normative implications', the design of our conceptual approach would meet this criterion despite the fact that our concept is not entirely descriptive in the sense of 'not implying any reference to reasons or judgements', as descriptive could also be understood in a very strict sense.

bb) The Methodology-Debate: A Discussion at Cross-Purposes

Presumably, the parallels of our approach to the positions of *Hart*, *Coleman* et al. are obvious. In fact, we are engaged in an endeavour which can doubtlessly be counted amongst other works of 'descriptive jurisprudence'. Nevertheless, it is noteworthy that this does not force us to reject normative jurisprudence as a methodological approach in its entirety. Simply, descriptive jurisprudents were and are following an entirely different enterprise than normative jurisprudents, which (famously) *Hart* himself pointed out in the postscript to his seminal work 'The Concept of Law': "Legal theory conceived […] as both descriptive and general is a radically different enterprise from Dworkin's conception of legal theory […] as in part evaluative and justificatory […]"[48]. He continues: "It is not obvious why there should be or indeed could be any significant conflict between enterprises so different as my own and Dworkin's […]"[49]. This insight is crucial. The appropriateness of any theoretical approach surely depends on what one aims to discover or to prove with it. Descriptive jurisprudence is a more than legitimate enterprise due to its aim of examining an essentially normative phenomenon – like rights or in *Hart*'s case the law – with the goal of producing a concept, which should sensibly pre-structure normative debate and theory without substantively predetermining it. Essentially, descriptive jurisprudence is a project of meta-ethics. Normative jurisprudence, on the

[47] In short, these reasons are practical adequacy, normative neutrality, and meta-theoretical accuracy. The particular significance of each conceptual reason will be laid out in detail in sec. III, 2., f), cc) below. Notably, the idea of 'conceptual reasons' in contrast to 'normative reasons s. str.' is at least similar to Brian Leiter's distinction between 'epistemic values' and 'moral values', see Leiter, "Hart/Dworkin Debate," 34 ff.

[48] Hart, *Concept of Law*, 240.

[49] Ibid, 241.

other hand, may produce very different results with regard to terms like 'rights' or 'law', but strictly speaking it does not employ a method contradictory or averse to descriptive jurisprudence. At best it can make the claim that the method of descriptive jurisprudence is not incorrect, but rather insufficient to solve any practical legal problems. Yet, as much is evidently true and should also readily be conceded by any descriptive jurisprudent.[50] Already by definition, one cannot be able to offer solutions to practical normative problems by means of a descriptive concept. In other words, the substantive normative notions necessary to describe rights as a practical phenomenon, i. e. to describe such rights that people actually have, cannot be included into *Hart*'s theory, at least not if it were to remain descriptive or normatively neutral.

Accordingly, the somewhat sound idea behind normative jurisprudence is that it is impossible to grasp the idea of normative notions like law or rights solely in an abstract way, i. e. to grasp the idea of law or rights 'as such' irrespective of an already specified or pre-existing legal system or a normative/argumentative practice that actually works with rights.[51] In practice there simply does not (and never will) exist a thing like law 'as such'. There are – and have been, and will be – different legal systems that actually exist and are being practiced. We can perceive and explain each of these specific legal systems in its own terms, and we can, of course, find out what they all necessarily have in common. Yet, even these common, necessary conditions could hardly be regarded as law 'as such'. Rather the normative jurisprudents' assumption appears correct that these necessary conditions need to be enlivened by substantive normative argument.[52] Only then we are actually able to determine the nature of 'law' or of 'rights' as phenomena of normative practice.[53] And would it then not be better to engage in normative argument, in the interpretative practice, as which law presents itself, *straight away*? This last point appears to be of some importance in the debate. It is correct that rights are an instrument ap-

[50] For instance, Perry is right when he supposes that by observing "that officials and perhaps others accept the rule of recognition, meaning they regard it as obligation-imposing […]" what Hart actually does is "to describe the problem of normativity of law rather than to offer a solution" (Perry, "Methodological Positivism," 466).

[51] Dworkin, *Law's Empire*, 13–14, 37 ff., 45 ff., 91. I thereby presume that all thoughts which Dworkin developed specifically with respect to a concept of 'law' can be transferred to other essentially normative notions such as 'rights'.

[52] See e. g. Finnis, *Natural Law*, 3: "[…] a theorist cannot give a theoretical description and analysis of social facts [and therewith neither of the law as a social practice], unless he also participates in the work of evaluation, of understanding what is really good for human persons, and what is really required by practical reasonableness.".

[53] James Sherman, "Dialectical Deadlock and the Function of Legal Rights," https://ssrn.com/abstract=1976312, 58–59. Here Sherman claims that the 'order of justification' runs the other way around than is normally assumed. From defining a correct concept of rights we are not supposed to be able to draw substantive normative conclusions, but rather such a concept could only be deducible from a 'superior' normative theory.

plied in normative practice, and that normative practice cannot be understood without reference to substantive normative considerations. However, this does not imply that we cannot determine a neutral terminology before engaging in the task of interpretation, namely with reference to (a) actual manifestations of the term and (b) necessary, meta-ethical structures. We would aim at a concept then, which tells us *what* rights are – that includes how we should understand the term – and expressly not *which* rights there are. Moreover, descriptive jurisprudence rests on the claim that it is not only possible to produce such a concept, but that, if it were possible, it is also ultimately desirable to do so as a preliminary, theoretical step. In this sense, normative and descriptive jurisprudence are not mutually exclusive, which *Hart*, as mentioned earlier, correctly clarified. Rather, normative jurisprudence represents an interpretative enterprise which, as such, is sensible and even necessary, but which would do well to employ an impartial terminology to begin with. And producing such a terminology is, in turn, the very goal of descriptive jurisprudence.

Due to these rather loose interpretations, it may be doubted whether *Hart* and *Dworkin* would have fully agreed with this characterization of the relation between descriptive and normative jurisprudence. This is a matter which we cannot decide in detail in this context. In any case, for our purposes it must suffice to pinpoint the methodology of our approach, which is for the most part analogous to that of *Hart*'s descriptive endeavour concerning the concept of law. In short, the theoretical design can be summarised as such: Our approach is descriptive in the sense of aiming at a normatively neutral concept of an essentially normative term, namely rights. This happens however in full concession of the limited – or rather entirely non-existent – ability of such descriptive approaches to offer solutions for practical normative problems in law and morals alike. Thus, our aim is as simple as it might be sobering: A cogent descriptive theory regarding normative notions like rights can achieve nothing more – but also nothing less, for that matter – than setting the stage for substantive, justificatory approaches. At best it will define the (deontological) limits of normative practice which any substantive, justificatory approach has to comply with. It will ask the correct questions that a substantive normative theory needs to answer. It will build the basic terminological framework in which any coherent justificatory approach can and has to fit.

2. Overview of Content

For reasons of clarity and comprehensibility, the structure of the ensuing investigation shall be roughly delineated at this point. Mainly it will be oriented at the two consecutive questions (1.1) and (1.2). First, and for most of this book, we shall be concerned only with the scope of rights, i. e. with the purely de-

scriptive question (1.1). The three features of the scope of rights are already familiar to us: Rights are normative, advantageous, and appendant. Yet, what we need to find out in order to formulate a concept of rights are the possible manifestations of this scope, i. e. an answer to the question of which structural elements of our normative practice are or can be advantageous and appendant to a respective holder and under which conditions. In fact, in order to identify the scope, we need to engage in an investigation of the underlying, general, metaethical structures of our social normative practice – a task almost too big even to try to engage in. In order to delimit this otherwise hopelessly wide endeavour at least to a reasonable degree, we shall (a) not examine the normative practice of a society as a whole but instead restrict our analysis (for the most part) to the internal logic of one *normative system* – a concept that will be introduced presently and thoroughly explained subsequently – and (b) other than that restrict ourselves to critical issues in moral and legal theory which are directly relevant for the theory of rights. The structure of our investigation will thereby defer to the central (and in each case eponymous) notions from Choice Theory and Interest Theory alike, i. e. the investigation in the first main part, sec. II, will pivot on the notions of decision[54] and interest, or, more precisely, on legally protected decisions and interests. In the latter case that implies only such interests that serve as (intersubjective) *reasons* for other people's duties. Hence, we will analyse the concept of actions, which we shall trace back to the notion of a practical decision, in sec. II, 2., and the mode in which such actions are evaluated, which will lead us into the field of deontic logic in sec. II, 3. Subsequently, the notion of normative reasons, both practical and abstract, will be elucidated by reference to a line of theory know as Principle Theory in sec. II, 4. In other words, we will first deal with the meaning and (deontological) structure of actions and action evaluations and subsequently attend to the variety of reasons and their respective relevance for the theory of rights. All these (in parts rather abstract) theoretical deliberations will be framed by explanations regarding the concept of a 'normative system' in secs. II, 1. and 5. Thereby the notion of a 'normative system' will simultaneously form the general theoretical frame for the investigation in this first main part of the book.

[54] In terms of accuracy the term 'decision' appears preferable to 'choice', which is why throughout this work we shall refer to practical 'decisions' when one could colloquially also say that one chose to do something. The same goes for German language, as one could translate both terms with '*Entscheidung*'. Yet, both languages allow for a more precise distinction. Whilst the term 'choice' in the sense of 'choosing to do X' insinuates a *discretionary* act that happens independent of necessary criteria for this choice (similar in German: '*Wahl'*), the term 'decision' implies an act, which is based on reasons in favour of the option decided for and possibly against others. What is commonly referred to as 'choice' as in 'Choice Theory' ought to be understood in this latter, narrower sense and should therefore preferably be referred to as 'decision'.

Following these general theoretical wanderings, this almost violent tour through a variety of areas of moral and legal philosophy, we will finally attend to the theory of rights as such in the second main part, sec. III. Thereby, in sec. III, 1., we will begin by working out relevant manifestations of the scope of rights in normative practice. In this part, the investigation will be strongly based on *Wesley N. Hohfeld*'s scheme of fundamental legal positions, though rather than simply adopting it, instead applying the insights won hitherto. In effect, analogously to *Hohfeld*'s scheme, we will identify four distinguishable positions as manifestations of the scope. In the ensuing sec. III, 2., we will then set our mind on programmatic question (1.2) in order to find out which of the four manifestations should be included in a cogent concept of rights. In other words, in a final step we will submit the traditional concepts of rights offered by Choice Theory and Interest Theory to a critical evaluation, concluding with a reasoned decision in favour of a modest version of Choice Theory.

II. The General Functionality of Normative Systems

As indicated earlier, even though this work regards itself as one dedicated to the aims and methods of descriptive jurisprudence, simultaneously one of its goals is to reveal the very narrow limits of what descriptive jurisprudence is able to accomplish, to show that we need to engage in normative reasoning and substantive debate in order to demonstrate how important to us normative terms really are. Surely, to try and explain the meaning and functionality of normative practice in contemporary human societies as a whole would be an endeavour too large in scale not only for this thesis, but certainly for any one book. Thus, we need to find a way to restrict our approach in terms of what it should be able to explain. In order to do so, a (supposedly original) concept shall be presented and outlined in this first main part, namely that of a *normative system*. The overall approach concerning rights developed here tries to restrict itself insofar as it shall be limited to an analysis of the functionality and inherent logic of a single such system, rights being assumed to be a property explainable within the confines of one such system (at least for the most part[1]). This restriction shall serve as a kind of 'valve for theoretical complexity' and increase the explanatory adequacy of the overall approach. Introducing this concept, we are faced with two inevitable tasks: First, and naturally, we need to at least sketch the outlines of a definition for such systems. Secondly, we ought to be able to demonstrate that by restricting ourselves to the analysis of only one such system our approach is still explanatorily relevant. In other words, we ought to show that the concept of normative systems is a useful tool in order to map normativity or our normative practice. Not all of this can be achieved in one stroke, as we shall see presently.

1. Normative Systems I: The Concept of a Normative System

Let us start off with an attempt for a definition of a 'normative system' whose elements shall be explained bit by bit subsequently, mostly in this and the up-

[1] For the necessary vertical extension of normative systems and the role powers and immunities play in this extension, i. e. in between different systems, see below sec. II, 5., b) and sec. III, 1., b), bb), (3), and (4).

coming section II, 5.[2] A normative system shall be understood as the consistent process in which a set of principles or values is applied to (factual or hypothetical) actions in a way that allows applicants of the system to draw normative conclusions about these actions.[3] Thereby each normative system possesses both an authority, issuing and addressing normative content, and a set of addressed agents.[4] In this section we will only attend to the points 'authority and addressees' as well as to the consistency-criterion and close with a short note on the practical relevance of normative systems thus defined. Thereby the implementations in this section shall only serve as an extremely rough introduction. Consequently, the feature 'process of application of principles' will be elucidated by looking into the nature of reasons in sec. II, 4. Finally, in sec. II, 5., the problematic issues addressed in this and in the ensuing chapters will be supplemented and broadened. Surely, such a division of an explanation into various parts is far from ideal, yet it is owed to the complexity and interdependency of the various topics we are about to attend to in this first main part II. Thus, at this point I can only solicit the reader's understanding to appreciate the findings in this section only in connection to those in the following ones.

a) Addresser and Addressees

Essentially, every normative system features both an addresser of normative demands and respective addressees. More precisely, every normative system possesses both an authority and a set of addressed agents, typically a specific community. Importantly, 'authority' is used in a most wide fashion in this context.[5]

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[2] As clarified before already, the normativity of such 'normative systems' is one in a stricter sense.

[3] The idea of a 'system' is adduced in order to clarify the internal coherence/connection of its components, which finds its expression in the idea that the abstract reasons provided by the system, which may at times be adverse, are somewhat synchronised/harmonised due to the (definitional) necessity to produce unambiguous/homogenous results/judgements in normative practice. On the idea of internal coherence (German: "*innerer Zusammenhang*") as a central trait of legal systems: Werner Krawietz, *Recht als Regelsystem* (Wiesbaden: Steiner, 1984), 68–73, esp. 71. Cf. in contrast: Niklas Luhmann, *Das Recht der Gesellschaft* (Frankfurt a. M.: Suhrkamp, 1995), 40–41. For a good overview over different possible understandings and usages of the term 'system' in the context of law and legal systems see: Claus-Wilhelm Canaris, *Systemdenken und Systembegriff in der Jurisprudenz* (Berlin: Duncker & Humblot, 1983), 19–39.

[4] This definition differs significantly from Raz' approach to an idea of 'normative systems', see Raz, *Practical Reason*, 107 ff. Raz describes different types of normative systems, namely systems of interlocking norms, systems of joint validity, autonomous systems, and institutionalised systems. A thorough analysis of each of these concepts is impossible at this point, yet it is noteworthy that none of these 'systems' matches the (supposedly more general) concept of normative systems as introduced here. Especially, the notion of a strict inner consistency is implied in neither of Raz' systems.

[5] For instance, it is considerably wider than Raz' most influential concept of authority (see esp. Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon, 1986), 23–105), which refers

Not only does it not necessarily have to be one person/one agent that exerts authority, but it can be a group of persons or even the community as a whole, as is the case in democratic societies. Moreover, the 'authority' of a system does not even have to be personal at all, as is the case with divine rules or intrinsic goods, which provide reasons for actions. Hence, the notion of authority is understood in a sense that every consistent set of rules, i. e. every normative system, needs to be retraceable to some higher-order will or some higher-order good or goods, which we shall refer to as the authority of the system.[6] This shall only provide a rough idea of the notion of authority. We will return to and deepen this thought, especially the relation of normative content and higher-order authority, in sec. II, 5.

Corresponding to an authority addressing normative content, every normative system possesses a set of addressed agents. Normally, in intersubjective normative systems these addressees form the normative community. It is these intersubjective systems, e. g. certain areas of the law or the moral code of a community, which we will be focussing on. However, it is noteworthy that not every normative system needs to have more than one addressee. It is perfectly possible for a normative system to have an authority addressing rules at only one agent. Thereby the distinctive feature dividing intersubjective and intrasubjective normative systems is that of the personal identity of authority and addressee, i. e. we are faced with an intrasubjective system only in the case when a person directs normative content to oneself in the form of 'self-addressed commands'.[7]

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to political authority in the sense of state authority. Only one crucial difference is that Raz thus regards authority as something that can or needs to be *exercised* (ibid, 23). By contrast, authority in this context is meant only in a most technical sense as *any kind of higher-order justification* for any kind of normative content. Presumably, for any normative content such a justification needs to be provided – be it through an authoritative decision, i. e. an act of (political) competence, by means of an intrinsic/persistent reason, or by means of a combination of both. See esp. below sec. II, 5.

[6] Thus, also in accordance with the remarks in the foregoing footnote, we can distinguish between personal and substantial authority. Notably, the authority of a system neither has to be purely personal nor does it have to refer exclusively to persistent goods or normative content. It can, and often will be, a mix of both. In fact, we are very much used to this kind of construction from legal practice. Here we find a fundamental conflict between the will of a democratically elected sovereign and the rule of law, i. e. the rule of a set of inaccessible, persistent goods. Hence, we find the authority being in part personal and in part substantial, i. e. it is generally exercised by some agent, which is bound, though, to some fixed normative boundaries. Cf. also sec. II, fn. 235. Accordingly, the notion of 'authority' needs to be carefully distinguished from that of 'competence'. The latter can only be held and exercised by agents/persons. See therefore esp. secs. II, 3., c) and II, 5., b) below.

[7] Cf. Gerald Cohen, "Reason, Humanity, and the Moral Law," in *The sources of normativity*, ed. Christine Korsgaard (Cambridge: Cambridge University Press, 1996), 176; Michael Bratman, "Castaneda's Theory of Thought and Action," in *Faces of Intention* (Cambridge University Press, Cambridge 1999), 227. Cf. also Anthony Kenny, *Will, Freedom, and Power* (New York: Barnes & Noble, 1975), 32–33; id, *Action, emotion, and Will*, 2nd ed. (London:

b) Consistency

The central distinctive feature of normative systems is their inner consistency (or homogeneity[8]), which means that within one specific normative system, an applicant, by definition, cannot come to distinct evaluation results or judgements regarding the same action.[9] Precisely, in practice within one system every specific action can always only be either obligatory, forbidden, or permissible.[10] Thereby not excluded are conflicts between different abstract norms or different principles within one system. Such conflicts are rather constitutive for normative systems, as we will see below in sec. II, 4. The consistency-claim made here merely implies that a conflict between prescriptions as specified normative demands referring to specific actions is *per definitionem* impossible within one system. As this consistency criterion is a definitional feature of any one system, a case in which ones detects conflicting judgements regarding the same action X, which regularly happens in normative practice, of course, could only

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Routledge, 2003 [1963]), 167; Richard Hare, "Wanting: Some Pitfalls," in *Practical Inferences*, (Berkeley: University of California Press, 1972), 44–58. We will meet the notion of 'self-addressed commands' at various stages of this investigation. In short, the idea is that the internal aspect of performing an action ought to be described as the application of commands/of authority by the capable agent to oneself. This notion, which might appear a bit strange intuitively, relies on an understanding of the person/the agent as a discursive process – that is, as constituted by a reflexive, inner dialogue. In other words, the ability to enter into a relation with one's self (and thus the ability to command this self to behave in a certain way) is thereby regarded as a central – if not *the* central – trait of human beings or of capable agents more generally. Cf. Michael Quante, *Person* (Berlin/New York: De Gruyter, 2007), 24 ff., 153. This central idea about personhood can be traced not least to Kant, his conception of self-consciousness (cf. Immanuel Kant, *Critique of Pure Reason*, trans. and ed. Paul Guyer and Allen W. Wood (London: MacMillan, 1990 [1781]), 157–158, 334) and his notion of 'duties to oneself', which becomes understandable with reference to a dividedness of the person as a whole in *homo noumenon* and *homo phaenomenon* (Immanuel Kant, "The Metaphysics of Morals," in *Practical Philosophy*, ed. Mary J. Gregor (Cambridge: Cambridge University Press, 1999 [1797]), 395). Presumably, one does not have to accept all of the (by times problematic) tenets of Kantian philosophy in order to accept the notion of 'self-addressed commands', but it surely offers a strong basis for this idea. Besides, not only amongst philosophers in a stricter sense the link between freedom and 'self-commanding' was acknowledged. Thus, it was Johann Wolfgang Goethe who wrote: "*Wer sich nicht selbst befiehlt, / Bleibt immer Knecht.*" (in English: "One who does not command himself will stay servant forever."), see J. W. Goethe, *Poetische Werke Vol. 2*, Berliner Ausgabe, Vol. 1–16, ed. Siegfried Seidel, Berlin, 1960 ff., http://www.zeno.org/nid/20004846281, 368. Even though all these thoughts are certainly worthy of a more elaborate discussion, as much will have to happen in a different context. For our purposes we simply have to presuppose axiomatically the notion of a person as the maintaining of a conscious relationship with oneself.

[8] In fact, there are different ways to perceive this notion of 'consistency' within a normative system, i. e. different forms of consistency. These shall be discussed in detail at a later stage, precisely in sec. II, 5., b), cc).

[9] Cf. Ota Weinberger, "Die Pluralität der Normensysteme," *Archiv für Rechts- und Sozialphilosophie//Archives for Philosophy of Law and Social Philosophy* 57 (1971): 401.

[10] See below sec. II, 3.

mean two things: Either we are dealing with conclusive judgements referring to a specific action or merely with *prima facie* judgements, with conflicting *general* norms or principles. The latter possibility, conflicts of general norms, is implied in the consistency-claim made above as this claim only refers to specific actions and corresponding specific judgements. And in the former case, if there were indeed conflicting conclusive judgements, we are not dealing with one system, but with a multiplicity of (competing) systems. To clarify the terminology used in this context once more: The notion of a 'conclusive judgement' is understood as the ultimate result of a balancing process, not as the process itself. A 'conclusive judgement' is equivalent with a specific 'prescription' regarding the action in question. Such prescriptions contrast with *general* 'norms'. Thus, the problem of a 'conflict of prescriptions' is not the same as a 'conflict of norms' within one system, but the former can by definition only be presented as a conflict *between different systems*. From these two kinds of normative conflicts – intra-systemic conflict of norms/principles and inter-systemic conflict of prescriptions – we need to distinguish carefully the notion of a true dilemma, which may also occur within one system. Yet, in deviation from most common interpretations, it is not to be understood as a conflict of obligations, but rather as a practical decision situation, in which none of the available options of conduct is legitimate, i. e. allowed to be performed. We shall incrementally attend to each of these possible normative 'conflicts' in much detail in the following sections.[11] For now, a central, heuristic insight from this preliminary categorisation is that in social normative practice, as we know it, there is not one overarching or comprehensive normative system, but rather our practice is essentially built and to be understood as a plurality of normative systems.[12] The fact that this fundamental multiplicity of normative systems is also a theoretical necessity has to be axiomatically presupposed for now. We shall return to this problem in sections II, 4., and II, 5., as an adequate understanding of this problem asks for a proper understanding of the logic of actions and practical reasons, which will be provided in the subsequent sections.

[11] For a detailed explanation of the functionality and significance of intra-systemic conflicts between norms and/or principles see sec. II, 4. For a better understanding of inter-systemic conflicts cf. the remarks on the multiplicity of normative systems in sec. II, 5. The notion of a dilemma as a possible inconsistency within a normative system is a viable challenge to our theory, which we shall deal with in detail in sec. II, 3., b). In short, the occurrence of genuine dilemmas is possible within a (consistent) normative system, yet only as provisional conclusions, which ultimately need to be resolved by the respective authority by means of an additional judgement.

[12] Cf. Weinberger, *Pluralität der Normensysteme*, 399.

aa) Specificity of Actions

Duly note that our consistency-claim is a rather modest one due to being linked to the inner logic of only one normative system. Thus, correctly understood it has no substantive normative implications at all. In other words, it should not be mistaken for the admittedly strong substantive claim that normative practice in itself *ought to be* consistent. Consistency as described here simply states the idea that we need to be able to reach unambiguous judgements regarding specific actions within a specific normative context. As much is simply a practical necessity, of which the consistency-claim is an equally necessary consequence. We shall sketch this central thought now and return to it in detail in sec. II, 5., b), cc).

As indicated earlier, the consistency claim is closely linked to the notion of a specific or specified action, which (exclusively) can be the object of a conclusive judgement or of a prescription. What exactly is meant by that? Without having to rely on a specific concept of actions yet, this notion can already be determined insofar as it is regarded as a practical necessity to take into account *all relevant circumstances* with regard to an action in order to come to a conclusive judgement. In other words, the accuracy of an action evaluation depends on the amount of relevant circumstances considered in evaluating it. In order to clarify these thoughts, consider the following example: A takes out his dream woman W to his cabin by the lake in order to have a romantic night there (including consented sex, if it were solely for A to decide). Just as W has explicitly given A the appropriate consent and things seem to turn out just as planned for A, he hears C crying out for help, who is just about to drown in the lake. A, being an excellent swimmer, could easily save C, however A is afraid that W might take back her consent if he would leave now. Suppose further that A is not only a decent lover, an excellent swimmer, but also a master at defusing bombs and at the very same time, whilst A and W are in the cabin and C is drowning in the lake, there is a huge bomb about to explode in the nearby town T, and A is the only one able to defuse it. However, he would not be able to both save C and defuse the bomb. Suppose further that all these are facts which A is aware of. What ought A do? In order to give an answer to this question, we have quite a few different sets of facts and circumstances to evaluate. First of all, with W's consent, A certainly has a permission to have sex with her – a permission at least in relation to W herself. Nevertheless, we would assume that he also has an obligation to save C's life and, moreover, that this obligation somehow 'outweighs' his former permission. Yet, from an even wider angle the same would presumably happen to this obligation in relation to the 'conflicting' obligation to defuse the bomb and save not one, but thousands of lives in T. The question we need to be concerned with in this context is: Are we dealing with different normative systems (due to the at least *prima facie* conflicting judgements) or simply seg-

ments of one and the same system? I assume the latter is the case and I shall try to show why that is so: Both action evaluations 'A is permitted to have sex with W' and 'A is obliged to save C from drowning (instead of having sex with W)' leave out essential features of the situation that is to be evaluated, in both cases the circumstances of the bomb scenario in T, A's ability to help and his knowledge of these facts. Supposing that we are dealing with a system that weighs saving others' lives higher than individual pleasure, and in which the saving of a thousand lives is regarded as preferable to the saving of one, in our example the resulting, unambiguous judgement will have to be that defusing the bomb is obligatory for A, implying that all other actions are forbidden. The point is that in order to properly assess an action within a normative system, one needs to consider as much information as possible regarding the accompanying circumstances of the action in question. Moreover, I claim that this is a universal, however non-normative, claim within any normative system, as only by assessing an action properly, and that is comprehensively, we know exactly what the object of our evaluation is in the first place. Only by presupposing the aim to evaluate one comprehensive set of facts we can prevent different competing action evaluations for the same situation (as in our example) and thus conflicting normative judgements within one system. Naturally, we could still formulate less wide action descriptions, only that this would be a straight way into confusion about *actual*, concrete normative demands (as we also saw in our example). Therefore, in order to determine the concrete normative demand derived from one set of principles or rules, we need first to consider the maximum of possibly relevant circumstances in a given situation. Once more, this claim is universal for all normative judgements within any normative system. Despite what some may assume now, this does not make me a moral particularist[13], because there is a decisive constraint with regard to this claim, though one which does not affect its universality. Namely, it is not implied that all these circumstances considered also need to count as normatively *relevant*. The question regarding normative relevance is subsequent to the practical necessity of considering the maximum of *possibly* relevant circumstances. And it is answers to this question about relevance that actually define what a normative system is, what it consists of and what results it produces.

bb) Normative Relevance of Circumstances

Arguably, this qualification is in need of some further clarification. Let us therefore return to our example with the cabin at the lake. If I am correct with the universality claim above, then we are dealing with one normative system in the

[13] Jonathan Dancy, "Moral Particularism," in *Stanford Encyclopaedia of Philosophy*, ed. Edward N. Zalta (Stanford University, 1997–), https://plato.stanford.edu/archives/fall2013/entries/moral-particularism/. Cf. also id, *Ethics without Principles* (Oxford: Clarendon, 2004).

example and different action evaluations, most of which are simply not accurate enough. This assumption presupposes an important point though, namely that all circumstances described in the example are regarded as normatively relevant within the system in question. Imagine, for instance, that A is an egoistic hedonist that principally does not care about other people but only about his own pleasures. In that case, following this moral code A would be permitted (if not even obliged) to have sex with W, and this so even if he would know and consider all the other circumstances mentioned in the example. Thus, we are of course dealing with a normative system here which is distinct from the one we described earlier in the cabin-example. In A's egoistic system the set of normatively relevant circumstances is considerably narrower. And exactly this is the crucial point: In order to identify a normative system, we need to determine two things, namely its set of values or what it counts as normatively relevant, and the fact that these values are applied in a consistent fashion, i. e. that for every specific action it produces only one prescription/concrete normative demand. This is the reason then why we should never *a priori* be restrictive with the circumstances considered. Otherwise we run the danger of not including all normatively relevant reasons in our judgement and thus possibly ending up with a false normative conclusion on the basis of a given set of values. One might object that the evaluations made on the basis of a restricted set of circumstances are not strictly speaking 'false', but merely represent some kind of *prima-facie* evaluations. Such a view would disregard the original purpose of prescriptions and normative systems in general, though, which is to guide agents in making concrete judgements in specific situations, to give them conclusive reasons for how to act in specific contexts. In what way is a *prima-facie* permission to sleep with W or a *prima-facie* obligation to save C useful for A in this situation in which he has to decide what to do? I tend to think it is useful in no way at all. This surely raises another possible objection: Is not the construction of different 'normative systems' only another way of framing this problem by calling A's permission to sleep with W no longer a *prima-facie* permission but a permission within another (in this case hedonistic) normative system? Even though not implausible, such an objection would miss the decisive point of my argument. I am not claiming that we cannot subdivide the decision-making process that is arriving at a normative verdict, with the language of '*prima-facie* obligations' and the like being one way of doing so and the talk of 'reasons' that need to be balanced another. My point is simply that in order to make the most of this decision-making process, in order for it to produce the most accurate and clear results, it needs to rely on a most accurate consideration of possibly relevant circumstances. Only then does a normative demand make proper sense in connection with the normative context to which it refers, be it a much reduced normative system as in our hedonism example or a more comprehensive one as in the original example.

To avoid misunderstandings, let me reframe the problem once more: First of all, it is important to note that the demonstrated consecutive two-step-process (first trying to consider all circumstances, then filtering out those that are normatively relevant) is a necessity for *theoretical* accuracy. As such, it does not imply that in practical normative reasoning we actually always do proceed in that way *nor* that any of us ought to proceed in that way under all circumstances. On the contrary, our limitations with regard to time and information often require us in real life to perceive circumstances through a normative filter, i. e. to already perceive only certain circumstances as relevant due to normatively pre-shaped mental images. My claim is not that one should always make an attempt to widen these pre-shaped images in order to come to ever more differentiated and better judgements. Although this seems not an entirely unreasonable claim (at least to a certain degree), it goes well beyond what I am trying to argue. To what extent it is actually good to make an effort to constantly widen one's normative worldview and when it might not be is not our concern because it is an issue which needs to be resolved by a substantive normative theory.[14] Accordingly, pointing out the necessity to consider as many circumstances as possible for making a proper judgement is not making a normative claim, but rather aiming for theoretical clarity. The fact that there is, within our (modest) theoretical framework, a possibility for normative systems to constantly expand their view on the world and consequently expand their normative checking routine is, as such a possibility, readily accepted. From a meta-ethical point of view this does not pose a problem because this possibility is not entailed by the demand that such an expansion has to or ought to happen. The central non-normative claim merely is that we are in need of clear and *unambiguous* judgements, no matter the normative basis for these judgements, and thus that the idea of *prima-facie* normative demands will often be misleading. After all, being normatively neutral, this should be an entirely acceptable claim: We need precise normative judgements, i. e. we need to avoid the situation where a delimited canon of values generates incompatible prescriptions. This idea is already grounded in the very purpose of normative science as 'applied science'. To practice law in particular, but also ethics, is or at least should not be mainly about elaborating ever more sophisticated accounts of the abstract wonders of values, principles or rules. It is about deciding cases, judging specific actions. The necessity to at least find unambiguous judgements is inherent to any normative practice then. In a nutshell: The claim that one ought to consider as many practical circumstances *as possible* already contains a decisive practical limitation: what exactly is regarded as still possible or advisable and what is not has to be determined by a substantive normative theory.

[14] As is the related conflict between equity and legal certainty or between consequentialist and deontological reasoning; see therefore below sec. II, 4., c), dd).

cc) Persistence of Normative Judgements

There are certain temporal problems with regard to the persistence of practical judgements within one system over time, which shall not be left unmentioned in this context. However, it is assumed that our meta-ethical consistency claim generally remains untouched by these problems, as they also need to be resolved by a substantive normative theory. In detail: There are mainly two problems regarding the temporal extension of normative systems. One is the problem of a change in norms after an action has been performed and the ensuing retrospective judgements.[15] The second is the problem of future changes in judicature, i. e. the introduction of a differing judgement about the same kind of action without a relevant difference in circumstances.[16] Presumably, by claiming that every normative system needs to provide an ambiguous evaluation regarding a specific action it is not claimed that within this system the judgement cannot change over time, even without a relevant change in the circumstances. Hence, it is not implied that retroactive punishment, for example, is per se impossible. However, in order to allow for it to happen one would have to rely on a proper, substantive theory of the evolution of normative systems, which cannot be provided here. This limitation of our theoretical approach is independent of the definitional claim that a normative system is best understood as a process rather than as a somewhat static set of rules or possibly a set of rules and principles. Rules (and principles, for that matter) realise their inherent purpose by being applied to actions, and in order for rules to exist and to be applied we need abstract reasons.[17] This constant interplay between the concrete level of actions and rule-application and the abstract level of reasons as a necessary feature of normative systems is what makes such systems more suitably defined as processes rather than aggregates of norms at a certain point in time. In fact, it seems advisable to distinguish between two different concepts of 'process' then: One refers to the idea of specification of normative content through application and is as such a definitional trait of normative systems as introduced earlier. The other one refers to the temporal dimension of normative systems, i. e. changes

[15] Perhaps most strikingly in the case of retroactive punishment. To get an impression of the two main opposing standpoints in this debate – still vivid till this day – see only: Gustav Radbruch, "Gesetzliches Unrecht und übergesetzliches Recht," *Süddeutsche Juristen-Zeitung* 1 (1946): 105–108; H. L. A. Hart, "Positivism and the Separation of Law and Morals," in *Essays in Jurisprudence and Philosophy* (New York: Oxford University Press, 1983), 72–78. Cf. also Hart, *Concept of Law*, 211–212.

[16] Regarding the theoretical problem of to what extent legitimate expectations regarding the law are (or rather ought to be) protected for the future, that is to say the problematic implications of the doctrine of judicial precedent, i. e. the binding effect of (high-court) judgements, cf. only Michael Gerhardt, "The Role of Precedent in Constitutional Decisionmaking and Theory," *College of William & Mary Law School Faculty Publications* Paper 980 (1991), http://scholarship.law.wm.edu/facpubs/980.

[17] For an elaborate explanation of this point in considerable detail see below sec. II, 4., b).

of content over time, and is as such excluded from our investigation. Precisely, it is assumed that the timeliness of normative systems in terms of norm application is independent of the question of to what extent time itself can affect changes in a system's content. In order to answer these questions, in order to properly explain the idea of law as a process in the latter sense, we are in need of a substantive theory that offers an account of the functions of concrete normative judgements *in time* – a theory that can surely not be provided here.[18]

c) Theoretical Relevance of the Concept

A specific problem about our definition of normative systems might be its possible width, or rather the danger that it might be too narrow to actually be of relevance in order to explain complex normative nexuses, because when strictly applied also a sole and simple norm would fall under the definition. However, this problem appears more fearsome than it actually is, as it is also entirely possible to subsume much more complex systems under the definition, e. g. the catalogue of fundamental rights in the German constitution. In fact, any (however large) set of principles issued by a specific authority and addressed to a set of agents can be a normative system as long as it delivers consistent results, i. e. as long as it ultimately matches every specific action with an equally specific normative demand. Therefore, not all principles that are part of the system need to play a relevant role in every judgement made on the basis of the system, which makes it possible for more complex systems to adequately capture a great amount of actions. Hence, even though the conclusions we are about to draw about the structure of normative systems will not be about 'the law' in its entirety,[19] they are far from being trivial. They do have explanatory relevance at least with regard to large parts of what we know as law, e. g. constitutional law or the law of fundamental rights.[20]

2. Freedom of Decision and Actions

As we can see from the standard examples concerning rights in sec. I, 1., a), bb), the notion of rights seems to be one which is for the most part closely linked with that of actions – either one's own actions as in 'A has a right to do X' or

[18] Especially, such a theory would have to include a proper assessment of the conflicting functions of orientation, i. e. for agents to *ex ante* know how to direct their future behaviour, and an indicatory/establishing function, i. e. reacting to changes in social values by setting a new standard for conduct.

[19] See below sec. II, 5., esp. b) and d).

[20] Moreover, the fact that even a single norm falls under the definition serves as a good indicator for the vast extension of normative systems in normative practice, see below sec. II, 5., b).

someone else's as in 'A has a right that B not do X'. Hence, we need to suppose that in order to gain an appropriate understanding of the notion of a right, one ought to be clear about the concept of actions to begin with. This is what we shall attend to in the following section.

a) Necessary Presupposition: Undetermined Decisions

Before we start examining the concept of actions as such, we ought to clarify one notion that is often regarded as a precondition for our very ability to be moral agents: free will. In this respect, our hypothesis shall be: Some idea of an agent's ability to make undetermined (or at least not entirely determined[21]) decisions, i. e. an agent's ability to decide for themselves between different options with regard to their behaviour, is a necessary precondition for any concept of normativity.

Before clarifying the plausibility of this assertion, at first it seems vital to distinguish two different ways in which the notion of decisions could generally be understood. First, we could understand it in an internal way, thus being limited to the area of the mind. In that sense one could e. g. decide to do more sports in the future, yet doing so could be and remain a purely 'mental act'. Generally, one can simply regard something as valuable in his or her mind and we could regard that act as his or her 'decision'. On the other hand, there is the notion of a decision applied, an effective or *practical decision* as one might call it, which leads to perceivable events in a social, intersubjective environment. In this section on the meaning of actions we shall restrict ourselves to this second understanding of decisions. It is in these *effective* decisions that the mind actually meets the world, that the deontic meets the ontic. Hence, a general distinction is proposed between an intrapersonal level of normativity, which is concerned with mental activity like thoughts, wishes, fantasies, deliberations, plans, etc. – plainly speaking: with all that happens 'only' in our heads – and an interpersonal one, which is concerned with analysing actions and normative systems.[22]

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[21] Notably, the notion 'undetermined' should not be understood in a particularly strong sense. Even if we correctly understand (legal) autonomy as a 'threshold concept' (in German: "*Schwellenkonzept*", see: Thomas Gutmann, *Freiwilligkeit als Rechtsbegriff* (München: Beck, 2001), 6–12, esp. 9–10), i. e. as something which an entity either possesses or lacks in a binary fashion, beyond this threshold – i. e. amongst such beings generally regarded as autonomous – a decision can surely be more or less *influenced* by external, heteronomous factors (ibid, 7). In other words, the idea of 'undetermined decisions' as introduced here and as used subsequently does not (have to) rely on a strong concept of metaphysical freedom in the sense that these decisions must be entirely free of external influences, but it simply presupposes the general capacity to form an independent decision between different options of conduct *in light of* more or less strong heteronomous influence on one's decision-making ability. The crucial idea is that of a resulting, realised option of conduct being retraceable to a decision which is at least not *fully* explainable in terms of external causes.

[22] Again, the resemblance to a traditional Kantian distinction is unmistakeable, i. e. Kant's

Admittedly, by making this assumption I will have to rely on the reader's pretheoretic intuitions to a certain degree.[23] And surely, the proposed distinction is not at all unproblematic. For example, can there not be interpersonal rules sometimes which forbid intrapersonal acts? Suppose the moral code of a community does not allow persons to fantasise about killing other people, maybe not enforcing the prohibition with drastic legal sanctions but at least with some kind of (moral) reproach, because such fantasising is thought to be bad for the development of one's own character or personality. Suppose further that A vividly imagines killing B and later on talks about these fantasies. Consequently, A would have to be reproached for his fantasies. Thus, can there be interpersonal rules whose purpose is the evaluation of mental processes? One might think that the reproach is only possible because A confesses his phantasies and thus puts them into an intersubjective sphere. An adequate response to this objection could be the following: Clearly the reproach does not depend on the mere telling of having had such fantasies, but on allowing oneself to have had them in the first place. Yet, only by reporting about the mental activity did it become perceivable in an intersubjective context in the first place. In this way A's fantasy also became an intersubjectively perceivable event, an event which we believe can have causal effects like spoiling one's character. Not until we regard it as such can a link be established from the event to a somewhat blameworthy decision and, consequently, can moral responsibility be ascribed. Thus, the example does not disprove our conception of events as occurrences perceivable in a social context, distinguishable from mere mental activity, but rather helps to reinforce it.[24]

Let us return to our initial assertion that the individual ability to make undetermined decisions is a necessary, internal precondition of our normative practice. To begin with, the idea of practical decisions as the link between mind and world is loosely based on a Kantian understanding of agent causation, dividing causality in general into natural causality (i. e. the laws of physics) on the one hand and a 'causality by freedom' on the other, which means that agents acting on behalf of their own decisions create their own causes that cannot be

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distinction between 'morality' and 'legality' (Kant, *Metaphysics*, 375, 383). Kant held that the law, in contrast to morals, "has to do, *first*, only with the external and indeed practical relation of one person to another, insofar as their actions, as deeds, can have (direct or indirect) influence on each other" (ibid, 387). Without committing myself (or indeed having to commit myself) to the Kantian distinction between law and morals in detail, I do believe this general separation between an intrapersonal and an interpersonal level of normativity to be a rather useful axiom in order to roughly map out a way through normativity in total.

[23] Cf. Kent Bach, "Actions are not Events," *Mind* 89 (January 1980): 115.

[24] The possibility that this proposed demarcation between interpersonally perceivable events and mere intrapersonal mental activity might not be entirely congruent with the one between morality and legality in a Kantian sense (see above sec. II, fn. 22) poses a problem, which unfortunately cannot be solved here but could give rise to further investigations.

explained as the effect of any prior cause.[25] I am thereby not necessarily supporting all Kantian claims about the nature of causality and/or perception.[26] The only point is that within a normative system, if we aim at ascribing responsibility for actions in the first place, we cannot avoid adopting such a differentiated account of causality, just as we cannot avoid adopting some account of freedom of will, yet only to the extent that we presuppose both accounts as an internal element of our normative practice. Thus, the initial assertion might seem like an enormously strong claim only at first glance as no claim about an *actual* existence of any kind of free will is entailed by it. Essentially, what we are dealing with in this respect is the long-standing debate regarding the possible compatibility of the notions of free will on the one hand and the idea of a causal determinism on the other.[27] A development and defence of a reasonably elaborate position in this extensive academic debate between compatibilists and incompatibilists is plainly impossible in this context. Thus, a position in this dispute will only be taken insofar as we shall make the following, supposedly rather modest, axiomatic assumption: Even if there were no actual free will, we would still have to presuppose it in social life within the internal logic of our normative practice in order to ascribe responsibility.[28] In other words, we need a notion of free decisions in order to *make sense of* normative practice in the first place,

[25] Following Kant, a human agent, being part of the physical world, is submitted to the (causal) rules of this world. Yet, by also being an intelligible being it can start new causal chains due to his or her own willing. In this way the two forms of causality are compatible. To be precise and avoid misunderstandings it would probably be better not to speak of "two forms of causality" in this context in the first place. Also for Kant there is only one set of causal statements that describe the relation between a cause and an effect, which is natural causality. 'Causality by freedom' does not imply another kind of causal *relation*, but rather only adds the idea of *independent* causes to the general concept, see Kant, *Pure Reason*, 465: "[…] causality [of our will] […], independently of those natural causes, and even contrary to their force and influence, can produce something that is determined in the time-order in accordance with empirical laws, and which can therefore begin a series of events *entirely of itself*". See also ibid, 634. Cf. Eric Watkins, "Kant," in *A Companion to the Philosophy of Action*, ed. Timothy O'Connor and Constantine Sandis (Oxford: Wiley-Blackwell, 2010), 526.

[26] For a rough outline of such a Kantian account of causality see Bertram Kienzle, "Klassische Kausalität mit und ohne Konstanz," in *Auf Freigang*, ed. Sibille Mischer, Michael Quante, and Christian Suhm (Münster: Lit, 2003), 93 ff.

[27] For a traditional incompatibilist view see e. g. George Berkeley, *A Treatise Concerning the Principles of Human Knowledge*, ed. Jonathan Dancy (Oxford, Oxford University Press, 1998 [1710]). For a classical compatibilist account cf. esp. Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge: Cambridge University Press, repr. 2006 [1651]). For a good overview over the more recent development of the debate see Neil Levy and Michael McKenna, "Recent Work on Moral Responsibility," *Philosophy Compass* 4 (2009).

[28] For a more sophisticated development of this general idea see Michael Quante, "Philosophische Freiheiten. Eine systematische Landkarte zur Einleitung," in *Auf Freigang*, ed. Sibille Mischer, Michael Quante, and Christian Suhm (Münster: Lit, 2003), 14 ff.; id, *Einführung in die Allgemeine Ethik*, 4th ed. (Darmstadt: Wiss. Buchgesellschaft, 2011), 165 ff., esp. 175. Here Quante aptly describes freedom as an 'internal momentum' of our ethical practice of ascribing responsibility.

i. e. the practice of prescribing rules and ascribing responsibility for not complying with them. Only radically deterministic incompatibilist approaches are thus excluded from the scope of this thesis. A detailed explanation of why this is believed to be an acceptable (and supposedly largely agreeable) consequence is arguably beyond the scope of this thesis.

b) The Concept of Actions

What exactly is an action then? We will begin scrutinising this question by sketching the rudiments of *Donald Davidson*'s standard account in this respect. Surely, a comprehensive analysis of this standard conception, let alone of the theory of actions in total, cannot be provided here. However, a few weaknesses of the standard account shall be pointed out, namely those which are relevant for our purposes. In this process, the outlines of a concept of actions will emerge, which shall serve as a basis for the further investigation of rights.

aa) The Standard Conception

Arguably the most common and widely accepted approach to an action definition is the one offered by *Donald Davidson*, who designed and defended a causal theory of action, i. e. a theory which claims that an "agent performs an action only if an appropriate internal state of the agent causes a particular result in a certain way"[29]. In fact, even though his works have been subject to a wide debate and have prompted quite a lot of disagreement – often enough with good reasons as we will see – *Davidson*'s main theses about the nature of actions remain so widely accepted in contemporary literature on actions that they are worth being treated as a basis for the ensuing investigation. A convincing theory of actions will have to engage with *Davidson*'s fundamental theses, which shall be summarised as follows[30]:

(I) Actions are events. Taken into account the distinction between world and mind made before, *Davidson* draws a rather natural conclusion, which is still drawn by most authors concerned with action theory nowadays, namely that actions essentially are events. More precisely, an action is supposed to be a certain kind of event – one which is in some way caused or can be explained in terms of a preceding mental activity by the agent performing the event. That is: If A's

[29] Wayne Davis, "The Causal Theory of Action," in *A Companion to the Philosophy of Action*, ed. Timothy O'Connor and Constantine Sandis (Oxford: Wiley-Blackwell, 2010). Davis offers a brief introduction to causal theories of action in general. Cf. also Donald Davidson, "Actions, Reasons, and Causes," *The Journal of Philosophy* 60 (November 1963).

[30] The three main theses are inspired by the outline of Davidson's account in: Ralf Stoecker, introduction to *Handlungen und Handlungsgründe*, ed. Ralf Stoecker (Paderborn: Mentis, 2002), ix–xii. Cf. also id, "Davidson," in *A Companion to the Philosophy of Action*, ed. Timothy O'Connor and Constantine Sandis (Oxford: Wiley-Blackwell, 2010), 603.

arm rises, the event – that is, what everybody can witness – is 'A's arm rising'. If, however, the overt arm movement is caused by some mental episode of A's, we say 'A raised his arm' as a specific way of describing the event 'arm rising' and thus qualifying it as an action.[31]

(II) Actions are explicable by a pair of attitudes of the agent, his or her *primary reason*. The mental side of acting, which *Davidson* is referring to here, has been given a lot of different names. Whilst he wants the cause for a physical event classified as an action to be understood as the pair of *desire* and appropriate *belief* of the acting agent,[32] others have preferred notions like intention[33], willing[34], or volition[35]. And even though very different in detail, they all have in common that they describe a somehow irreducible mental element of what constitutes an 'action', or more precisely a behaviour that is at least thought to be under some kind of control by the agent performing it.

(III) The relation between primary reason (II) and the event under (I) is that of cause and effect. According to this orthodox position there are two events involved in explaining actions: a mental one (II), and the actual physical event (I), the 'action' s. str. The relation between these two represents a third element of the action definition in need of explanation. The orthodox position holds that there is a causal relation between (II) and (I).

bb) The Causal Structure of Action Explanations

Consequently, we shall examine possible defects of these conceptions, especially regarding the proposed underlying causal structure, which is adopted by most contemporary conceptions of actions. Precisely, we shall demonstrate that the model 'event – causal relation – event' is not appropriate and that the logic of actions requires a more complex model of causality, one that accounts for the notion of independent first causes[36] in the form of undetermined or not entirely determined practical decisions, which mainly function as the leverage point for the ascription of responsibility for performing an action.[37] In detail:

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[31] Wittgenstein, *Philosophical Investigations*, 3rd ed. (Oxford: Blackwell, repr. 1995 [1953]), § 621, 161.

[32] Davidson, "Actions, Reasons, and Causes," 686.

[33] This term has been fundamentally shaped by Gertrude Anscombe, mostly in: id, *Intention* (Oxford: Blackwell, 1979 [1957]). Cf. Michael Bratman, *Intention, Plans and Practical Reason*, (Cambridge, MA: Harvard University Press, 1987). In contrast to Davidson's account Bratman held someone's 'intention' to be an irreducible mental element, not to be divisible into desire and belief. Cf. also id, *Faces of Intention*, 244–245.

[34] Herbert Grice, "Intention and Uncertainty," in *Proceedings of the British Academy Vol. 57* (Oxford: Oxford University Press, 1971).

[35] Carl Ginet, *On Action* (Cambridge: Cambridge University Press, 1990), 30–39.

[36] Cf. above sec. II, fn. 25.

[37] This problem is relevant in the context of rights as a conception of actions being both a decision in favour of an option X and against an option Y, which is implied by the proposed causal structure of actions, is vital for the ensuing critical re-analysis of the deontic operators,

To begin with, let us consider the different existing positions regarding the causal structure of actions in order to adequately distance ourselves from them. Therefore, let us once more suppose that actions have something to do with (a) a physical event and (b) some kind of mental episode. Roughly four different positions can be distinguished then:[38] (1) The term 'action' describes an event and only this single event as a basic action.[39] The corresponding mental activity is the cause but is not to be confused with the actual action-event, which may have further imputable effects. In accordance with this, we may distinguish different descriptions of the same basic action. Roughly, this is the orthodox position held by *Davidson* and his followers. (2) Others claim that the term action essentially refers only to the mental act involved, which is in the relevant literature often referred to as the act of 'trying'.[40] This classification is supposed to give a clearer account of the specific intentional nature of actions. The underlying reasoning is all but implausible: In the standard example the event of arm rising stays the same, whether it happens intentionally or not. The difference lies in the causal 'bringing about' of the event, i. e. the 'trying' by the agent. So, if the mental act of trying is what defines an action, we might just as well have found our essential defining feature. (3) Notwithstanding the soundness of this argument, others raised the equally sound objection that the mere 'trying' without any accompanying event cannot reasonably be called an action, certainly because it would deviate too much from our ordinary understanding and usage of the term 'action'. For example, a person with a numb arm might mentally try to raise it without any perceivable outward effect. Did he nevertheless perform an action? This appears at least doubtful, which is why quite a few scholars have argued that the term action is best described by combining all elements of the causal process. Hence, an action is supposed to be best described as a com-

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whose results in turn will enhance our understanding of the theoretical structures underlying not only the Hohfeldian scheme of legal entitlements, but also and especially the dispute between Interest and Choice Theory.

[38] Cf. Christoph Lumer, "Handlung/Handlungstheorie," in *Enzyklopädie Philosophie*, ed. Hans Jörg Sandkühler (Hamburg: Meiner, 1999), 540.

[39] Donald Davidson, "Agency," in *Essays on Actions and Events* (Oxford: Clarendon, 1980), 59; the assumption that actions are events is wide-spread. Hornsby, on the other hand, has contended that actions could be better understood as 'activity', as something that an agent is engaged in, that he or she is doing rather than simply an event happening. This account is not entirely convincing, either, as even attempts to do something, i. e. engaging in doing something but not being able to finish it, can be described as events, namely the events of starting to do something, thereby aiming at a certain goal. See Jennifer Hornsby, "Basic Activity," *Aristotelian Society Supplementary* 87 (June 2013): 7.

[40] Jennifer Hornsby, "Trying to Act," in *A Companion to the Philosophy of Action*, ed. Timothy O'Connor and Constantine Sandis (Oxford: Wiley-Blackwell, 2010). Cf. id, *Actions* (London: Routledge & Kegan Paul, 1980). Cf. also Ginet, *On Action*, 15–20, even though Ginet puts an emphasis on the notion of a 'volition' as the defining feature of an action, see above sec. II, fn. 35.

bination of both the act of trying *plus* the ensuing physical event.[41] (4) Finally, there are those who claim an action is best described as neither the event nor the mental activity but rather as the specific *causal relation* between these two elements.[42] With this position it is argued that an action is neither an event itself nor a mental act causing the event – it is more precisely said to be the very causing of the event. Thus, the action is identified with the intentional bringing about of the event.[43] It seems evident that this position faces possibly even greater doubts with regard to compatibility with everyday usage and common understanding of the term 'action' than position (2) before.

Without wanting to dwell on the respective strengths and weaknesses of each position, for our purposes it is most noteworthy that all of them have one thing in common: Their conceptions are based on the same structural phenomena with regard to actions and causation. In all four there is some mental event or mental act involved, e. g. an intention or volition to do something, which causes a certain physical event, i. e. usually some kind of bodily movement.

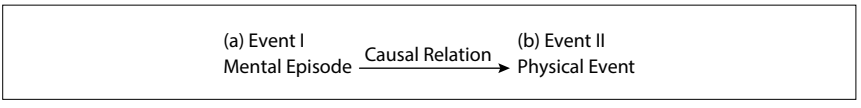

Figure 1: Causality Model I.

Thus, in a way they fail to converge on a single definition for 'action' because they have a single practical phenomenon to define but are bound to a causal theorem which consists of three different elements – two events and their relation.[44] Whilst all four positions at least agree on this basic structure, a conception of *agent causation*[45], as it is proposed here, differs not only in terms of which elements are to be included into the definition but also in terms of the underlying causal structure. Presumably, we experience problems in defining what an action is just because we are concerned with a phenomenon located at the

[41] See only Brian O'Shaughnessy, "Trying (as the Mental 'Pineal Gland')," *The Journal of Philosophy* 70 (June 1973): 383–386.

[42] Georg von Wright, *Norm and Action – A logical enquiry* (London: Routledge, 1963), 35 ff. Cf. also Fred Dretske, *Explaining Behaviour* (Cambridge, MA: MIT Press, 1992), 17. Dretske also focuses on the causal relation between some internal occurrence and external behaviour. He does not, however, describe it as a punctual moment in time, but as a "process – C's causing M – that begins with C and ends with M". Thus, Dretske's view must probably also be located somewhere in between (3) and (4) of the suggested categories.

[43] Von Wright, *Norm and Action*, 35 ff. Cf. also Maria Alvarez and John Hyman, "Agents and Their Actions," *Philosophy* 73 (1998): 219–221.

[44] O'Shaugnessy, "Trying," 375.

[45] For a rough outline of such a theory of agent causation see Randolph Clarke, "Toward a Credible Agent-Causal Account of Free Will," *Noûs* 27 (June 1993): 191–203. See also below sec. II, fn. 48.

very crossroads of mind and world. Thus, roughly speaking, it could be argued that it is neither to be found only on one or the other side, see position (1) and (2), nor on both together, see position (3), but rather that it *is* the crossroads, the very link between mind and world. *Von Wright* once described this idea quite fittingly (in spite of arguing against it almost in the same breath) as a momentary "click in the brain" – the moment in which a state of mind turns into an outward behaviour.[46] Yet, arguably, this 'relation' between the two levels, the linking notion between the mental and the physical aspect of acting, between the mind and the world, is not some in-between between cause and effect, but it is best described as a cause by itself, an undetermined first cause.[47] *O'Connor* gets to the heart of this idea of first causes, when he writes: "I am the source of my own activity, not merely in a relative sense as the most proximate and salient locus of an unbroken chain of causal transactions leading up to this event, but fundamentally, in a way not prefigured by what has gone before"[48].

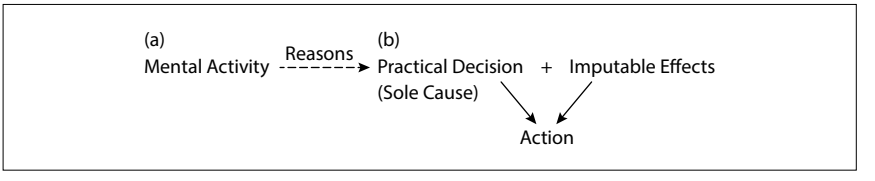

Figure 2: Causality Model II – Agent Causation.

The defect of the standard conception is thus that it relies on a one-track conception of causality, that is, the notion that every event can be explained causally, i. e. every event is both cause for some effect and effect of some preceding cause. If we as a moral or legal community want to hold people responsible for their actions this model is insufficient, though. If actions were causally explicable the notion of individual responsibility could not be simultaneously held up. Therefore, a practical decision needs to be understood as unique in its causal

[46] Georg von Wright, "Explanation and Understanding of Action," *Revue Internationale de Philosophie* 35 (1981): 138–139.

[47] Hence, Bach's account (4) is indeed able to explain the importance of decisions for describing certain events and only these events as actions. Unfortunately, he does not identify the action with the underlying practical decision as an event birthed into the world by an agent's discretion, but instead he regards the mere relation between two separate events as an action and thus identifies it with virtually no relevant entity at all. As such it cannot reasonably be regarded as a suitable definition. Precisely, when Bach states "Actions […], not being events, are neither causes nor effects" (Bach, *Events*, 120) he goes one step too far. Correctly understood, an action *is* a cause, yet simply not any cause but a first, undetermined one.

[48] Timothy O'Connor, "Agent Causation," in *Agents, Causes, and Events: Essays on Indeterminism and Free Will*, ed. Timothy O'Connor (New York: Oxford University Press, 1995), 173. For an excellent overview of agent causal theories from Reid to Chisholm see: Timothy O'Connor, *Persons and Causes* (New York: Oxford University Press, 2000), 43–66.

structure by being an independent first cause, i. e. *only* a cause. It should already be clear from the context that the notion of a practical decision describes the *result* of a (supposed) mental process, i. e. in favour of X and against alternative options, and not the process itself. These decisions then cannot be explained in terms of their own causes, but only in terms of reasons for making them, which in a way opens up the ontic world of cause and effect to the deontic world of possibilities and options. Importantly, a more general idea of causation is thereby not given up, i. e. the relation of cause and effect is not principally questioned. We rather need to enrich our understanding of causality by adding the element of practical decisions as first causes for ensuing effects in order to make sense of our normative practice.[49]

Arguably, the relation between the concepts of 'actions' and 'practical decisions' is in need of some further clarifications. Precisely, we may ask ourselves: Is a practical decision itself already an action? If so, are both concepts equivalent and therefore interchangeable? To begin with, the terms are by no means equivalent, though they are very closely connected. Looking to figure 2 above, we shall understand an action as (intersubjectively perceivable and thus evaluable[50]) practical effects or occurrences which we ascribe to an agent as his or her doing. We are only able to ascribe them, though, by supposing some kind of control of the agent over the respective events – precisely, by supposing that the agent decided to let them happen, despite the fact the she could have decided not to do so. Quite simply, this very connection between causal world and conscious agent, the possibility to impute practical effects to an agent, is represented by the notion of a practical decision. Importantly, 'decision' is not to be understood in the sense of a necessarily conscious act, but rather only in the sense of an agent's acute ability to decide differently with regard to the imputed effects, i. e. the idea that A performed an action X because she somehow could have decided to perform Y instead.[51] Accordingly, a practical decision is not just some mental act that could or could not have consequences in the real world; rather, the very notion necessarily implies such effects as it represents the (otherwise missing) link between mind and world. Put bluntly, it merely

[49] Roderick Chisholm, *Person and Object* (London: George Allen & Unwin, 1976), 69–72. Cf. also O'Connor, *Persons and Causes*, 68–74.

[50] Once more, the notion of 'internal actions' is already conceptually excluded due to the exclusive focus on intersubjectively perceivable events. As much is thought to be a plausible and useful limitation of the concept of actions as an essential feature of actions is the fact that they are evaluable. As we saw earlier, such evaluations occur in intersubjective contexts, see above example in sec. II, 2., a). Consequently, the idea of an *only* internal action must be a *contradictio in adjecto*.

[51] In this respect our account crucially differs from Harry Frankfurt's account of actions, which is essentially flawed. Decisive for the determination of an action is the possible otherness of the underlying decision, not of the externally perceivable events. See therefore below sec. II, 2., c).

represents the fact that you let your mental activity have practical effects on the world.[52] Hence, a practical decision cannot itself be an action. Actions comprise both practical effects *and* an imputation context. Thus, for reasons of theoretical clarity it seems appropriate to distinguish sharply between actions as the objects of evaluation in normative practice, and practical decisions as the reference point for such evaluations. Precisely, in normative practice we assess and evaluate actions, i. e. practical occurrences imputed to an agent as her doing, and not practical decisions, already because the latter cannot even be named due to their sole function as imputation connections. Yet, as we shall see in much detail in sec. II, 3., the structure of action evaluations corresponds to the structure of practical decisions because it is these decisions which function as leverage points for ascribing responsibility in the first place. Thus, a practical decision could be described as the origin of an action, but it certainly is not an action itself, which ultimately debilitates possible objections regarding an otherwise implausible 'regress of actions', which would occur if we were to equate actions and (practical) decisions. Only in that case the decision to do something would require another decision/action to decide accordingly and so forth.[53]

Once more in other words: The notion of a practical decision both represents a necessary condition for actions, yet by definition it cannot occur on its own. Being a first *cause* its very existence already implies some practical *effects* and thus the existence of some (yet unspecified) action. These thoughts can be neatly illustrated by employing the image of a source in relation to its river: Clearly, the source is not (equivalent to) the river. Still, without source there can be no river. And the existence of a source necessarily implies the existence of a river, though which may vary greatly in length and width. To conclude: Practical decisions are best understood as the leverage points for the ascription

[52] Thereby it is irrelevant whether the effects come from active or passive behaviour. If we generally presuppose a decision-making-ability, then one cannot avoid making practical decisions/performing actions – even if you decide not to act, then the action 'standing still' has an effect on the world as you could have done something different, see below sec. I, 3., b), aa), (1) on the nature and meaning of omissions.

[53] Christian Budnik, "Überlegen und Entscheiden," in *Handbuch Handlungstheorie*, ed. Michael Kühler and Markus Rüther (Stuttgart: Metzler, 2016), 172. As indicated there, quite a few theorists will probably object to the notion of undetermined decisions as these decisions' provenance allegedly remains somewhat mystical. Yet, that would be a justified objection only if we already supposed that everything had to be explainable in terms of cause and effect, i. e. that everything has to have a provenance in the form of a cause. In fact, why should it not be plausible to assume the idea of a consciousness (possibly as the result of a very long evolutionary development) that initiates its own causal chains, especially by virtue of this being something that we all experience? To be clear, I am still not claiming that there actually *is* freedom of this sort, but I am simply concerned with the question: What do we have to suppose in order to make sense of our normative practice? What are its foundations? In this respect, I seriously wonder why it should be more mysterious to presuppose something which we are all familiar with from our own subjective experience, namely our ability to make decisions, than presupposing a lack of that very thing. In fact, the latter appears more of a mystery to me.

of responsibility or blame for actions, i. e. by means of practical decisions we establish a connection between the agent and practical occurrences, whereas actions are a means to (linguistically) frame the overall context, the leverage point plus imputable effects. Moreover, in the internal logic and practice of a normative system, i. e. for our purposes, it is sufficient to work with actions and suppose the notion of a practical decision only as a means to impute practical effects to an agent. Once more figuratively speaking, we know everything that defines a river if we learn about its course from its mouth back to its source without necessarily having to know where exactly the water comes from. Thus, more intricate matters regarding the nature of decisions in a more general sense as (purely) mental episodes, e. g. the relation of deliberations and decisions[54], can be left undetermined due to our focus on intersubjective normative practice. Importantly, the effects of practical decisions can – again in analogy to the river-image – be both temporally distant and/or imputed in a general fashion to a series of individual practical decisions, which shall be demonstrated in the following section.

cc) Breadth and Generality of Action Descriptions

In addition to the implied mono-causal structure of cause and effect, *Davidson*'s idea of a concept of actions being limited to 'basic actions' deserves rejection as well. In normative practice we ought to opt for a much broader understanding of the term – a task which is most relevant for our enterprise, as it would add yet another 'valve' of theoretical complexity. In short, in normative theory in general and in the theory of rights in particular we are concerned with action evaluations. Presumably, the result of an action evaluation essentially depends on the breadth and generality of the respective action. If this action can be everything from the most concrete to the most general, the task of preliminarily clarifying the exact action examined clearly is one of major importance for the resulting judgement.[55]

[54] Budnik, "Überlegen und Entscheiden," 172–176, with further references.

[55] Instantly problematic appears the relation between (1) this rather wide concept of actions and (2) the above mentioned theoretical necessity to take into account all relevant circumstances for an action evaluation. Presumably, we need to distinguish two different problem areas here: With (1) we are concerned with the generality of action descriptions, e. g. the action 'building a house' as the summary of various single steps and single actions, whereas with (2) we claimed that in order to evaluate each action we need to consider all relevant circumstances *for this action*. An example: A builds a house on his land. For quite a few parts of it she hires illicit workers. Clearly, the latter action is forbidden. That does not make the former, more general action forbidden, though. Rather we can say "A was permitted to build her house", despite the fact that not every single step was legitimate. Importantly, the result of an action evaluation is essentially dependent on the width/generality of the action description in question. Only for this description can we actually determine all situationally relevant circumstances. In case of

(1) Breadth

The standard account claims that only the basic event, i. e. roughly the first identifiable event in a however long causal chain, is a proper 'action' and that the ascription of further causal effects merely represents different possible descriptions of the same basic action. Hence, with the width of actions we mean the possibility to describe a series of effects in temporal order as an action itself, depending only on the possibility to impute these events to the exercised will of an agent (or possibly a group of agents[56]).

In order to elucidate the underlying problem let us have a look at a rather specific problem from the field of action theory, namely that of *action individuation*.[57] The problem basically deals with the temporal integration of actions, i. e. with the question: *When* does an action take place? *Bach* illustrates the problem appealingly with an example, which shall be adopted for our purposes:[58] Camper A fires his rifle at an attacking coyote. The coyote, badly wounded, flees and dies 24 hours later from the fatal wound. What exactly did A do? Which action or actions did he perform? There are various ways of describing what happened. At least the three most distinct shall be listed here: (a) A pulled the trigger. (b) A shot at the coyote. (c) A killed the coyote. *Davidson* and other proponents of the standard account claim that only *one* action happened, the basic action (a). All other statements are supposed to be nothing but different descriptions of the somehow *primitive* action 'pulling the trigger'.[59] This position can also be referred to as a reductionist account.[60] Yet, following the standard account we are faced with the problem that A apparently killed the animal 24 hours before it actually died, which seems plain wrong.[61] In contrast, the standard account argues that if we qualify (c) as an independent action, then A seemingly engaged in killing the coyote for a whole 24 hours, even though he might

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the action 'building a house', that means all circumstances concerning the question of whether it was allowed to build a house on this piece of land, in general and *with whatever means*.

[56] The intricate problem of group action cannot be dealt with further here. At any rate, the possibility of group actions is not excluded by the thoughts and remarks provided. Cf. also below sec. III, 1., a), bb), (1) for an explanation of how Wesley N. Hohfeld's scheme of entitlements is able to account for such 'group actions'.

[57] Sometimes also referred to as the 'time-of-a-killing-problem', see Judith J. Thomson, "The Time of a Killing," *The Journal of Philosophy* 68 (1971): 115. Cf. also Donald Davidson, "The Individuation of Events," in *Essays on Actions and Events* (Oxford: Clarendon, 1980).

[58] Bach, *Events*, 117.

[59] Davidson, "Ageny," 59. Cf. Anscombe, *Intention*, 45–46.

[60] Irving Thalberg, *Perception, Emotion, and Action* (New Haven: Yale University Press, 1977), 85.

[61] The same happens if we apply the definition from position (2) above, probably even more so in this case: A would have killed the coyote by just trying to shoot at it. Bach in a way eludes the problems associated with individuation in his account (4), but at the (much too) high cost that his 'actions' are no longer relevant entities at all (see above sec. II, fn. 47). Cf. Stoecker, introduction, xxi.

have been on the way home or doing something entirely different already at the actual time of death. This is only a pseudo-problem, though. Whether a set of facts, an event or a series of events can be ascribed to an agent as his or her action is not a question of consciousness about the events or effects at the time of their occurrence. It is a (normative) matter of imputation of the effects to a practical decision, which in turn will depend on the (subjective or intersubjective) foreseeability of certain consequences. If A foresaw and could foresee that his rifle shot would (or at least could) eventually kill the coyote, why should we not qualify (c) as an independent action? Our example – like all standard examples for the problem of action individuation (e. g. poisoning the well, flipping a light switch, etc.) – have in common that there is only one practical decision but several effects associated, which are temporally detached. That is, (a) can be assigned to a specific point of time t_1. At exactly t_1 A pulled the trigger then, whereas (b) happens at a point of time t_2 and the coyote dies at a point of time t_3. In my view, each of the events at t_1 till t_3 can without inconsistencies be called actions of A, because as much is not a matter of when something happens that could be directly influenced by A but rather it is a normative matter of imputation, of ascribing an event (or a series of events) to a decision. Imputation of certain effects is necessary in order to ascribe responsibility for an action, in fact in order to qualify something as an action in the first place. If that is so then in terms of terminology it is an unreasonable claim that we should only think of the practical decision, the basic action, as a proper action. In fact, an action fits practical needs much better if it is understood as *at least* one first cause plus further imputable effects. In other words, the content of (a) simply is the minimum content that one can expect from an action. Other causally related effects, as long as they are regarded as imputable, can form actions just as well. Thus, there is no reason not to think of three distinct actions in the above mentioned example.[62]

(2) Generality

The aforementioned imputable effects need not only be temporally rather distant. Moreover, we need not always retrace every action to a single practical decision; we can just as well refer to a series of decisions. Without a doubt, much of what we usually refer to as 'actions' cannot be linked to just *one* practical decision. For example, 'to build a house' surely describes a single action, and just as surely one would have to make quite a number of practical decisions in the course of doing so. This does not pose an insuperable conceptual concern as

[62] In this respect O'Shaughnessy's account (3) is entirely agreeable and almost identical to ours. It would have been desirable, though, for him to have rejected the idea that there were two causally related events involved in an action – a notion he explicitly defends, though. See O'Shaughnessy, "Trying," 375.

it is only a matter of abstraction, of consolidating different action descriptions. Hence, 'to build a house' is a more general compound of various simpler actions dominated by a superordinate goal. In the image of a river from before, we may think of such an action as a river with various influent streams. Another example: If A in our coyote case not only shot the animal but also afterwards walked up to it and stabbed it, she still would have killed the coyote only once. Or imagine a passionate football player, who plays a match with her team. It is natural to refer to the activity as 'she played football' instead of referring to every single decision made in the course of the match. Most often there is simply no need for such detail in intersubjective discourse. The overall effect that she was running around kicking a leather ball every once in a while for roughly 90 minutes can be grasped more easily by referring to the general action 'playing football' without risking theoretical inconsistency. Concluding this section, we can thus hold that any action comprises at least one practical decision as a first cause and at least one imputable effect, possibly a wide range of such effects.

c) Frankfurt's Critique of the Principle of Alternate Possibilities

Even though we cannot discuss all problematic aspects of the aforementioned action definition, despite the fact that there are surely quite a few worthy of discussion, we shall at least opt for one of the most relevant criticisms of a conception of actions like ours based on undetermined decisions or the individual ability to freely decide between alternative options – namely *Harry Frankfurt*'s influential work on this topic.[63]

Therefore, we need to return to our basic presupposition: causality by free will and undetermined decisions as an internal momentum of our normative practice. Implied in this presupposition is what *Frankfurt* called the Principle of Alternate Possibilities (PAP).[64] By defining actions as behaviour that is to some extent controlled or governed by the entity performing it, which would e. g. also include purposeful behaviour by animals, *Frankfurt* tried to make a point against the aforementioned principle. His basic argument is the following: A person can be responsible for her actions, even though she could not have done otherwise. There are possible circumstances in which an agent A could not decide to do Y instead of X, e. g. because of some apparatus attached to A's brain that would force him to do X anyway. What if, however, A would want

[63] An overview over Frankfurt's account as well as the arguments offered by both its supporters and opponents can be found in Levy and McKenna, "Moral Responsibility," 98–102. Another challenge that would surely be worth discussing, but cannot be considered in detail is the one offered in: Fred Dretske, "Machines, Plants and Animals: The Origins of Agency," *Erkenntnis* 51 (1999). Dretske essentially questions whether there is a clear line to be drawn at all between those capable and those not capable of performing actions/making decisions.

[64] Harry Frankfurt, "Alternate Possibilities and Moral Responsibility," *The Journal of Philosophy* 66 (December 1969): 829.

to do X and actually does X independent of the apparatus and for her own reasons? Would she then not be responsible for doing X, even though she *practically* could not have done otherwise?[65] *Frankfurt* is relying on the readers' intuitions here. His example completely misses the point, though. The principle of alternate possibilities is not falsifiable in this fashion.[66] In fact, an agent can only be responsible for her actions if and only if she could have done otherwise.

In detail: Suppose our action definition, comprising both first cause and imputable effect(s), was correct. Then an agent would be responsible for an event in case she decided to (causally) bring about this event and could have decided differently. This differing decision could have two effects though: (1) bringing about another, different event *or* (2) bringing about the same event only in this case not causally due to the agent's own will, but due to some irresistible external force. Thus, strictly speaking, in the second case it would be no 'bringing about' of the event in the first place. So, what *Frankfurt* actually describes in his example are two different sets of facts.[67] In both cases A is able to decide to do Y but would eventually end up behaving in a way that would seem as if she performed X. The difference between the two scenarios is that if she decided to do X, she could indeed be held responsible for doing so because she at least *could have decided* to do Y, even though that would have led her to doing X anyway.[68] However, in case she decided to do Y and ended up doing X because of some irresistible form of coercion applied to her she could not be held responsible for doing X. That is so, because in the second case *she* did not bring about her body performing X, but the behaviour was caused by some external force. Thus, consequently and strictly speaking the event in the second case cannot even be called an action, because it lacks an actual practical decision made by A herself and therewith the possibility for ascribing responsibility, whereas the ascription of responsibility in the first case derives from the very fact that A actually brought about her own behaviour with the possibility of deciding to do Y instead – with the consequent effect of not being responsible for X – which she simply did not do. In other words, in the first case A is responsible for her action because she could at least have decided not to be re-

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[65] Ibid, 835–836.

[66] For a few notable examples of a correspondingly critical assessment of Frankfurt's challenge to PAP (out of the vast amount literature on Frankfurt in general) see only: Robert Kane, *The Significance of Free Will* (New York: Oxford University Press, 1998), 40–58; Carl Ginet, "In Defense of the Principle of Alternative Possibilities: Why I Don't Find Frankfurt's Argument Convincing," *Philosophical Perspectives* 10 (1996); Michael McKenna, "Alternative Possibilities and the Failure of the Counterexample Strategy," *Journal of Social Philosophy* 28 (1997); Michael Otsuka, "Incompatibilism and the Avoidability of Blame," *Ethics* 108 (July 1998).

[67] Cf. McKenna, "Alternative Possibilities," 77.

[68] This kind of objection is also referred to as the 'flicker strategy', cf. John M. Fischer, *The Metaphysics of Free Will* (Oxford: Blackwell, 1995), 134–140.

sponsible.[69] This might sound strange at first, which is possibly due to a rather strangely constructed example. As a normative conclusion it is entirely sound. In fact, *Frankfurt*'s machine either (a) controls the consciousness of the agent in the sense of eliminating options from the start or (b) by changing the agent's mind if she decided something wrong, i. e. in the example to do Y. If (b) were the case then the machine would only get active if A decided to do Y. If she decided to do X her decision would be the only relevant incentive for the performance of X. If she decided to do Y, the machine would automatically change her mind making her prefer and perform X instead. Still, after the machine's interference it would also be her decision, namely deciding in favour of Y, which in this case is the *indirect* cause for her according behaviour, namely the occurrence of X.[70] Hence, what Frankfurt misinterprets is the connection between causality of decisions and responsibility. Whilst he appears to treat both ideas analogously, they clearly are not. In both cases A's decisions are (however directly or indirectly) causal for X. In the first scenario A's decision is actually free. Thus it can serve as an undetermined first cause. The idea of responsibility is inseparably linked to this notion of a first cause. In the second case A's decision to do Y may have eventually led to her doing X, but this decision would have been determined by the interference of the machine. This interference does not destroy the causal chain, but it does exclude the possibility of ascribing responsibility. Ironically, *Frankfurt* thus in a way emphasises with his example what he intended to refute in the first place: the necessary connection between responsibility and the indeterminateness[71] of practical decisions.[72]

d) Conclusion

In this section we found that the most fundamental and unanalysable feature of an action is a practical decision, which itself represents an undetermined or not entirely determined first cause. In a nutshell, the notion of a practical decision thereby represents the idea that, in intersubjective social practice, responsibility

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[69] Cf. Otsuka, "Avoidability of Blame," 688.

[70] It is this resemblance, I think, which led Frankfurt to the conclusion that "the behaviour of the unknowing addict is plainly as intentional when he is caused to take the drug by the compulsive force of his addiction, as it is when he takes it as a matter of free choice." (Harry Frankfurt, "The Problem of Action," *American Philosophical Quarterly* 15 (April 1978): 161).

[71] Regarding the necessary degree of this indeterminateness see already above sec. II, fn. 21.

[72] As already mentioned, another example which Frankfurt offered as a challenge for PAP is this: Drug addict A is said to take heroin, because she "enjoys its effects and considers them to be beneficial", see Frankfurt, "Problem of Action," 160. In fact, she would take heroin anyway, because she unknowingly became addicted to the drug. So, basically the machine from the first example is replaced by some internal but nevertheless irresistible force. To Frankfurt it seems clear that the addict (i) took the drug *freely* and (ii) could not have done otherwise (ibid). In my view, as much is simply a *contradictio in adjecto*.

for intersubjectively perceivable occurrences is ascribed to an agent, which is only possible by supposing the agent's ability to decide between different options. Put differently, a practical decision is what we cannot avoid presupposing in order to understand 'A's arm rising' as 'A raises his arm'[73], i. e. to understand something that happens as something that someone does. Consequently, we defined an action as one or the concatenation of a number of such practical decisions plus imputable, intersubjectively perceivable effects. This definition is considerably broader than that of *Davidson*'s standard account and consequently much more flexible. As indicated earlier, actions are the universal currency of normative systems. The evaluation of every action is entirely dependent, though, on the breadth of the respective proposition of the specific action description in each and every case.

3. Deontic Logic

As mentioned earlier, for the most part the notion of rights, or of having a right, is in one way or another linked with actions, either as in 'A has a right to do X' or as in 'A has a right that B does (not do) X'. So far we only got to know the concept of actions as such. Yet, the 'rights' in the just mentioned examples are evidently not only referring to actions, but rather to the respective action evaluations, i. e. to the way in which the action X is normatively assessed in the normative system in question. Such evaluations, i. e. the normative demand associated with the action in question, are expressed with the aid of the deontic modalities. Essentially, actions are said to be either permissible (P), obligatory (O) or forbidden (F).[74] In short, for the question of whether a right of someone exists it appears to be of central importance whether a certain reference action is either the object of a duty, i. e. of a positive obligation (O) or a negative prohibition (F), or of a permission (P). It is especially this modality 'permission' and its debatable deontological structure which is the main reason why we need to engage in a thorough analysis of the fundamental categories of deontic logics

[73] Cf. above sec. II, fn. 31.

[74] The abbreviations are borrowed from Georg von Wright, "On the Logic of Norms and Actions," In *New Studies in Deontic Logic*, ed. Risto Hilpinen (Dordrecht: Reidel Publishing, 1981), 22. Besides, we shall leave the question unconsidered whether the notions of obligation, prohibition and permission refer *only* to actions or also to states of affairs, i. e. in this context we shall analyse the meaning of 'ought' only in the sense of an 'ought-to-do' and disregard the possibility of an 'ought-to-be'. As much appears to be a reasonable theoretical concession, as surely no one would object to the claim that (O), (F) and (P) at least *also* refer to actions. Regarding the distinction between 'ought-to-do' and 'ought-to-be' see von Wright, "Logic of Norms and Actions," 9. See originally Charles Broad, *Five Types of Ethical Theory* (London: Kegan Paul, 1930), 141–142. Cf. also John Horty, *Agency and Deontic Logic* (New York: Oxford Universtiy Press, 2001), 34 ff., 59 ff. For a rough introduction to Broad's central theses see Quante, *Einführung Ethik*, 31.

at this point. A precise understanding of the nature and importance of permissions will prove to be vital for a correct appreciation of the merits of the Choice or Will Theory of rights in the second main part of this book. In this respect my main theses to be outlined and defended in this section are the following: Permissions – as opposed to obligations and prohibitions – ought to be understood as 'normative exemptions' (in German: *Freistellungen*), i. e. to have a permission to do X implies being allowed to choose between either doing X or performing some alternative option Y, both of which being legitimate options.[75] If this were true, it would have great effect on the theory of rights, as *Hart*'s well-known distinction between 'unilateral' and 'bilateral' liberties would prove to be at best dispensable, if not even plain false.[76] Additionally, the most important implication of this first thesis is that any lack of a duty (positive or negative) with regard to a certain action would automatically result in such a 'normative exemption' for the addressed agent, i. e. in terms of logical relations there is an exclusive disjunction between (O), (F) and (P) within every normative system. As much will prove to function as a central argument in favour of Choice Theory later on, which is why we need to take a close look at the logical structure of permissions at this point. In the course of doing so, an original model of the relations between the fundamental deontic operators shall be sketched.[77]

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[75] This alternative option Y should not be misinterpreted as 'the omission of X', at least not in the sense of non-X, i. e. all alternative options to X. On this delicate relation between action-option X and its omission see presently sec. II, 3., b), aa), (1). On the idea of 'legitimacy' as a marker for the normative status of options of conduct see also presently sec. II, 3., b), aa), (2).

[76] H. L. A. Hart, "Bentham on Legal Rights," in *Oxford Essays in Jurisprudence (Second Series)*, ed. Alfred Simpson (Oxford: Clarendon, 1973), 175–176 (hereafter cited as *LR*). In short, the idea is that a unilateral liberty exists in case one is (only) permitted to perform an action X, whilst in order to possess a bilateral liberty one needs to be permitted both to perform X and to abstain from doing so. Accordingly, A would, for instance, have a unilateral liberty to pay her debt to B on time (she is allowed to do so, yet not allowed to abstain from doing so), whereas she would have a bilateral liberty to donate money for charity, for example. Other ways to frame this idea include distinguishing between 'weak and strong permissions' (see therefore: von Wright, *Norm and Action*, 85–87, esp. 86: "An act will be said to be permitted in the weak sense if it is not forbidden; and it will be said to be permitted in the strong sense if it is not forbidden but subject to norm. Acts which are strongly permitted are thus also weakly permitted, but not necessarily *vice versa*. […] an act is permitted in the strong sense if the authority has considered its normative status and decided to permit it. […]"; id, "Logic of Norms and Actions," 25; cf. also Raz, *Practical Reason*, 85 ff.), or between 'half-liberties' and 'full liberties' (Joel Feinberg, "Postscript to 'The Nature and Value of Rights'," in *Rights, Justice, and the Bounds of Liberty* (Princeton, NJ: Princeton University Press, 1980), 157). All these distinctions are equally problematic because they treat both respective notions as one building upon the other – that is, bilateral liberty/strong permission/full liberty as a gain in freedom compared with unilateral liberty/weak permission/half-liberty – thereby conflating two distinct theoretical perspectives. See below sec. II, 3., b) aa) and esp. secs. III, 1., a), cc), (2) and III, 1., b), bb), (2), (c).

[77] Admittedly, this is a rather delicate balancing act. I dare to advance in a field of study which is indeed far too broad than to be pressed into one small chapter. On the other hand –

In order to incrementally explain and defend the two working theses from above, we shall proceed as follows: In section a) we shall delineate the most important and predominant assumptions from common deontic logics regarding the fundamental deontic modalities mentioned above. Our object of study will therefore be Standard Deontic Logic (SDL) accompanied by a possible-worlds semantics, which presumably is the prevalent system of deontic logic today.[78] In section b) this system shall be critically reviewed and in parts revised. Consequently, in section c) we will point out the most important implications for normative practice and substantive normative theory design of the newly developed system of deontic modalities.

a) Fundamentals of Standard Deontic Logic

There are various theories concerning the fundamental modalities in deontic logic. For the sake of simplicity we will only discuss the presumably most common system, originally developed by *G. H. von Wright*, namely what is nowadays referred to as 'standard deontic logic' or simply SDL.[79] A thorough analysis of SDL, let alone a formally correct logical analysis, cannot be provided here.[80] Instead, as a basis for the ensuing discussion we shall formulate three fundamental assumptions expressly or implicitly provided by SDL, all of which I also believe to be at least predominant, if not pervasive, in deontic logics as a field of study more generally. The first one appears to be trivial at first glance

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in my defence for doing so nonetheless – I can hold that it has to be done and to be written in order to support a central point elsewhere. Presumably, this exactly is both chance and curse of trying to make a theoretical cross-section as proposed earlier. Besides, with regard to the quality of the analysis I need to concede that despite my fiercely criticising traditional deontic logics in this section, I am not so bold as to try to develop a singular, conclusive system of deontic logic in the sense of a system of formal logic. The following remarks, thoughts and observations should rather be seen as a critical challenge to common arguments and structures from the point of view of a jurist as a 'normative practitioner'. Ideally, they will prove helpful in principally rethinking and rewriting the logic of norms and prescriptions as a future task for those more skilled in the language of formal logics.

[78] For a brief, but well-written introduction to the history of deontic logic see Simo Knuuttila, "The Emergence of Deontic Logic in the Fourteenth Century," in *New Studies in Deontic Logic*, ed. Risto Hilpinen (Dordrecht: Reidel Publishing, 1981).

[79] SDL as a system of logic goes back to a series of publications by Georg Henrik von Wright, the most important of which is his paper 'Deontic Logic' (Georg von Wright. "Deontic Logic," *Mind* 60 (January 1951): 1–15) which not only established a new school in deontic logic, but the very term 'deontic logic' in the English language – a terminological reference to Ernst Mally's publications on the subject in German language in the 1920s, cf. Ernst Mally, *Logische Schriften* (Dordrecht: Reidel, 1971). Cf. also von Wright, *Norm and Action*; id, "Logic of Norms and Actions".

[80] For something of the sort, an analysis of problems entailed by SDL for practical normative reasoning, see Jörg Hansen, Gabriella Pigozzi and Leenert van der Torre, "Ten Philosophical Problems in Deontic Logic," in *Normative Multi-agent Systems*, Dagstuhl Seminar Proceedings 07122. http://drops.dagstuhl.de/opus/volltexte/2007/941.

as it simply seems to state the fact that the notions of 'obligation', 'prohibition' and 'permission' all apply to actions:

SDL1: (O), (F) and (P) are all concerned with the same reference object, namely an action.

With this apparently weak thesis quite a few critical points remain untouched. For now, it can remain unconsidered whether (O), (F) and (P) are conclusive with regard to their reference object or whether there might be other parallel operators. Moreover, it is left undetermined whether (O), (F) and (P) only apply to actions or also to states of affairs, the latter of which will not be our concern in this context.[81] Finally, and as we shall see presently, it is also left undetermined by SDL1 whether one or two of these three might be more fundamental than the others or how they might be interchangeably definable. At this point our second main thesis comes in.

SDL2: (O) implies (P).

It is usually presumed that an obligatory act must also be permissible or that obligation implies permission. Furthermore, SDL1 and SDL2 are believed to be consistent due to the following (implied) reasoning: Both (O) and (P) refer to a certain action X. Yet, (O) contains more information than (P) or refers to more than only action X, but (O) is said to imply that not only the action X is permissible, but also that the omission of X is not permissible/forbidden. In this sense (P) is regarded as a 'unilateral liberty' or a 'weak permission'.[82] The reference object of both (P) and (O) is supposed to be an action X, for example the action X 'A jumps into the pool'. In case X is (O), e. g. if A jumps into the pool in order to save B from drowning, it is supposed to be also permissible (P). In case X is (P), it could be either obligatory or optional (OP)[83] in the sense of a 'bilateral liberty' or a 'strong permission', yet the latter only if the omission of X were also permissible (P).

In order to elucidate this common understanding of the relation between (O) and (P), let us consider another related thesis: Implied by SDL1 and SDL2 is the idea that the three deontic modalities (O), (F) and (P) are mutually definable, all three by each one of the other two simply by adding the sentential connective of negation represented as '∼'.[84] Generally, in ethics and in deontic logic the three

[81] See above fn. 74.

[82] See above fn. 76.

[83] Paul McNamara, "Deontic Logic," in *Stanford Encyclopaedia of Philosophy*, ed. Edward N. Zalta (Stanford University, 1997–), https://plato.stanford.edu/archives/win2014/entries/logic-deontic/.

[84] Ottfried Höffe, *Lexikon der Ethik*, 7th rev. ed. (München: C. H. Beck, 2008), 48–49; McNamara, "Deontic Logic"; Annemarie Pieper, *Einführung in die Ethik* (Tübingen: Francke, 2000), 18; Quante, *Einführung Ethik*, 28; Klaus Adomeit and Susanne Hähnchen, *Rechtstheorie für Studenten*, 6th ed. (Hamburg: C. F.Müller, 2012), 30–32.

operators (O), (F) and (P) are regarded as somehow basal categories in order to determine the normative demand regarding an action or a type of action,[85] even though sometimes, with regard to their mutual definability or explicability, one or two are regarded as more fundamental than the others.[86] *Belzer* writes in this respect: "It is common in deontic logic to take one of the three concepts – 'obligatory', 'forbidden', 'permissible' – as primitive and to define the others in terms of the chosen one, the most popular approach defining the permissible and forbidden in terms of the obligatory."[87] As much is what *von Wright* did by placing the modal operator (O) for 'obligatory' in the centre of SDL. Hence, adding the proposition p to this operator (O) "the standard definitions of 'permissible' and 'forbidden' are $Pp = \sim O \sim p$ and $Fp = O \sim p$, respectively"[88]. Accordingly, translating these findings into the language of actions, an action X is supposed to be permissible if the omission of X is not obligatory, and it is supposed to be forbidden if its omission *is* obligatory. Similarly, this reasoning

[85] See already Gottfried Leibniz, *Frühe Schriften zum Naturrecht* (Hamburg: Felix Meiner Verlag, 2003 [1669–1671]), 46–52, esp. 47. Leibniz mainly focussed on the notions of permission (lat.: *Jus*) and obligation (lat.: *Obligatio*) as seeming analogues to the alethic notions of possibility and necessity, at various points he refers to forbidden actions as well as the negation of one's right (ibid, 48–49). See also Reinold Schmücker, "Grundkategorien moralischer Bewertung," in *Handbuch Angewandte Ethik*, ed. Ralf Stoecker et al. (Stuttgart: Metzler, 2011), 13–14; Edgar Morscher, *Normenlogik: Grundlagen – Systeme – Anwendungen* (Paderborn: Mentis, 2012), 9; Risto Hilpinen and Paul McNamara, "Deontic Logic: A Historical Survey and Introduction," in *Handbook of Deontic Logic and Normative Systems Vol. 1*, ed. Dov Gabbay et al. (London: College Publications, 2013), 5 ff.; Höffe, *Lexikon der Ethik*, 48–49; Pieper, *Einführung Ethik*, 18; Franz von Kutschera, *Grundlagen der Ethik*, 2nd ed. (Berlin: De Gruyter, 1999), 1; Quante, *Einführung Ethik*, 28; Hubert Fackeldey, *Handlungsnormen* (Bern: Peter Lang, 2005), 21; Winfried Löffler, *Einführung in die Logik* (Stuttgart: Kohlhammer, 2008), 237 ff., esp. 237.

[86] For a dissenting approach, see for instance von Kutschera, *Grundlagen*, 1. Here the notion of obligation is regarded as more fundamental than the other two, because those are supposed to be explainable in terms of (O) and not *vice versa*. Cf. also Herbert Keuth, "Deontische Logik und Logik der Normen," in *Normenlogik*, ed. Hans Lenk (Pullach: UTB Verlag Dokumentation, 1974), 65. Tomberlin on the other hand describes deontic logic as simply "the logic of obligation and permission" (James Tomberlin, "Deontic Logic," in *Cambridge Dictionary of Philosophy*, 3rd ed., ed. Robert Audi (New York: Cambridge University Press, 2015), 255). The same is held, for instance, in: Ota Weinberger, *Normentheorie als Grundlage der Jurisprudenz und Ethik* (Berlin: Duncker & Humblot, 1981), 56; Stephen Kuhn, "Deontic Logic," in *The Oxford Companion to Philosophy*, 2nd ed., ed. Ted Honderich (Oxford: Oxford University Press, 2005), 199. Cf. also Peter Prechtl, "Deontische Logik," in *Metzler Lexikon Philosophie*, 3rd ed., ed. Peter Prechtl and Franz-Peter Burkard (Stuttgart: Metzler, 2008), 343. Prechtl distinguishes the three (supposedly fundamental) deontic operators 'permissible', 'forbidden' and 'indifferent'. The juxtaposition of permissibility on the one hand and 'indifference' as (supposedly) a position of 'normative exemption' is at least surprising. It is a mistake not uncommon, which, as we will find shortly, is grounded in a confusion between two distinct levels and therewith two distinct sets of deontic modal operators, see below sec. 3., b), aa) and cc).

[87] Marvin Belzer, "Deontic Logic," in *Routledge Encyclopedia of Philsophy*, Vol. 2, ed. Edward Craig (New York: Routledge, 1998), 887.

[88] Ibid.

works also for (P) or (F) as the respective primitive operator. For instance, if we regarded (P) as primitive we could define 'obligatory' as $Op = \sim P\sim p$ and 'forbidden' as $Fp = \sim Pp$.[89] Much the same would apply for (F) in relation to (O) and (P). To conclude: Even though (O), (F) and (P) are believed to vary in terms of specificity, the presupposition of a trivalent system of basic deontic modalities in order to normatively assess actions can be regarded as predominant amongst those concerned with deontic logics in general and with SDL in particular.[90] Also we can conclude that in order to define the modalities mutually it appears crucial to assess not only X as the action we are interested in but also the omission of X. We shall return to the notion of omission presently. Before we do so, let us consider our third and final thesis regarding SDL, which is very much connected to the foregoing presumptions:

> SDL3: At least to some extent there is an analogy between alethic modal logics and deontic modal logics, i. e. the basic logical relations between the alethic modalities necessary, impossible and possible are mostly analogous to the relations between the deontic modalities obligatory, forbidden and permissible.[91]

Sumner, for instance, claims as a basis for his ensuing analysis of rights that "[…] deontic categories (required/forbidden) are counterparts, or perhaps special cases, of alethic modal categories (necessary/impossible)"[92]. To clarify this common reasoning, let me quickly offer a most rough introduction into alethic

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[89] Von Wright, "Logic of Norms and Actions," 5. See also: Robert Alexy, *Theorie der Grundrechte*, 3rd ed. (Frankfurt a. M.: Suhrkamp, 1996 [1985]), 183–184 (hereafter cited as *TG*); Edgar Morscher, "Deontische Logik," in *Handbuch Ethik*, ed. Marcus Düwell, Christoph Hübenthal, and Micha Werner (Stuttgart: Metzler, 2011), 327.

[90] For a notable, if not very recent, counter-example see Alexius Meinong, "Psychologisch-ethische Untersuchungen zur Werth-Theorie," in *Gesamtausgabe, Vol. 3: Abhandlungen zur Werttheorie* (Graz: Akademische Druck- und Verlagsanstalt, 1968), 88–93. Here Meinong invented a scheme with four basic modalities, which ultimately leads to even more puzzles than with the three modalities of the standard model. For a short introduction to and critique of Meinong's central theses see Hilpinen and McNamara, *Historical Survey*, 9–15.

[91] See, inter alia: Leibniz, *Frühe Schriften zum Naturrecht*, 46–52; Alois Höfler, "Abhängigkeitsbeziehungen zwischen Abhängigkeitsbeziehungen," *Sitzungsberichte der kaiserlichen Akademie der Wissenschaften Wien (Philosophisch-historische Klasse)* 181 (1917); Alan Anderson, "A Reduction of Deontic Logic to Alethic Modal Logic," *Mind* 67 (1958): 100–103; Arthur Prior, "Deontic Logic," in *The Encyclopedia of Philosophy (Vol. 4)*, ed. Paul Edwards (London/New York: Collier-MacMillan, 1972), 509–510; von Wright, "Logic of Norms and Actions," 4. In the same essay von Wright also expressed a few doubts regarding the extent of the analogy and remarks: "[…] the analogy between the two logics is not as perfect as many people have thought" (id, "Logic of Norms and Actions," 6–7). Nevertheless, he concludes the article with a generally affirmative remark regarding the idea of an analogy. Thus, it appears that von Wright would affirm the rather weak thesis SDL3 despite the 'imperfection' of the analogy.

[92] Leonard Sumner, *The Moral Foundations of Rights* (Oxford: Clarendon, 1987), 22, 23 (hereafter cited as *MF*).

modal logic and the prevalent possible-worlds semantics.[93] Alethic modalities are concerned with the truth value of certain propositions. Fundamentally, alethic modal logic is a bivalent logic with the basic operators true (T) and false (F). By expanding the truth value of a proposition from one world, the actual world w, in which p can only either be true or false, to possible other worlds w', we can expand the alethic operators (T) and (F) likewise to 'necessity' (N), 'impossibility' (I) and 'contingency' (C)[94]. A proposition p is necessary in case it is true in all possible worlds. It is impossible in case it is false in all possible worlds. It is contingent if it is true in some possible world or worlds, and false in some possible world or worlds. Traditionally, the logical relations between these extended modalities are illustrated in the so-called 'modal square of oppositions':

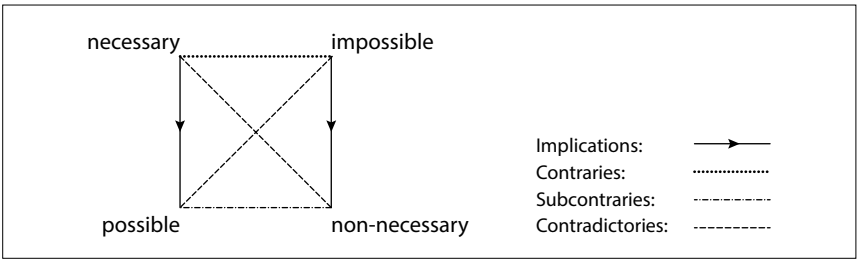

Figure 3: Square of Oppositions with Alethic Modalities.[95]

Let us quickly clarify the different relations named in the illustration: Two propositions are contrary if they cannot both be true. They are contradictory if they have opposing truth-values – that is, if the truth of one implies the falsity of the other and *vice versa*. They are subcontrary if they can both be true, but cannot both be false. And finally, they stand in a relation of implication if the truth of the first implies the truth of the second, but not conversely.[96] Importantly, if we

[93] The idea of explaining notions such as 'necessity' and 'impossibility' with reference to other possible worlds originates once again from Leibniz. For an introduction to Leibniz' account of possible worlds, see Nicolas Rescher, "Leibniz and Possible Worlds," *Studia Leibnitiana* 28 (1996). This idea has been incrementally developed and refined most prominently in: Rudolf Carnap, *Meaning and Necessity*, 2nd ed. (Chicago: Chicago University Press, 1970 [1947]); Saul Kripke, *Naming and Necessity* (Oxford: Blackwell, 1980); id, "Semantic considerations on modal logic," *Acta Philosophica Fennica* 16 (1963). Notably, Kripke was the first to introduce a proper semantics of possible worlds for alethic modal logic. Cf. also Morscher, *Normenlogik*, 107.

[94] Normally this third operator is referred to as 'possible'. Shortly we shall look into the reasons for why it seems preferable to avoid the ambiguous term 'possibility' in this context.

[95] The design of figs. 3 and 4 is adopted from McNamara, "Deontic Logic". Cf. in this respect also Adomeit and Hähnchen, *Rechtstheorie*, 28, 30; Klaus Röhl, "Praktische Rechtstheorie: Die deontischen Modalitäten," *Juristische Arbeitsblätter* 31 (1999): 602.

[96] McNamara, "Deontic Logic".

combine the subcontrary operators 'possible' and 'non-necessary' we are able to deduce the notion of 'contingency' from the scheme, i. e. if a proposition is both possible and non-necessary, its truth value is contingent. The consistency of the interdependent logical relations in the former scheme will not be contested here, but will be presupposed for the further investigation.

Of increased interest to us is the presumption that the deontic operators are supposed to be applicable analogously, i. e. that they are supposed to possess the same interdependent logical relations as presented in the square of oppositions.

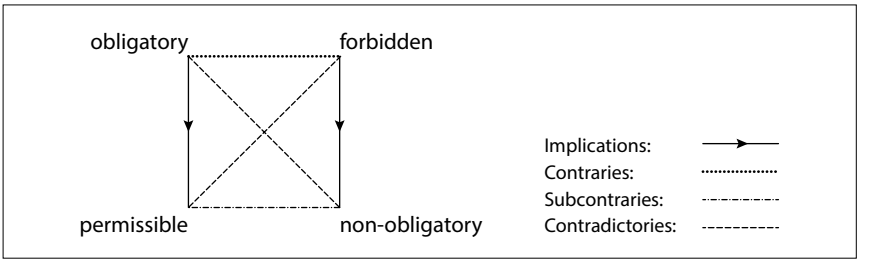

Figure 4: Square of Oppositions with Deontic Modalities.[97]

As one already finds from the illustration, the relations between the alethic modalities necessary, impossible, and possible are supposedly analogous to the (presumably fundamental) deontic modalities obligatory, forbidden, and permissible. Additionally, we find the operator 'non-obligatory' in the illustration, which needs to be read as 'is allowed to be omitted' and is sometimes referred to as "omissible"[98]. A few important insights implied in this 'Deontic Square (DS)'[99] are: If an action X is obligatory, it is also permissible. In other words, DS implies the truth of SDL2. Furthermore, if an action X is forbidden, it can neither be obligatory nor be permissible. And finally, analogous to the results in the alethic modal square there is a fifth modality which is deducible: If an action X is both permissible and omissible, it is supposed to be 'optional' (OP). This latter point is of crucial importance to us. Not the feature 'permissibility' or 'permission' as such is supposed to grant a 'normative exemption' as described earlier, but only the combination of 'permissibility' and 'non-obligation', i. e. the case in which one is both allowed to do and to *omit* an action X, is said to substantiate the normative position of being free to choose whether to perform X.

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[97] Ibid; Adomeit and Hähnchen, *Rechtstheorie*, 28, 30; Röhl, *Praktische Rechtstheorie*, 602.

[98] McNamara, "Deontic Logic".

[99] Ibid.

One aspect about SDL is still unclear so far: If alethic and deontic modal logic are structurally analogous, how are the deontic modalities spelled out in a possible-worlds semantics? Presumably, if it simply were true in all possible worlds that A performs action X at a certain point in time, it would make A's doing X necessary, but not obligatory. Hence, for the deontic modalities, in contrast and in addition to the logical structure of the alethic modalities, one has to refer not simply to all possible alternative worlds, but to *relatively ideal* worlds.[100] Precisely, one needs to take into account possible worlds ideal in relation to the primarily examined, actual world w, i. e. only such worlds in which the truth value of A doing X is uniform to the evaluation of X in w.[101] Accordingly, an action is obligatory if A's doing X were true in all worlds w' relatively ideal to actual world w. In turn, it is supposed to be forbidden if it were false in all worlds w' relatively ideal to w. Finally, it is supposed to be permissible if it were true in some of these worlds and false in some of them. We shall find that this wide-spread understanding of 'permission' or 'permissibility' in relation to the concepts of 'obligation' and 'prohibition' and in analogy to the alethic notions of 'necessity', 'impossibility' and 'contingency' is flawed, which is mainly due to a lack of a proper assessment and understanding of the concept of actions in the first place.

b) Revision of SDL

Let us now critically examine the three foregoing theses associated with SDL. Therefore, in section aa), we will begin by accumulating a few general thoughts and observations regarding the deontic modalities by once more giving careful attention to our concept of actions. First, we shall point out two different understandings of the term action and the theoretical consequences of this distinction. Consequently, we shall critically examine the nature of omissions, which, as we clarified earlier, play a central role in determining the normative demand associated with an action. Thereafter, in sections bb) and cc), we will review and (where necessary) revise our three central theses in the light of the former findings. Thereby we will find that neither SDL1 nor SDL2 are strictly speaking false but that both together are irreconcilable. SDL3 on the other hand will be shown to be plain wrong.

[100] Also referred to as worlds "deontically accessible" from world w, cf. Kuhn, "Deontic Logic," 199–200. The difference is one only in terminology, not in meaning.

[101] Hence, 'ideal' in this context is far from meaning anything as 'paradisiac', but it simply describes a state of harmony between different worlds with regard to the deontic results produced in these worlds.

aa) Two Perspectives on Actions – Two Levels of Deontic Logic

Earlier we identified the central feature of any action X as a *practical decision* in favour of a certain option X and thereby against other possible options Y, Y', etc. Hence, it is important to note that the *action* X strictly speaking is not equivalent with the sole *option* X as a mere factual occurrence (as a single event or a series of events). The notion of an 'action X' rather implies both the existence of an actual option X, i. e. an option realised or at least hypothetically to be realised, and at least one alternative option Y.[102] In other words, the evaluation of an action X implies the evaluation not simply of X as a solitary option of conduct, factually or hypothetically realised, but additionally the evaluation of alternatives, of at least one alternative option Y. Consequently, we can deduce a crucial insight for our analysis: In normative contexts the term 'action' is used ambiguously. Precisely, we are able to distinguish two meanings of this term: One that refers to the 'action as such', i. e. especially to the underlying (actual or hypothetical) practical *decision* – in favour of option X and against option Y – and one that refers to the solitary option of conduct X, factually or hypothetically realised. Moreover, in accordance with that we are able to and hence should distinguish two (different, however related) theoretical perspectives on actions and on action evaluations and consequently two perspectives on the modalities in deontic logic: one that is concerned with the *normative demand* associated with 'actions as such' and one that is concerned with the *normative status* of actions in the latter sense.[103]

Inspired by *H. L. A. Hart*'s (at least) analogous distinction between internal and external point of view,[104] we shall refer to these two theoretical perspectives as the *internal perspective* (for actions as such) and the *external perspective* (for plain options of conduct). This theoretical link might come as a surprise at this point. My point is the following: With both theoretical perspectives, we necessarily presuppose an effective intersubjective normative practice with some authority issuing rules and addressing these rules to certain agents. Also with

[102] Cf. above fn. 75.

[103] Thereby the term 'normative status' significantly differs from von Wrights 'deontic status' (von Wright, "Logic of Norms and Actions," 23), which in our context would describe the normative demand associated with an action.

[104] Hart, *Concept of Law*, 55–61. Unfortunately, Hart did not apply his theoretical approach, the distinction between internal and external aspects regarding rules, to the basic categories in deontic logic. I assume if he would have done so he would have found that traditional deontic logic fails because it cannot make sense of the transition between these two perspectives. It is noteworthy that a reasonably sophisticated treatise of Hart's (for the most part ingenious) work cannot be offered in this context. That is, the question of to what extent our idea of internal and external perspective is analogous to that of Hart is left to be determined by possible future investigations. For a well-written introduction on the topic of Hart's internal and external perspective in general cf. Scott Shapiro, "What is the Internal Point of View?" *Fordham Law Review* 75 (2006), http://ssrn.com/abstract=937337.

both perspectives we suppose someone examining normatively guided conduct with a specific interest, which we shall simply refer to as the examiner. Now, importantly, neither is the internal point of view restricted to applicants of the respective rules, e. g. the *ex ante* directly addressed agent or the *ex post* addressed judge, nor is the external viewpoint restricted to an external observer in the sense of someone not affiliated with the respective moral community. Hence, the internal/external distinction does not refer to an affiliation of the examiner to the community in any way but rather to the distinct epistemological interests any examiner can obtain with regard to a certain action. With the internal perspective, we attend to an 'action as such' and therewith essentially to a practical decision (X→Y). Yet, at least theoretically, one can take another perspective by asking not 'what ought to be done?' but rather in a more limited fashion, from a supposedly external perspective, 'is the realised conduct conformable to the rules of the system?' This latter question regarding conformity or non-conformity does not necessitate the same amount of information with regard to X as the former one asking for the normative demand. Here a plain statement about the normative status of X as a single option of conduct would suffice, whereas from the internal perspective we need information about both the normative status of X *and* the status of at least one option Y[105]. Hence, with the internal perspective we examine the actual demand addressed to an agent capable of complying with it, capable of making practical decisions. Surely, however, also an external observer of a normative practice can be interested in whether a certain conduct is, for example, obligatory and not just conformable. Likewise, it is undoubtable that an applicant can by times be interested only in the conformity or non-conformity of his or her actions. Importantly, the external perspective does not happen to be a sociological[106] or empirical perspective, but it is rather a normative point of view on normatively guided conduct, from which we do not merely examine the action in accordance with the structure of a practical decision, but from which we understand 'actions' as solitary, factually or hypothetically realised options of conduct – knowing, however, that it is still normatively guided conduct which is examined. As a consequence, the external perspective necessarily presupposes an internal practice of capable agents making practical decisions. In short, internal and external perspective are literally only *perspectives* on the same phenomenon, namely an intersubjective normative practice. One perspective takes into account only the unidimensional option of conduct, whilst the other frames the entire practice by holding a multidimensional viewpoint at an action as essentially a practical decision in favour of X and against some alternative option Y.

[105] In some cases of all possible options Y, as we shall also see presently.
[106] Cf. Dworkin, *Law's Empire*, 13.

What exactly is this Y as the 'alternative to X' or the 'omission of X', though, and how do we correctly evaluate or assess it? At a closer look, we find that the nature and normative function of Y as supposedly 'the omission of X' is as important for a correct understanding of deontic modalities as it is unclear. Can 'the omission of X' actually be obligatory just like X itself? Can we infer insights about the normative demand associated with 'the omission of X' simply by knowing the demand associated with X? Hence, before we can confer the insights won so far to the fundamental categories of deontic logic – with the result that in accordance with the distinct theoretical perspectives on actions and action evaluations we are in need of distinguishing two sets of deontic modalities – we need to clarify the nature and function of Y in determining the normative demand associated with an action X.

(1) Actions and Omissions

The notion of 'omission' is essentially ambiguous. In fact, it possesses at least three possible meanings: (1) First it can simply and intuitively refer to the entirety of alternative options to X, i. e. non-X. (2) Yet, in those cases in which we formulate a moral or legal reproach for someone omitting an action, we do not refer to an entirety of alternative options but to a specific, *hypothetical* action which had been obligatory but has not been performed.[107] (3) Finally, the third possible understanding describes the notion of 'omission' in a way in which it serves a purely theoretical purpose. In this sense 'the omission of X' gains importance in order to determine the normative demand for a certain action X. The crucial difference between (1) and (3) is that in order to determine the normative demand for X we do not in every case have to refer to the omission of X in the sense of (1), i. e. as the *entirety* of all alternative options, but in some cases it suffices to determine the normative status of *at least one* alternative option Y. Precisely, in order to determine the normative demand for any action X we invariably need to determine the normative status of the option X and whether there is at least one legitimate option Y to fall back on for the addressee of the rule. In doing so we shall use 'legitimacy' and 'illegitimacy' as the possible labels for the normative status of any single option of conduct. Only if we answer the question regarding at least one legitimate alternative option negatively, do we indeed refer to the omissions of X in the sense of (1), because in this case we

[107] Once we raise an accusation towards A regarding an omission we are not simply saying what she did not do, but implied is a statement about what A specifically *ought to have done* in a certain situation instead of doing what she did. We no longer evaluate her factual behaviour, the actually given set of facts, but rather an action/a set of facts that never happened, that is purely hypothetical; yet in terms of normative reasoning, it is just as specific as her actual behaviour. Hence, the reproach with omissions in this sense lies in not performing a specific *action* which would have been obligatory. Or in other words, the leverage point for the accusation is not non-X, but a specific hypothetical action X which has unduly not been performed.

need to determine that there are strictly no alternative options to fall back on. If we answer the question positively, though, it suffices to determine (at least) one option Y which is allowed, that is to say, legitimate. Hence, 'omission' in the sense of (3) describes a theoretical auxiliary tool, which sometimes means all alternative options equivalent to (1) and sometimes only at least one alternative option Y.

Thus, it appears the notion of '~X' in the mutual definitions of the three modalities should be handled with more care than it is usually done.[108] Put simply, by equating '~X' with (1) one misses out on the fact that the different normative demands do not necessarily imply statements about the normative status of all alternative options to X. Importantly, due to the fact that we ask for the normative status of at least one alternative option Y, we do not and cannot determine the normative demand for Y by determining that of X. In detail: The normative status of Y (or of all Y') *solely* has an auxiliary function in order to determine the normative demand for action option X. In order to determine the normative demand for one specific alternative option Y, which we could of course do, we would have to think of Y as the central action option, i. e. we would have to make this specific Y the new X and compare it to its own alternatives instead. Accordingly, the relation of X to Y is essentially distinct from that of Y to X, which makes it impossible to draw conclusions from the normative demand for X to that for Y. If we examine the action X, we evaluate a specific option X in comparison to other legitimate alternative options to fall back on. In order to determine an answer to that question we construct Y as one out of innumerable alternative options to X. Only if we think of Y as a specific option, though, one given a normative status, can we label it legitimate or illegitimate. If we answer the question negatively we infer there is no legitimate alternative course of action at all. If we answer it positively we infer that there is at least one legitimate and realisable alternative option to X, which is sufficient information to determine the normative demand for X. In short, X is a concrete option; the 'omission of X' in the sense of (3) on the other hand is more of an open question. Hence, if we were to turn X and Y around, i. e. if we were to examine Y as an action option, then for Y (as the next action option X) the former X would be just *one* alternative option.[109] An example: Suppose it is forbidden for A to

[108] Cf. von Wright, "Logic of Norms and Actions," 7, 24. Von Wright correctly asserts "that individuals [i. e. actions/options of conduct] cannot be 'negated'. '[*F*] ~ x' and '[*O*] ~ x' are meaningless signs" (ibid, 24).

[109] Dissenting in this respect: Carl Bottek, *Unterlassungen und ihre Folgen* (Tübingen: Mohr Siebeck, 2014), esp. 338. Presumably, despite being spirited and well-argued, Bottek's claim that omissions essentially *are* actions is not entirely accurate. He is right to the extent that a reproach for omissions is grounded in the idea that an obligatory action was not taken (see above). However, this would not be a proper explanation for the idea that an 'omission' is the deontological counterpart to an action (of non-X in relation to X). It would instead only shift the perspective toward the analysis of another action X. We are always investigating and

assault B. Traditional deontic logic infers that the omission of this action X is obligatory for A. This inference, which appears intuitively sound, bears evidence of a serious theoretical defect, though. For an action X to be forbidden, there has to be at least one option Y as a legitimate alternative to fall back on. For instance, instead of assaulting B, A could take a walk. However, A's talking a walk is far from being 'obligatory' for A. Suppose that A is also allowed to drink a coffee instead of assaulting B, then A's taking a walk would be optional (OP) for A. Yet, there is no way to infer from some action X being forbidden that the omission of X is optional, which is simply due to the fact that we do not have to refer to all possible alternatives to X in order to determine a prohibition of X.[110] The point is: We cannot determine the normative demand for an omission as an entirety of options, because normative demands can only be assigned to *actions*. Hence, we cannot in all cases determine the normative demand for a specific alternative option Y by knowing the normative demand for X and hence the normative status of Y, because we do not have sufficient information to do so, as for instance in the case of X being prohibited. Once more from a different angle: The statement 'A has a duty to omit X or a duty not to do X' is in fact paraphrasing the prohibition for A to do X. That is, the duty in the sense of a prohibition in this case is certainly not identical with a positive obligation as we came to know it. With an obligation a concrete conduct is prescribed. It is a somewhat 'aimed ought', whereas it is exactly this which is not the case for a 'duty to omit X'. It merely tells A not to do X – i. e. it is tantamount to a prohibition of X – not what A actually ought to do.

There are quite a few who claim the difference between action and omission is only formal and not semantic. For instance, *Kelsen* asserts that action and omission are two categories that are interchangeable and could better be reduced to the simpler category 'conduct'.[111] All things considered so far, this does not seem to hold true. *Kelsen* assumes that (a) 'you ought to tell the truth' is equivalent to (b) 'you must not tell lies'. If I tell a lie and this is regarded as my action X, then the omission of X in the first sense of non-X is not to tell a lie. It could, however, as we have seen, be all kinds of actions. It does not necessarily have to be that I tell the truth instead. That means (b) might be implied by (a), but this implication does not go both ways. For instance, (b) does imply the alternative option simply to stay silent.

To summarise: Intuitively, we assume that a person A can simply decide not to perform a certain action X, i. e. to omit X, without committing oneself to a

evaluating certain actions X. If we want to describe what it is that is non-X, i. e. the structural counterpart of X, then it would be futile to state that the omission of X is just another X. Due to the innumerability of alternative options to any specific X, one is bound to understand the nature of non-X as a necessarily indeterminate question for at least one legitimate alternative to a primarily examined option X.

[110] Cf. von Wright, "Logic of Norms and Actions," 24.

[111] Hans Kelsen, *Allgemeine Theorie der Normen* (Wien: Manz, 1979), 76–77.

specific other course of action. For instance, the content of the statement 'G chose not to kill P' seems explanatorily sufficient. This way of thinking shall be fundamentally challenged. In effect, to behave is always to perform some action. Precisely, if we presuppose the general ability to make practical decisions, one cannot avoid making these and thus performing actions. If you decide not to go to work today but instead to stay in bed, you do not only 'not go to work' but you also and inevitably perform the action 'staying in bed' despite the fact that it might feel like not taking action or doing nothing at all. Whatever decision an agent takes with regard to his or her conduct, the result will be a specific *action* that is actually happening, even if that means that an agent just consciously sits or stands around, only seemingly doing nothing at all.[112]

The central assumption that an agent, if generally capable of making decisions, cannot avoid performing actions – put bluntly, that one cannot not act – will surely be objected to. Critics will thereby probably, and at first glance not unjustly, refer to the subjective experience of behaving as well as basic neurological insights with regard to action and motivation. Both tell us that we are not actually always *positively* motivated to act nor positively decided in favour of some course of action, but rather very often the mental act behind not doing something is an inhibition – in other words, a directed volition not to do something, to restrict oneself or one's natural impulses. Neuro-scientific research suggests that these two mental processes – positive motivation to actively perform a certain action and the negative motivation to inhibit oneself – can be clearly distinguished, not only with regard to the subjective experience of the agent, but also with regard to different brain activity in each case.[113] An example: A is heavily provoked by B in such a way that A is virtually driven to attack B violently. Suppose A musters all power of will she can not to do it, not to give

[112] A short side note: The explanation so far does not even to some extent explain why some omissions are associated with a legal charge whilst others are not. For example, when A, who is a lifeguard, just stands at the riverbank and watches B, who is unable to swim, drown, in most legal systems A would be charged for murder or homicide – in legal terminology not because she (actively) killed B but because she omitted saving him. However, when you go out on a Friday night, (probably) no one would legally or morally accuse you of murder, because you did not spend the time or money to prevent children in some other part of the world from starving to death. The difference between these two cases lies in the accountability of the outcome or, in other words, the actual possibility of having exercised the action demanded. Whether someone is obliged to take a certain action is a normative question. The hypothetical action of rescuing B in the first example must have been both understandable and realisable for A in this situation, whereas responsibility on a scale as broad as depicted by example two cannot sensibly be claimed by any normative system (at least not from any single individual). To draw a line where responsibility for actions not taken starts and where it ends is a normative problem which cannot be further dwelled upon here.

[113] See, for instance, Benjamin Libet, *Mind Time – The Temporal Factor in Consciousness* (Cambridge, MA: Harvard University Press, 2004), 137–151. Very roughly, Libet's point is this: Based on empirical research he regards the main function of our (experienced) conscious will as a 'conscious veto' against actions otherwise already initiated on a neurological level.

in to her impulses, and just keeps standing still where she is. Our account of actions and omissions insinuates that A's actual action was 'standing still', which was not obligatory, but rather permitted. Accordingly, one may assume that our account is inadequate due to its divergence from the subjective experience of A as the acting agent in this situation. Intuitively it seems A would not claim that she positively decided to stand still, but at best that she decided not to let her temper get the better of her. In effect, such an objection is hardly convincing. Our account is perfectly able to properly describe the respective actions performed in the example. First, the mental act or self-addressed command 'to restrict oneself' can without further ado be regarded as a positive action itself, a practical decision to positively stop one's own natural impulses. The internal, mental act reaches an intersubjective sphere through communicating it or simply through the experience of other agents or empirical knowledge. Thus it becomes perceivable for others and henceforth evaluable. Effortlessly we can then determine the 'obligatory-ness' of the action 'inhibiting oneself'. In this sense we could say 'A is obliged to stop herself' instead of 'A is under a duty not to do X', which I presume is not only in accordance with A's subjective experience, but rather describes it more precisely. Besides, there are other possible, externally perceivable actions that are separable from the former action and hence ought to be evaluated separately. At least these are (1) the possible attack on B which is forbidden and (2) the mere standing still. The latter is caused by a successful self-restraint or self-commitment and is as such not obligatory but permitted. For instance, in the same situation another person P who possesses an increased impulse control could possibly also decide not only to stand still (trembling with rage), but even to turn around and walk away – another possible and legitimate action which would thus also be permitted. Hence, it is decisive for the cogency of our account of actions and omissions to clearly identify the action examined. Decisive in this respect is what we actually do or want to understand as actions in a social context, as intersubjectively perceivable and evaluable. In any case, however, only such specific *actions* are possible objects of the fundamental evaluation patterns. An entirety of alternative options to a specific option X is certainly not.

(2) Two Kinds of Deontological Statements

Thus, we are now able to sketch the respective information content of the various deontic operators in accordance with the two perspectives on actions as well as with the theoretical role of omissions. Let us begin with level one, an action assessed from an external perspective. When we ask for the normative status of a singular option of conduct we can initially distinguish two different possible answers: It can be positively relevant, i. e. compliant with a normative system, or negatively relevant, i. e. non-compliant. Instead of compliant and

non-compliant (and for lack of better expressions) we shall, as indicated earlier, henceforth use the terms legitimate (L) and illegitimate (IL).

(L)X = option X is legitimate = X(+)[114]
(IL)X = option X is illegitimate = X(–)

On second level we examine the normative demands that a system addresses – that is, the practical normative content that is directed at the applicants of the system. From this internal perspective we extend our view to possible alternatives to X and thus to practical decision situations. To be clear: The point of reference, of evaluation is still a specific option of conduct X – only now in relation to possible alternatives. Thus, the second-level statement/normative demand regarding X contains two pieces of information: the normative status of X *plus* the normative status of either at least one option Y (insofar as Y is a legitimate option) or all alternative options Y, Y′, etc. (insofar as all of them are illegitimate). If one combines the two possible normative statuses of X and the two possible outcomes with respect to the omission of X in the sense of (3) accordingly, namely that either all Ys are (IL) or that at least one Y is (L), we receive four possible combinations:

(1) X(+) / all-Y(–)
(2) X(+) / one-Y(+)
(3) X(–) / one-Y(+)
(4) X(–) / all-Y(–)

Positions (1) and (3) are an exact representation of our (seemingly) well-known deontic modalities obligatory (O) and forbidden (F). Position (2) represents a permission (P) in the sense of a 'strong permission' or in the form of an optional action (OP), i. e. a permitted decision. In short, one is obliged to do X, if he or she is not allowed to do anything else under the given circumstances. A permission exists, if one can actually decide to perform X or refrain from doing so by doing Y. And finally, a prohibition can only be sensibly formulated if there is at least one legitimate alternative option to the illegitimate option X, even, as we saw earlier, if it was only the alternative option 'standing still' and thus refraining from doing X. Position (4) on the other hand is a special case, which one would probably not expect in this context given the fact that we are used to thinking of (O), (F) and (P) as somewhat basal.[115] It will thus require our special attention. What (4) describes is the normative situation of a *true dilemma* – therefore marked (D) in the following – which some will find surprising, if not

[114] The operator (L) neither implies an 'ought' (as in an obligation) nor a 'permission'. Precisely, it could be both. It simply represents a kind of positive marker, a plain (+) in the basic binary code of normative systems regarding singular options of conduct.
[115] Schmücker, "Grundkategorien," 13.

bewildering, to be mentioned in the same breath with the other three.[116] The reasons for why this is on the one hand a logical consequence of our thinking thus far, yet why (D) nonetheless does not possess the same practical relevance as the other three, will be laid out presently. Before we do so and in order to clarify the abbreviations used henceforth, once more an overview of all *a priori* distinguishable deontic modalities on second level:

(O)X = action X is obligatory = X(+) / all-Y(–)
(F)X = action X is forbidden = X(–) / one-Y(+)
(P)X = action X is permissible = X(+) / one-Y(+)
(D)X = action X is dilemmatic = X(–) / all-Y(–)

Once more, the rather unexpected operator (D) describes the decision situation of a true dilemma. Interestingly, the deontological structure of such dilemmas, which scholars have quarrelled over literally for ages, fits neatly into the overall scheme presented here. A standard example for a dilemma is the so-called 'Trolley-Problem'[117] – roughly, a case in which human life must be weighed against other human life by some individual agent A. Precisely, if A did X she might save Q's life but thereby kill P, whereas if she did Y it would only be the other way around. Accordingly, a true dilemma is defined here as a situation in which none of the available options of conduct considered by themselves are allowed, that is, legitimate. Notably, this understanding of true dilemmas differs decisively from the standard conception for genuine dilemmas provided by *Sinnott-Armstrong*, who defines it as a situation in which (1) an agent A ought to do X, (2) A ought to do Y, (3) A cannot do both X and Y together, but each separately and (4) neither obligation overrides the other.[118] The (possible) occur-

[116] Arguably, the most influential work on the topic of moral dilemmas in recent years was: Walter Sinnott-Armstrong, *Moral Dilemmas* (Oxford: Basil Blackwell, 1988). A good overview of the various (futile) attempts to explain the role of dilemmas in deontic logic is provided in: Lou Goble, "A Logic for Deontic Dilemmas," *Journal of Applied Logic* 3 (2005): 461–483. For a recent and elaborate approach on the topic of 'moral dilemmas' in German cf. also Helen Bohse-Nehrig, *Moralische Dilemmata als wahre Widersprüche* (Münster: Mentis, 2013).

[117] Originally developed in: Philippa Foot, "The Problem of Abortion and the Doctrine of the Double Effect," *Oxford Review*, No.5 (1967), http://www.pitt.edu/~mthompso/readings/foot.pdf. Cf. also the extensive discussion of the problem by Judith J. Thomson in: id, "Killing, Letting Die, and the Trolley Problem," *The Monist* 59 (1976): 204–217; id, "The Trolley Problem," *Yale Law Journal* 94 (1985), 1395–1415.

[118] Sinnott-Armstrong, *Moral Dilemmas*, 29. The elements of the definition are analogously adopted. Originally, it says: "A moral dilemma is any situation where at the same time: (1) there is a moral requirement for an agent to adopt each of two alternatives, (2) neither moral requirement is overridden in any morally relevant way, (3) the agent cannot adopt both alternatives together, and (4) the agent can adopt each alternative separately" (ibid). The notion 'moral requirement' thereby roughly corresponds with that of an obligation in our terminology (ibid, 12–15), whereas Sinnott-Armstrong fails to distinguish clearly enough between concrete obligations in the form of prescriptions and general obligations in the form of norms, see below sec. II, 4., b).

rence of such dilemmas has traditionally been regarded as an inconsistency in one's moral theory.[119] Importantly, most normative conflicts thus labelled as 'dilemmas' do not fall under the definition provided here which is due to our theoretical framework of multiple normative systems. Additionally, neither true dilemmas as introduced here nor the two other kinds of conflicts – intra-systemic conflicts of general norms/principles and inter-systemic conflicts of concrete prescriptions – pose an insuperable concern for substantive normative theories.

In detail: Within our theoretical framework the standard cases according to *Sinnott-Armstrong*'s definition do not pose any difficulty at all – at least insofar as they indeed refer to two conflicting *concrete* obligations – because then they would actually refer to conflicts between different systems. Moreover, such conflicts are rather a vital part of the overall conception. Undoubtedly, it must be impossible for two conflicting obligations to exist within one system, yet this possibility is already conceptually excluded (see above), i. e. any set of rules/principles which were to produce two conflicting concrete obligations could not be regarded as a 'system' in the first place. One may object that there is no meaningful difference between claiming there are two conflicting obligations or claiming there are no legitimate options of conduct. That is, in the example one might say that the claims 'A has an obligation to save P as well as an obligation to save Q' and 'A is prohibited to kill P and to kill Q' are two sides of the same coin, one positive and one negative way of expressing the same normative requirement. There is a decisive difference, though: An obligation demands something – a specific conduct to be realised positively, i. e. even in the case of a dilemma as understood traditionally one could comply with *some*, even though not all, normative requirements. However, in my view the idea of someone being able to comply at least with one *positive* obligation is better framed as different reference systems addressing competing demands at the agent, whereas we can clearly distinguish the idea of a situation in which there are precisely no positive options at all within one system, but every possible conduct would ultimately lead to illegitimate results. Precisely, the conception of a dilemma as a conflict of obligations does not sufficiently take into account the possibility of multiple normative systems and thereby ultimately misses out on the possibility of an independent deontic modality (D) apart from obligations and prohibitions within one system. Let us apply these thoughts to the aforementioned 'Trolley-Problem'. First, we could frame the case as a conflict of general, *prima facie* norms or principles. As indicated earlier, we shall attend to the nature of such conflicts in detail in the following section II, 4. Already we may state that in case such a *prima facie* conflict occurs, in practice it needs to be resolved by means of a prac-

[119] See only Terrance McConnell, "Moral Dilemmas," in *Stanford Encyclopaedia of Philosophy*, ed. Edward N. Zalta (Stanford University, 1997–), https://plato.stanford.edu/archives/fall2014/entries/moral-dilemmas/, sec. 3, with further references to the respective accounts of Kant, Mill, Ross et al.

tical judgement. That is, in practice a decision *has to be made*, both by the acting agent *ex ante* and the judge concerned with the matter *ex post*. Hence, the idea of two conflicting concrete obligations would imply that not one verdict would be spoken, but rather two or more, which would in turn mean we are dealing with more than one normative system. The impossibility to behave legitimately is thus better illustrated as an entire absence of positive/legitimate options.

Surely a few questions regarding dilemmas remain: How can such genuine/true dilemmas occur in normative practice? And does the possibility of their occurrence render a substantive normative theory inconsistent? To begin with, they can occur only if no criteria can be found (or indeed possible criteria are excluded *a priori*) which could mark one of the possible options preferable in relation to the others.[120] In (moral or legal) practice such cases especially occur when a normative system contains absolute, i. e. non-quantifiable values/principles. Such would, for instance, be the case if the 'Trolley-Problem' would be judged under German law, where neither qualitative (concerning the value, the importance of the individual existence) nor quantitative criteria (concerning the number of lives possibly saved and/or the amount of approximate life-time left) with regard to human life ought to be applicable in order to produce a preference or to come to a verdict.[121] The extent to which it is sensible to presume absolute values in general shall not be our concern here. Exactly how to solve the problem of true dilemmas, how one should dissolve this situation if it comes to it, is a substantive moral question far too complex to be dealt with here in adequate depth. Fortunately, the substantive question is not what interests us anyway. We rather want to know whether (D) is a viable deontic modality or not. Even though the structure of (D) is mirror-imaged to that of (P), the answer is theoretically yes, in practice ultimately no – at least not in the same way as the other three are. In contrast to (P), (D) does not contain any viable information for the applicant of a normative system, except for the mere fact that a true dilemma occurred. Whilst (P) signalises to the addressee that she may decide what to do herself, i. e. offering a multitude of possible roads to take, (D) leaves no options to choose between at all. Given the fact that one simply cannot avoid

[120] In this respect it shows a structural similarity with (P) as introduced before, namely with regard to the lack of a clear, predefined normative demand to which an agent can adjust his or her conduct. The difference is that in the case of a permission the decision regarding which option is more preferable lies by definition solely with the acting agent herself.

[121] In fact, the implied reasoning can be regarded as a rather vital part of the common understanding of law in Germany, see especially the famous judgement from 2012 by the German Constitutional Court (*Bundesverfassungsgericht*) about the constitutionality of the so-called '*Luftsicherheitsgesetz*', BVerfGE (*Amtliche Entscheidungssammlung des Bundesverfassungsgerichts* // German Supreme Court Reports) 115, 118. In this ruling the highest German court declared a law as unconstitutional that would allow the downing of an airplane hijacked by terrorists. The judges based their decision on a fundamental 'imponderability' of human life and thereby committed themselves to a strictly anti-consequentialist position.

behaving oneself in *some* way, this entails that (D) has to be resolved in an additional, second step for one of the other three modalities to actually make *any* conduct legitimate and thus possible to perform. To avoid misunderstandings, it shall be emphasised that this does not imply that within a normative system decision situations of the like of (D) cannot or indeed should not occur; that is, that they indeed pose an insuperable concern for normative theories. Only (D) itself cannot sensibly be adduced in order to formulate a practical normative demand. Eventually one would have to revert to one of the other three modalities. In other words, a sensible, viable prohibition can only be formulated if there is at least one option to fall back on for the agent in question.[122] True dilemmas are nevertheless theoretically possible within a normative system. At first glance, this assumption (the possibility of dilemmas) appears to be in conflict with the conceptual necessity for a normative system to produce unambiguous judgements.[123] Yet, as indicated earlier, these judgements only need to be *ultimately* unambiguous, which effectively resolves the (seeming) conflict as the idea that (D) can serve as a provisional result in the process of drawing a normative conclusion/making a normative judgement is itself consistent with the consistency-claim regarding normative systems.[124]

Even if not outright inconsistent, can the fact that a normative theory allows for dilemmas to arise within its framework be invoked as a strong argument against the theory's overall plausibility/cogency? I do not dare to form a final judgement on this question here. It might seem – especially from the point of view of a consequentialist – as though it were at least more truthful to renounce the possibility of such situations *a priori*, if they would have to be resolved for one of the other categories anyway. It is hard to deny some plausibility to such an argument. On the other hand, a normative theory that would not allow for any dilemmas to occur, i. e. a radically consequentialist account, would have to provide the applicant in any such situation *a priori* with a definite normative demand, (O) or (F), and would thus in a way leave no room for individual responsibility. In other words, why should it not be possible to acknowledge the existence of a dilemma as a first step in order to consequently solve it by means of an additional judgement? An advantage of such a (deontological) reasoning might be that it better lives up to the imminent tragedy of certain real-life cases by *prima facie* denying the possibility of only one plainly *right* solution of the case, a right decision for the agent – whilst simultaneously acknowledging the necessity that some decision has to be made. To conclude: True dilemmas and therewith the operator (D) are at least possible within a normative system.[125] If

[122] Just as well a sensible obligation necessarily implies that in a certain context there is no alternative option to fall back on.

[123] See above sec. II, 1., b).

[124] Ibid.

[125] Cf. Matthew Chrisman, "Deontic Modals," in *Routledge Encyclopedia of Philosophy*

they do occur, it is the task of the norm issuer to make an additional judgement about how to resolve (D), i. e. to make the action X in question either permissible, obligatory or forbidden. Hence, (D) itself, in contrast to (O), (F) and also (P), is not immediately relevant to the applicant of a system in terms of being a realisable normative demand for the addressee of the system's rules.

As indicated, given the fact that the normative requirement is supposed to be *unambiguous*, the modality (P) is not unproblematic, either, insofar as it does not strictly speaking contain any normative *demand*, at least not in the sense of a predefined normative content directed at an agent that could simply be followed. In fact, as much is the very nature of permissions, namely that the addressee has to decide for herself what to do. The permission is not itself normative content defined by the system but rather the content in question is left open to the agent's own normative definatory power.[126] Thus (P), in sharp contrast to (O) and (F), does not offer an unambiguous precept in the sense of a (more or less) clear, directed requirement. The normative demand conveyed by it is nevertheless unambiguous: Quite simply, the agent addressed by it may/ought/has to decide for him- or herself. By making the step from the first to the second level one implicitly embraces this possibility, namely that the normative definatory power regarding certain actions is delegated to the individual addressee of the system, that the individual agent is endowed with this 'power' herself. In short, a permission (P) does not prescribe normative *content*, as is the case with (O) and (F), but it represents a (delegated or original) individual normative *competence*.[127] Thus, competence and permission (P) go hand in hand. Notably, the term 'competence' as such is thereby understood very generally as any normative definatory power of an entity regarding a certain normative matter, i. e. irrespective of whether one wants to refer to authoritative competences in a stricter, traditional sense, e. g. the power of the lawgiver or the judiciary, or the competence of an individual agent in an intersubjective system, e. g. the citizen's right to enter into contracts. For better discriminability we shall henceforth always refer to the latter as 'individual competences'.

bb) Two Meanings of Permission

The findings so far enable us to infer that and why SDL1 and SDL2 are incompatible. As a reminder: We designated SDL1 as the claim that (O), (F), and (P)

(Online Version 2015), https://www.rep.routledge.com/articles/thematic/deontic-modals/v-1/: "Perhaps a full theory of morality will explain that genuinely *moral* dilemmas are impossible, but this is a substantive claim about morality rather than a trivial claim about semantics".

[126] Importantly, between 'positive' and 'negative' on first level does not stand 'optional' – in the sense of a possibility to choose – as is too often wrongly assumed. See below shortly, sec. b), dd).

[127] We shall return to this central thought of a juxtaposition of authoritatively imposed content and individual competence in sec. c) below.

all refer to the same reference object and SDL2 as the claim that (O) implies (P). Hence, SDL1 is true only if we understand (P) as a normative exemption as sometimes represented by (OP). Only then (O), (F) and (P) truly refer to the same object, namely an *action as such*, and therewith ultimately to a practical decision. However, if this were the case then SDL2 would necessarily be false, because (O) would not imply (P), but they would rather exclude each other. If, the other way around, we would understand (P) as (L), then SDL2 would be correct, but SDL1 would be false, because (O) and (F) refer to actions as such whilst (L) refers to a solitary option of conduct.[128] The above shows only that SDL is somehow flawed and that we could understand the notion of 'permission' either way. In order to prove that a permission *should* be understood in the sense of a 'normative exemption' and that these 'strong permissions' stand in an exclusive disjunctive relation to (O) and (F) we need to take one step further and question the analogy-thesis SDL3.

cc) Analogy between Alethic and Deontic Modal Logic?

Essentially, the possible-worlds semantics which functions neatly for alethic modal logic is not transferable to the deontic modalities due to very different underlying epistemological interests in each field of modal logic. Precisely, due to the specific task of judging and guiding conduct the deontic modalities demand a distinct logical structure that gives credit to the ability of agents to make practical decisions.

(1) Constructing an Analogy: Two Levels of Statements

To begin with, we shall try to work out commonalities in logical structure between deontic and alethic modalities. First of all, both sets of modalities have at least similar reference objects. Both refer to certain propositions. Alethic modals describe the truth-value of propositions p in general. Deontic modals refer to certain kinds of propositions, namely to descriptions of actions.[129] As we learned earlier, due to the possible-worlds semantics alethic modal logic presupposes two different levels of statements with regard to a certain proposition p. In the actual world alone a proposition can be labelled either true (T) or false (F). Taking into account other possible worlds the truth value is specified to either necessary (N), impossible (I) or contingent (C).[130] The relation of these

[128] For an example of the rather common confusion of (P) and (L) see only Löffler, *Einführung Logik*, 237. The idea of distinguishing two senses of 'action' and accordingly two senses of 'permission' at least shines through in: Johan Van Benthem, Davide Grossi, and Fenrong Liu, "Priority Structures in Deontic Logic," *Theoria* 80 (2014): 139–140. However, the authors remain far too vague and brief in this respect.

[129] At least also; see once more above fn. 74.

[130] Additionally, in the case of epistemic uncertainty about the first-level truth-value of p, one might say that p is possibly true (t) or possibly false (f). In contrast to the first- and sec-

alethic modalities is illustrated in the following table, arranged according to the respective strength of the truth value statement:

First Level Unidimensional statements regarding the truth of propositions p in actual world w	Epistemic interest: The truth value of proposition p	(T) = true (F) = false
Second Level Multidimensional statements regarding proposition p in all possible worlds	Epistemic interest: The absolute strength of a unidimensional truth value statement	(N) = necessary (I) = impossible (C) = contingent

Figure 5: Two Levels of Alethic Modal Logic.

If we compare these findings to the two levels of deontic operators, at first glance there do appear to be a few analogies. On the basic first level we find a bivalent logic in both cases with the operators (T) and (F) as well as (L) and (IL). Also in both cases these basic operators are further specified on a second level by putting the first-level statements in relation to respective *alternatives*. Surprisingly, however, we find that we end up with three operators on level two in alethic logic – (N), (I) and (C) – whilst we were able to distinguish four

ond-level operator these imply only indirect truth value statements regarding p – that is, statements of uncertainty with regard to the actual unidimensional truth value statements (T) and (F). Accordingly, it would surely also be possible to make such statements in deontic logic regarding the possibility/probability that either (L) or (IL) occurs in a normative system. Hence, with regard to an option X we could state that it is 'possibly legitimate', 'possibly illegitimate' or simply 'normatively contingent' representing 'either (L) or (IL)'. We could note these operators like this: (l)X = X_p(+); (il)X = X_p(–); (nc)X = X[(+) or (–)]. Importantly, the information content accompanied by the operator (nc) should be carefully distinguished from the notion of a 'normative exemption'. (nc) certainly does not imply that X is permitted due to neither being positively demanded (obligatory) nor negatively prohibited (forbidden), but it does state an epistemic uncertainty about an evaluation regarding X that can be determined. Hence, not (nc) but rather (P) is able to account for 'normatively indifferent' actions or 'morally neutral' behaviour, cf. below sec. c), (1).

Generally, we need to raise a practical question in this respect, namely which deontic operators are actually of any use to us, as we are concerned with norms and their application. From the point of view of a normative scientist, rules or norms are either supposed to ex ante guide the behaviour of agents addressed by the content of the norm or to allow an ex post judgement about an action in the light of the normative content of the norm. By defining the normative status of an option of conduct X or the normative demand for an action X, we determine certain normative requirements. Thus, because of the inherently practical aspect of norms, we need to be able to acquire an unambiguous result with regard to the normative requirement. In other words, for the normative sciences only such categories can be relevant in the first place which express toward the user a clear normative requirement with regard to an option of conduct or a choice situation. That implies that such statements about X that do not at all make it clear how an agent is or was supposed to behave in a specific situation can be disregarded as irrelevant for our purposes, which goes for (nc) as well as for (l) and (il).

theoretically relevant operators on the same level in deontic logic. The reason for this divergence is simple: In deontic logic we examine one specific proposition in relation to possible alternatives, whilst in alethic logic on level two we usually examine a whole set of possible propositions as such with regard to the question of whether all of them are either true or false. Hence, we can receive only three possible results: all true (= necessary), all false (= impossible), some/some (= contingent). We could, however, easily expand the alethic scheme to a tetravalent logic like the deontic logic on level two by adapting the respective question and focussing on a specific proposition p in actual world w in relation to p in other possible worlds w'. In that case we would end up with following alethic operators on level two:

Second Level Multidimensional statements regarding proposition p in actual world w in relation to p in other possible worlds w'	Epistemic interest: The relative strength of the unidimensional truth value statement	(N) = necessary (I) = impossible (PC) = positively contingent (NC) = negatively contingent

Figure 6: Second Level of Alethic Modal Logic – Alternative.

Proposition p is necessary if it is true in w and in all other w'. It is impossible if it is false in w and in all other w'. As much is evident. Furthermore, we might refer to p as *positively contingent* if it were true in w but false in at least one world w'. In turn, it would be *negatively contingent* if it were false in w but true in at least one world w'. Hence, (PC) and (NC) are nothing but specific manifestations of the generic operator (C) – simply with a relative focus on one of the examined possible worlds. Duly note that I am not claiming we *should* extend alethic modal logic to the above mentioned tetravalent scheme. On the contrary, the extension proposed here is not fit for the primary epistemological interest in alethic logic, which questions the absolute strength of a truth value statement. The extension to a tetravalent system is solely provided for theoretical purposes in order to precisely carve out the differences between the two kinds of modal logics in the following, because only this way are we able to construct two basic modalities on the first level and four basic modalities on the second level both in alethic and deontic modal logic.[131]

[131] Another short side note: In alethic modal logic there have been a number of quarrels over the nature of 'possibility'. Presumably, quite a few of those quarrels derive from indiscriminate usage of the term. In fact, there are in total five different ways to depict the colloquial notion of 'possibility' in terms of alethic modals. First, something can be possible in the sense of (t) or (f). Second, if p is (T) it is at least possible in the sense of being (PC) or (N). Third, if p is referred to as positively contingent or negatively contingent, it is possible in a very narrow sense. Fourth, these two combined, i. e. if p is (C) = (PC) v (NC), means possibility in the strict sense. And finally, it also seems reasonable to regard proposition p as possible

(2) Deconstructing the Analogy: Understanding and Assessment of 'Alternatives'

Despite a few superficial similarities, there are major differences in the structure of alethic and deontic modalities.[132] In this section we shall focus on two of these, both of which are related to the notion of possible alternatives to the central proposition p or action-option X respectively. In short, alethic and deontic logic vary not only in the understanding but – somehow consequently – also in the assessment of alternatives.

(a) Alternatives I: Understanding

Both in alethic and in deontic logic we examine alternatives to a specific proposition p in an actual world w. However, the two kinds of modal logic do not seem to take into account the same kinds of alternatives. In alethic logic we examine the same proposition p in alternative worlds w', whereas in deontic logic we examine alternative propositions p' or alternative options Y in the actual world w. At first glance, this differentiation appears questionable. Precisely, it might seem as if the alleged difference were based on a merely axiomatic presupposition of an action concept which is based on the principle of alternate possibilities within the actual world w (see above). Accordingly, what else is 'A doing Y' other than another possible world in which A does not do X, but does Y instead? This is the decisive point, though. In deontic logic we are not asking for an alternative assessment of the same proposition, but we are considering alternative propositions in the first place. Consider the following example: Suppose there is an option of conduct X 'drinking coffee' and an option Y 'drinking tea'. Respectively, there are the propositions (I) 'A drinks coffee' and (II) 'A drinks tea'. Suppose (I) and (II) are contradictory, i. e. if (I) is true in the actual world w (II) is false and *vice versa*. Now, in order to demonstrate that (I) is necessarily true (however absurd the claim might actually be) we would have to show that (I) is true in every possible world, i. e. that A also drinks coffee in every possible world w' at the same point in time. Hence, to determine the second-level alethic modality the proposition (I) remains unchanged. We analyse the truth value of (I) in w and the truth value of (I) in all w'. What would happen if we did the same thing in deontic logic with regard to the action X? First, we may determine that X is legitimate in w. Yet, if we learned that X was legiti-

in case it is not impossible, i. e. the negation of impossibility ~(I). Despite linguistic intuition there is a subtle difference between (C) as possibility s. str. and ~(I). The negation of impossibility comprises not only alternatively (PC) and (NC), but also (N) as a third contravalent modal. Hence, ~(I) describes possibility in a wide sense, meaning that p is true *at least* in one possible world. It is in this sense, namely as ~(I), that 'possibility' is used in the square of oppositions above.

[132] Thereby we will restrict ourselves to mere observations. The reasons for why this is and even has to be the case will be provided in the following subsection (3).

mate in all other possible worlds w', we would still not know why it should be *obligatory*. This is the reason why some scholars try to bridge this theoretical gap with reference to relatively ideal possible worlds (see above). This theoretical hat trick only raises problems, though, instead of solving any. Precisely, we might raise a justified objection as to what exactly qualifies worlds as ideal; that is, who chooses which world is relatively ideal and which is not? Especially, why resort to the strange construction of relatively ideal worlds in order to explain the notion of obligation, when it can be explained so much more easily? In effect, an action is obligatory if one has to perform it, which entails the idea that other possible actions should not be performed. In the example, 'drinking coffee' is obligatory for A if and only if 'drinking tea' as well as any other action is illegitimate under the given circumstances. To know about the legitimacy of 'drinking coffee' in other possible realities or under other possible circumstances is simply not of interest to anyone concerned with the application of rules or norms in this context.

(b) Alternatives II: Assessment

Furthermore, not only do alethic and deontic modal logic rely on different understandings of the notion of alternatives to the examined proposition p, but importantly they also vary in how they assess these already distinct alternatives. Precisely, the question asked with regard to possible alternatives essentially differs. Let us therefore have a closer look at the structure of the two sets of modals, beginning with the alethic modalities. In order to elucidate the actual differences between alethic and deontic modalities, we should at first agree on a common notation. As the bivalence of level one will remain unchallenged, instead of (T) and (F) or (L) and (IL) we shall simply note (+) and (–) for a positive or a negative assessment, irrespective of whether that applies to the truth of the proposition or to the legitimacy of the option of conduct. The primarily examined proposition p will be separated from the alternatives by a '/'. We will note 'alt' for alternatives and additionally 'all' if all alternatives are supposed to have a certain status and 'one' if at least one alternative is supposed to have this status. Finally, for reasons of simplicity we will adopt the language of 'p' and 'alt' instead of 'X' and 'Y' for the deontic modalities. Accordingly, we can note the four distinguishable alethic modalities on level two like this:

(N)p = (+)p / (+)alt all
(I)p = (–)p / (–)alt all
(PC)p = (+)p / (–)alt one
(NC)p = (–)p / (+)alt one

Let us now contrast these modalities with the logical structure of the deontic ones. As laid out earlier, here we distinguish obligatory (O), dilemmatic (D),

permissible (P) and forbidden (F). In the language described earlier, they would read like this:

(N)p = (+)p / (+)alt all	(O)p = (+)p / (–)alt all
(I)p = (–)p / (–)alt all	(D)p = (–)p / (–)alt all
(PC)p = (+)p / (–)alt one	(P)p = (+)p / (+)alt one
(NC)p = (–)p / (+)alt one	(F)p = (–)p / (+)alt one

Figure 7: Comparison – Alethic and Deontic Modalities.

Interestingly, we now find that only modalities (I) and (D) as well as (NC) and (F) are indeed structurally analogous. Especially in the – often allegedly analogous – pair (N) and (O) we find a striking structural difference, though. The same goes for the relation between (PC) and (P). How can we explain these differences? If we look closely at the assessment of p and the respective assessments of possible alternatives, we find that the underlying epistemological question is a different one in deontic modal logic from that in alethic modal logic. Whilst in the latter we ask the question 'does at least one alternative have a unidimensional status *different* from that of p?', in the former we generally ask 'does at least one alternative have a *positive* status (independent of the status of p)?'

(3) Distinct Epistemological Interests

So much for mere observations. Evidently, we ought to find a reasonable explanation for these differences. Essentially, the structural differences between alethic and deontic modalities are based on fundamentally different (primary) epistemological interests. In case we, as speakers of a language, use alethic modalities we are either interested in the mere truth value of a proposition p on level one or in the (relative) strength of such a unidimensional truth-value statement. Hence, the epistemic interest is always connected and related to the first-level truth value of p. In deontic logic, however, we are interested in the normative assessment of actions. As we saw earlier, actions as such can only be understood as being performed by agents capable of making practical decisions. Hence, the very idea of deontic logic and of 'obligation' presupposes a normative practice which is fully explainable only from an internal perspective, that is, on level two. Hence, technically speaking, in deontic logic we are not primarily interested in unidimensional first-level statements regarding legitimacy, but mostly in second-level statements, i. e. the primary epistemological interest regarding the normative demands on a capable agent with respect to an action X. Without a doubt the first-level statements do have relevant information content, too. Precisely, we can draw certain normative conclusions

from the mere fact of whether an action is in accordance with the rules of a normative system.[133] However, this information is in a way only a function of the complete second-level statement. And here lies the decisive difference between alethic and deontic modal logic: In the former the existence of a second level is not necessarily implied by a first-level statement, whilst in the latter this is the case. In other words, we may draw practical conclusions from an action's being legitimate or illegitimate, but these first-level assessments of actions already presuppose a normative practice on the second level where an action is always either obligatory, forbidden, permissible, or dilemmatic. This is why earlier we only distinguished between different perspectives (internal and external) on the same phenomenon, an intersubjective normative practice. Put simply, we cannot make sense of the deontic modalities without presupposing agents capable of making decisions.

Once more in other words: How exactly can we explain the differences in understanding and assessment of 'alternatives'? As laid out before, on the second level in alethic modal logic we want to learn about the (relative) strength of truth statements. Therefore, it is only consequent to analyse the truth value of p in every possible world. In deontic logic, however, we are evidently not interested in the (relative) strength of a legitimacy statement.[134] Indeed we do specify the first-level legitimacy statement with the second-level statement; however, not with regard to the *strength* of the first-level statement but instead with regard to alternative ways to behave, to act. Given this (primary) epistemological interest, it is then only consequent to ask for at least one *positive/legitimate* alternative and not for at least one differently assessed alternative, because the applicant of a normative system is interested in whether a legitimate option X has to be performed (= obligation) or one is free to perform it (= permission). If one adopted the logical structure of (N) and (PC) for (O) and (P) we would obtain a set of information that is in theory conceivable, but inviable for normative practice. For instance, if all alternatives to a legitimate option X were also legitimate, the action would still only be permissible. Similarly, if we knew that one alternative option Y to a legitimate option X were illegitimate, we would still not be able to determine the normative demand for X as it could yet be either obligatory or permissible. Accordingly, the leading question in alethic modal logic is also only consequent. Here we do not base our analysis on a decision, that is, alternative options of conduct to fall back on, as a theoretical starting point, but we are interested in the uniformity of a specific assessment of p in all possible worlds. To conclude: The differences in logical structure of the oper-

[133] The range of possible conclusions from an external perspective is strictly limited to this single thing: determination of conformity or non-conformity with the content of a normative system.

[134] As indicated before, even if an action were legitimate in all possible worlds it would not make this action obligatory.

ators in alethic and deontic logic are retraceable to the fundamentally different epistemological interests in making use of the respective modalities and therefore in deontic logic to the necessary presupposition of an agent's capability to make practical decisions. According to the respective epistemological interest on multidimensional level two we find that ultimately alethic modal logic is a trivalent logic, i. e. there are three conceivable results[135], whilst deontic logic is tetravalent with four conceivable results regarding the normative assessment of a practical choice situation.

(4) Excursus: Dilemmas as the Missing Theoretical Piece in SDL

This result differs most evidently from traditional deontic logic in the classification of the dilemma, which is usually not regarded as a proper deontic operator or as a decision situation structurally analogous to, for example, that of an obligation. However, even though it is not as relevant in normative practice as the other three (see above), for a correct and complete understanding of deontic logic it is an absolutely indispensable part. In this respect, the disregard for the deontological role of dilemmas in normative theory is admittedly somewhat surprising. For an attempt of an explanation for this disregard, let us have another quick look at the square of oppositions introduced earlier. There we find that we can indeed make sense of the logical relations predefined in the square by filling in (O), (L), (IL) and ~(O).

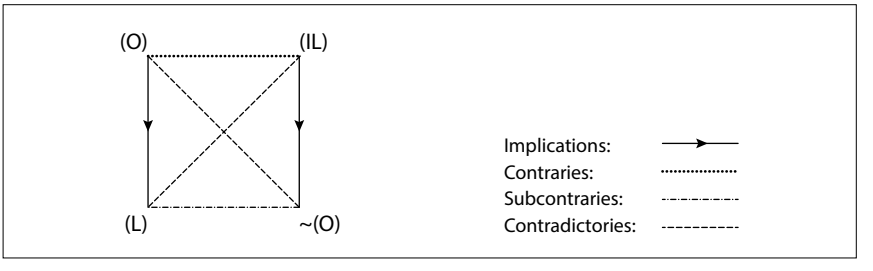

Figure 8: DS with Revised Deontic Operators.

The above represents the classical understanding of a scheme containing all relevant deontic operators, because in addition to the four positions depicted in the square, we can also directly deduce (P) or (OP) from the scheme by combining (L) and ~(O): An action that is legitimate and not obligatory necessarily offers a normative exemption.[136] Hence, it might appear as if the operators which are

[135] Necessary (p true in all worlds), impossible (p false in all worlds) and contingent (p true in some worlds and false in some worlds).

[136] Klaus Röhl and Christian Röhl, *Allgemeine Rechtslehre*, 3th ed. (Köln: Heymann, 2008), 191 ff.

either named in this scheme or which are deducible from it are somewhat conclusive in order to explain normative practice, because apart from (P) we find the obligation (O), the 'weak' or 'unilateral' permission (L), and seemingly also the negative notion of 'prohibition' with (IL). Yet, we know now that (IL) is not equivalent with (F). Hence, what we can strictly speaking neither detect in nor deduce from the scheme are both (F) and (D). Once more: A prohibition can only sensibly be formulated if the agent in question is or was allowed to act in an alternative way. As for the role of (D), we learned earlier that dilemmas are not as relevant in normative practice as the other three due to the practical necessity to convert them into another deontic operator in order to formulate a sensible normative demand. Thus, the assumption lies at hand that it is the comprehensible practical negligibility of (D) that led to its otherwise fatal theoretical neglect.

dd) Imperative Logic as an Objection?

Let us consider one possible objection a bit more thoroughly, which presumably some will raise against the idea of a multidimensional deontic logic as sketched so far. One may object that it might very well be possible to spell out the three deontic modalities (O), (F) and (P) in a strictly unidimensional system and thus also according to an action concept that defies the presumption of individual freedom, if one understands (O) and (F) as simple *imperatives* directed by the respective authority at an agent.[137] In terms of deontic structure, the three modalities would then have to be spelled out like this:

(+)	= Do X!	= obligatory (O)'
(–)	= Don't do X!	= forbidden (F)'
(+) or (–)	= Do X! *or* Don't do X!	= permissible (P)'

The idea is fairly simple: Allegedly, with (O)' and (F)' clear imperatives/commands are provided by a normative system whilst with (P)' such an imperative is not raised, which in turn is supposed to lead to some kind of normative vacuum with regard to action X, a state of affairs where it simply does not matter to the respective authority whether X is performed or not – in other words, a state of authoritative indifference. At what point exactly does this model fail? In a nutshell, the three alternative modalities implicitly presuppose an action concept that relies on the notion of practical decisions. As we clarified earlier obligations and prohibitions only make sense if there are other possibilities which are left to fall back on (or not). Admittedly, at first glance this might seem like a circular argument – certainly to those who think that optionality and freedom

[137] Cf. Adomeit and Hähnchen, *Rechtstheorie*, 30. There they seem to presuppose such a unidimensional understanding in their account of obligation.

are not necessary preconditions for actions.[138] In addition to the criticism levelled at these positions before, my claim here is not simply that my deontological model is correct just because it comprises the idea of optionality or because it explains it better, but rather that the multidimensional model is necessarily correct, because the unidimensional model on the one hand cannot forgo the supposition of freedom, whilst at the same time it is unable to incorporate it. Hence the action concept defended here and the very notion of obligation support each other mutually.

In detail: Allegedly the only possibility to make sense of a unidimensional deontic logic would be to deny the idea of optionality and commit oneself to a logic of imperatives as described above. Such a system needs to negate individual freedom, i. e. the individual ability to decide between different options from the start. It could only distinguish between rule-governed and spontaneous factual behaviour. Otherwise one would automatically end up with a multidimensional model proposed earlier, in which (O), (F) and (P) are normative way-markers for the generally capable agent. In the unidimensional model the modalities would have to be understood as mere triggers for behaviour, as immediate impulses (obligations) or negative barriers (prohibitions). Thus, the agent would have no proper control over his or her behaviour, but the norm would unilaterally dictate it, positively or negatively. Yet, such an understanding prompts serious theoretical problems: First of all, how can we explain responsibility for actions, that is, the ascription of responsibility? As indicated earlier, without reference to at least the possibility of free decisions within normative practice, there is simply no way to do so.[139] Secondly, how can we explain the fact that an agent performs or refrains from performing an action X despite this action being neither obligatory nor prohibited, but simply left unevaluated by the authority? In fact, permissions as structural features can, even in the form described above, only be properly explained with recourse to the individual ability to choose between different options. The decisive point thus is: If we understand the deontic modalities as unidimensional commands, initially there is no room for a third modality next to positive and negative commands – at least not without a noticeable but ultimately inexplicable *shift in the mode of addressing* the agent in question. Whilst (O)' and (F)' are clearly directed commands or imperatives, (P)' would surprisingly be read and understood as some kind of *offer* towards the agent to pick either of the former two imperatives for herself as he or she pleases. However, if we took the unidimensional nature of the imperative logic seriously there could surely be no possibility to choose here, but (P)' as the non-existence of (O)' and (F)' would simply imply that regarding an action X *alternatively* one of the two imperatives (O)' or (F)' exists

[138] See above sec. II, 2.
[139] Ibid.

or at least has to exist. Accordingly, (P)' cannot and should not be understood as a normative exemption in the sense 'either you do X or you do X – you are allowed to do both', but in terms of deontic logic (P)' would be equivalent to the statement 'either X is obligatory or X is prohibited'. Consequently, the proposition 'Do X! or Don't to X!' is by no means equivalent to 'You may do X.'. Thus, in a logical system that is unidimensional and works with only two operators, (+) and (–), any conceivable action would eventually have to be identified as either of the two. A lack of such a label for an action would consequently not lead to a normative exemption but merely describes a state of epistemic uncertainty. This, however, is an understanding already entirely opposed to our fundamental perception of permissions in everyday normative practice. Their very purpose seems to be that no predefined reason is unilaterally dictated but that the agent in question is free to do as she pleases, to find reasons and decide between different options by herself. This notion of optionality is simply not educible within a unidimensional deontic logic based on imperatives.

c) Implications of the New Scheme

Apart from the idea that the notions of obligation, prohibition and permission cannot be explained without recourse to the obliged person's ability to make practical decisions, what are (other) important implications of this newly developed scheme, especially with regard to an accurate theory design in legal and moral theory and thus for the theory of rights? Primarily, we gain an insight from the new scheme about normative systems which is central enough to the theory of rights to give this book its very name: the strictly exclusionary relation of duties and (strong) permissions in normative practice within one normative system[140] – the strictly exclusionary relation of predefined normative *content* in the form of authoritatively predefined practical reasons and of individual *competence* in the form of permissions. Precisely, within a normative system any action will always either be the object of a duty – positive or negative – or of a normative exemption, granting the agent in question the 'freedom' to individually form a decision between different options. Let us dwell on this central thought for a moment longer: To begin with, there is a general and necessary juxtaposition of the three deontic operators (O), (F) and (P) in normative practice. As much is not a theoretical, but certainly a practical necessity within any conceivable normative system in a world of human beings.[141] This

[140] We forgo (D) in this respect already due to the fact that in practice it has to be 'resolved' into one of the other three possibilities. Thus, in practice there is an exclusionary, contra-valent relation only among (O), (F) and (P).

[141] Obviously, the idea of a system in which every action is (O) or in which every action is (F) would be inconsistent. The same goes for a system in which every action is (P) which is quite fittingly described in the Hobbesian natural state, in which everybody has a "*Right* to

insight is crucial because it implies that any viable, i. e. practically possible, normative system and therewith any normative theory needs to strike a balance between predefined intersubjective value judgements or predetermined normative content, i. e. normative content directed at agents in the form of duties, i. e. (positive) obligations and (negative) prohibitions,[142] and normative areas of individual discretion, of personal autonomy or of individual competence, in which A is held to decide for herself which action to perform and for what reasons. These areas of personal discretion then come in the deontological form of permissions. Thus, in a way permissions reduce the requirements of what normative systems and their respective authorities need to prescribe, whilst simultaneously increasing the demands on agents to the extent that they are free to but also forced to find their own reasons.

These assertions ought not to be mistaken for the admittedly too far-reaching claim that any practicable normative system would have to cherish individual autonomy or personal freedom as something intrinsically good or desirable. As much is expressly not a necessary truth about every conceivable normative system. Take, for example, traditional religious ethics which are entirely duty-based.[143] In these normative systems a certain number of specific obligations and respective prohibitions were prescribed to the agents addressed. Apart from these duties, though, people were free to behave as they pleased. For instance, if middle-age farmer F followed all the duties set out by his king and his religion he would still do no wrong by freely choosing between eating potatoes or cabbage for lunch. Even in these systems, as in any conceivable system, permissions (P) as *structural elements* can be found.[144] The fact that personal au-

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any thing" (Hobbes, *Leviathan*, 99), i. e. in which there are no negative normative boundaries with regard to certain actions. Such a state would not describe, as Hobbes himself intended it to do, a normative system of some kind but rather a state of anomy, i. e. the entire absence of any rules, because no obligations or prohibitions would be predefined whatsoever. A system with only (P) and (O) is impossible, because (O) already presupposes that some possible actions are (F). A combination of only (P) and (F) might seem plausible at first glance – as in the idea of a system's being strongly based on individual liberty with only some explicit prohibitions. A system entirely without obligations is not really imaginable, though. Not only would any kind of contractual obligation be impossible, but also no one could ever be blamed for failing to help others, as this reproach is bound to an obligatory action that has not been performed (see above). So finally, what about a system that contains only obligations (O) and prohibitions (F)? We find that such a system is at least *theoretically* possible. However, as indicated earlier, it is at this point that we reach the limit of what can sensibly still be demanded of human beings by normativity. Such a system would have to predefine *the* plain right thing to do in any given situation. As pointed out earlier, such a system would be far too demanding in every respect. Thus, the presumption of three deontic modalities on level two is a theoretical necessity just like the existence of first-level modalities (L) and (IL) – only this time not an a priori deontological one, but a practical one.

[142] Which thus are also predefined and viable reasons for actions for the agents in question.

[143] Edmundson, *Rights*, 7.

[144] In this respect, it is noteworthy that, mentally, we ought to separate the notion of per-

tonomy as the freedom to decide certain things for oneself is not necessarily always regarded as an (intrinsically) good thing is another, a substantive normative matter. This question regarding a possible (intrinsic) value of personal autonomy is independent of the fact that there will always be a juxtaposition of predefined, intersubjective content and individual, subjective competence. Hence, a necessary truth about normative systems is the following: Regarding a specific action a system either needs to provide a definite judgement that can be directly facilitated in order to guide one's behaviour, i. e. a judgement in the form of (O) or (F), or it has to delegate this evaluation to the agent herself, i. e. give her permission to do as she pleases, to form her own judgement. Thus, the newly developed scheme should prove helpful in aiming at a more conscious theory building in ethics and law, which includes a better awareness of the fact that the existence of a duty implies an authoritative decision against someone's individual freedom[145] and *vice versa*, that any authoritative decision against regulation, against defining clear normative boundaries is in effect a delegation of normative competence to the individual.[146]

Finally, another important implication for the theory of rights, which shall at least be insinuated at this point, is the following: Hitherto, one might have argued that if we knew an action was neither obligatory nor forbidden, the action would not necessarily have to be optional (OP), because it could simply be the object of a 'weak permission' or 'unilateral liberty'.[147] *Hart*, for instance, defined a unilateral liberty as "the absence of either an obligation not to do something or an obligation to do it"[148]. We know now that such a reasoning is flawed and also why this is the case, namely due to disregard for the different

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mission as the deontic operator (P) from our positive linguistic intuitions regarding terms like 'permission', 'liberty', 'freedom', etc.

[145] Thereby we only refer to the individual freedom of the agent specifically addressed by a duty. Thus, these remarks do not touch upon, let alone preclude, the possibility of understanding a certain set of duties in the classical Kantian sense not as strictly speaking freedom-restricting but rather as enabling the exercise of (other people's) freedom in an intersubjective context and hence facilitating a maximum of freedom in total.

[146] Does this mean that any authoritative decision against defining duties is necessarily also a decision in favour of individual liberty or an (indirect) appreciation of individual liberty as a good worthy of protection? As much is not the case. The appreciation of individual liberty as an intersubjective value is not a deontological necessity, but rather a (ground-breaking) evolutionary step in substantive normative reasoning, which goes hand in hand with the emergence of 'rights'. Individual liberty as a value represents an institutionalised counterweight to authoritatively imposed duties. Once autonomy is accepted as an intersubjective value, to have liberties is then no longer only a necessary side effect of the unwillingness to impose duties by the relevant authority but means that the value of individual freedom is now more important in the sense of outweighing possible authoritative considerations in this case. Essentially, what we are dealing with here are the differences between pure duty ethics and such ethics principally working with rights – a topic we shall return to in much detail in sec. III, 2., e), cc) below when discussing the 'evolution of rights and rights talk'.

[147] See above fn. 76.

[148] Hart, *LR*, 175–176. Cf. also Nigel Simmonds, "Rights at the Cutting Edge," in *A De-*

levels of deontic modal logic. If we cannot determine either a positive obligation or a negative prohibition with regard to an action X, in practice we need to assert a permission (P) and therewith a normative definatory power held by the respective individual. A proper understanding of permissions is vital for an appropriate understanding of the Choice Theory of rights. However, we will have to postpone an adequate and more detailed assessment of the questions of whether a permission as such can be regarded as a normative advantage for the addressed agent[149] and whether permissions are equivalent to authoritative decisions in favour of individual freedom[150] to later stages of the inquiry.

d) Conclusion

Let us summarise our main insights from this section on deontic logic and to what extent they matter to us in finding an appropriate concept of rights. First, there is no sensible way to frame the notions of obligation, prohibition, and permission without presupposing freedom of decision. As much is only indirectly relevant for the theory of rights. Very much relevant, however, is the second main insight, namely that there is an exclusivity and a necessary juxtaposition of duties and permissions in any conceivable normative system – a fact that will indirectly serve as a strong argument in favour of Choice Theory in the second main part of this book.[151] Thus, in a way we concentrated mainly on this line of theory so far. More precisely, due to our strong focus on the nature of permissions and their role in normative reasoning in the foregoing section c), we hitherto mainly clarified the function of a structural element that is strongly emphasised with regard to rights by Choice Theory. Before we are truly able to enter the debate about rights, we need to ensure a proper understanding also of the structural complement to decisions, which in turn is emphasised by the rivalling Interest or Benefit Theory: reasons. A practical reason, as in 'a reason to do something', is the structural element of normativity that any plausible version of Interest Theory somehow incorporates.[152] Often enough, as in the case

bate over Rights, ed. Matthew Kramer, Nigel Simmonds, and Hillel Steiner (Oxford: Clarendon, 1998), 155.

[149] See therefore below sec. III, 1. under a), cc) (2), as well as b), aa) and bb), (2).

[150] See therefore below sec. III, 2., e), cc).

[151] The obvious assumption is that Choice Theory equates rights with permissions. Unfortunately, it is not quite as easy as that, as we shall see in the abovementioned second main part.

[152] For terminological clarification it appears noteworthy that the term 'practical reason' will throughout be used in this sense, as a reason that becomes practical, a reason for an agent to perform a certain action, not, as it is usually understood, in the sense of a 'general human capacity'. Cf. Jay Wallace, "Practical Reason," in *Stanford Encyclopaedia of Philosophy*, ed. Edward N. Zalta (Stanford University, 1997–), https://plato.stanford.edu/archives/sum2014/entries/practical-reason/. For a critical assessment of the diverse usage of the term 'reason for actions' cf. Ralph Wedgewood, "Intrinsic Values and Reasons for Action," *Philosophical Issues* 19 (2009).

of *Joseph Raz*'s influential formulation of an Interest Theory, which represents one of the most convincing accounts of the theory family up to date, the term 'reason' is even placed in the very heart of the respective rights' definition. *Raz* roughly defines a right as "an aspect of X's well-being (his interest) [which] is a sufficient *reason* for holding some other person to be under a duty"[153]. Thus, in order to acquire an adequate understanding of the undoubtedly central term 'reason' we need to leave the field of actions and prescriptions now and enter more abstract fields of normativity, namely those dealing with norms, rules, principles, values, and similar phenomena.

4. Principles, Norms and Values

So far we have discovered that to act essentially is to make a practical decision for a certain reason. What is this reason, though? A certain (prevailing or outweighing) value? A norm? Or maybe – often characterised as something in between the former two – a principle? And, most importantly, to what extent are these issues relevant for us in this context, i. e. in trying to find an adequate concept of 'rights'? Generally, we already clarified that the notion of rights is closely linked to that of reasons. If rights really *were* reasons, which we will presuppose at this point, there seems to be a meaningful difference, though, between rights in the sense of 'A has a right to do X' or 'A has a right that B not do Y' and more abstract rights such as 'A has a right to bodily integrity'. On the one hand there appear to be rights that are strictly linked to actions (specific ones or types of actions), on the other hand there are rights which do not show this connection. In any case, from common parlance we are very much used to both the former (see above sec. I, 1., a), bb), examples II or III) as well as the latter (ibid, example I). The difference between the two can be described as the one between practical reasons and abstract reasons. They shall henceforth be referred to as thus. One of my aims in this section is to show that abstract reasons are an important part of normative reasoning; that is, they play a meaningful role in the functionality of normative systems. In other words, normative systems are not simply the entirety of a certain number of *norms* but rather should be regarded as a process, one in which both abstract values and concrete prescriptions play a meaningful role as well. For the enterprise of finding out about the nature of rights, these insights are crucial insofar as any account of rights that would be limited to practical rights such as 'A has a right to do X' or 'A has a right that B not do Y' would *a priori* be overly restrictive. So far we have indeed restricted our analysis to the logic of actions or certain action types. Thus, we need to engage in an analysis of the nature of practical *and* abstract reasons as the content

[153] Raz, *Morality of Freedom*, 166.

of a normative system in order to truly and fully understand the nature of rights in turn. As indicated before, we shall thereby start from the premise that there actually are these two kinds of reasons: practical and abstract ones, the former being reasons for actions (concrete actions of more general action types) and the latter being plain reasons in the sense of general intersubjective goods or objectives. Hence, our preliminary assumption is that practical reasons can be described in the form of the deontological modalities (O), (F) and (P) whilst this is just not possible for mere abstract reasons. In contrast, these abstract reasons or values need to be regarded as somewhat ideal objectives.

More specifically, let us formulate two hypotheses regarding the nature of abstract reasons, which shall pre-structure the ensuing analysis:

> T1: In contrast to norms as practical reasons, abstract reasons are *not directly applicable* in the sense of implying the possibility to serve as a reason for an action or a concrete judgement.
> T2: Still, abstract reasons have a normative significance to the extent that they serve as quantities in the balancing process necessary for the solution of so-called 'hard cases'.

Whilst T1 points out the difference between abstract and practical reasons, T2 points out the meaningful role of abstract reasons for normative reasoning in general. For the purpose of elucidating these theses our main object of study will be the idea of *principles* as proposed by (what is normally referred to as instances of a) 'Principle Theory', the most prominent versions developed and defended by *Ronald Dworkin*, *Roberty Alexy* and their followers.[154] The main reason for choosing principles as the central object of study is their alleged existence in the 'border area' between norms and abstract values.[155] That is, on the one hand principles are supposed to be different from ordinary rules in being more general properties. Yet, despite their generality they are supposed to have a practical relevance, i. e. by principle theorists they are believed to be applicable in order to solve practical legal or moral problems. Hence, Principle Theory directly reacts to both of our central theses formulated above: It explic-

[154] See esp. Alexy, *TG*, 70 ff., and already Robert Alexy, "Zum Begriff des Rechtsprinzips," in *Argumentation und Hermeneutik in der Jurisprudenz*, ed. Werner Krawietz et al. (Berlin: Duncker Humblot, 1979), 59–87. See also: Dworkin, *TRS*, 22 ff. In his seminal work from 1985, Alexy borrowed a few ideas regarding the notion of principles from the prior works of Dworkin, with an emphasis on the norm-theoretical aspect of principles, though. Even before Dworkin, the general idea of principles as a specific kind of norms had been elaborately developed in Josef Esser, *Grundsatz und Norm in der richterlichen Rechtsfortbildung des Privatrechts* (Tübingen: Mohr, 1990 [1956]), 39 ff. For further references regarding the emergence of Principle Theory see: Robert Alexy, "Zur Struktur der Rechtsprinzipien," in *Regeln, Prinzipien und Elemente im System des Rechts*, ed. Bernd Schilcher, Peter Koller, and Bernd-Christian Funk (Wien: Verlag Österreich, 2000), 31.

[155] See only Alexy, *TG*, 133 ff., with further references.

itly negates T1, whilst it explicitly affirms T2. In other words, Principle Theory affirms both critical and controversial features of principles: their alleged role in balancing processes as well as their applicability.[156] My aim is to show that one can only have one or the other and that principles are best understood as being of normative significance only as abstract quantities in balancing processes. Thus, the ensuing investigation is roughly structured as follows: In section a) the outlines and common theses of Principle Theory as a line of theory shall be sketched. Subsequently I will roughly expound my main points of criticism of Principle Theory. Accordingly, in sections b) and c) we will then successively and in detail analyse T1 and T2, each in relation to the arguments which Principle Theory offers in each respect.[157]

a) Introduction: Principle Theory

Let us first try to get a clear picture of the central tenets of Principle Theory. Beforehand, it is noteworthy that there is a great variety of theories, which are regarded or regard themselves as 'principle theories' and that these function on a number of different levels. Accordingly, the (quite prevalent) critique can be and is usually divided into corresponding categories.[158] There are even quite a few scholars who generally reject Principle Theory.[159] In this respect it shall be

[156] With respect to the former point our approach indeed largely overlaps especially with Alexy's work, which will make it possible for us to simply rely on certain positions developed in his principle theory, especially with regard to certain deontological features of principles. This goes especially for the role principles play in balancing processes, in particular their role in practical legal or moral argumentation. In this respect, a central claim of principle theory, namely that not all cases can be solved simply by the application of rules, is strongly supported. On the other hand, our approach differs from ordinary principle theories in general and Alexy's approach in particular with regard to the practical applicability of principles (see above).

[157] In terms of theoretical frugality, it is at least not an unjust question, why we do not simply rely on the tenets of Principle Theory with respect to T2, which are principally shared/adopted here. In my view, a few explanatory words might be helpful, as this feature of principles is particularly often and rigorously criticised. Despite the fact that I will not be able to offer a conclusive defence of Principle Theory in this respect, it seems all but unjustifiable to support this central claim regarding principles with a few of my own thoughts on the matter.

[158] For the different kinds of possible attacks on Principle Theory and respective counterarguments see inter alia Alexy, "Struktur der Rechtsprinzipien," 36 ff.; Robert Alexy, "Die Konstruktion der Grundrechte," in *Grundrechte, Prinzipien und Argumentation*, ed. Laura Clérico and Jan Sieckmann (Baden-Baden: Nomos, 2009), 12–13; Jan Sieckmann, "Probleme der Prinzipientheorie der Grundrechte," in *Grundrechte, Prinzipien und Argumentation*, ed. Laura Clérico and Jan Sieckmann (Baden-Baden: Nomos, 2009).

[159] See inter alia Ralf Poscher, *Grundrechte als Abwehrrechte* (Tübingen: Mohr Siebeck, 2003); id, "Einsichten, Irrtümer und Selbstmissverständnisse der Prinzipientheorie," in *Die Prinzipientheorie der Grundrechte*, ed. Jan Sieckmann (Baden-Baden: Nomos, 2007); id, "Theorie eines Phantoms – Die erfolglose Suche der Prinzipientheorie nach ihrem Gegenstand," *Rechtswissenschaft* 4 (2010); Jospeh Raz, "Legal Principles and the Limits of Law," *The Yale Law Journal* 81 (April 1972); Jan Henrik Klement, "Vom Nutzen einer Theorie, die

noted that we will only be concerned with the 'norm-theoretical' aspects and level of principle theory, concerned with the logical and interdependent structures of norms, principles and similar elements, and only insofar as it is vital for our purposes. Accordingly, we will not be able to adequately discuss the cogency e. g. of Principle Theory's normative or argumentation-theoretical dimension in this context.[160]

aa) Principle Theory: Central Theses

Central to *Alexy*'s theory is his semantic concept of norms, which distinguishes between norm and norm statement, a norm being the analysable content of a norm statement. Norm statements however can take different forms.[161] The distinction is analogous to one common in the philosophy of language, namely between the form and the proposition of a statement.[162] This semantic concept presupposed, *Alexy* goes on defining two different subcategories of norms: rules and principles. Rules are supposed to be "definite reasons"[163], principles on the other hand he refers to as "*prima-facie* reasons"[164]. For him the main difference between rules and principles lies in the way these norms (can and do) conflict.[165] Much the same goes for *Dworkin*'s account of principles.[166] Both assume that a conflict between different rules could only be solved either by invalidating one

alles erklärt," *Juristenzeitung* 15 (2008). Rejecting an idea of specifically 'legal' principles as opposed to moral principles: Larry Alexander and Ken Kress, "Against Legal Principles," *Iowa Law Review* 82 (1996–1997); id, "Replies to Our Critics." *Iowa Law Review* 82 (1996–1997). For an apt critique of Dworkin's model of principles see Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon, 1978), 152 ff., 229 ff.

160 Jan Sieckmann, *Recht als normatives System* (Baden-Baden: Nomos, 2009), 44 ff.

161 Alexy, *TG*, 40 ff., esp. 42–43, with reference to the similar terminology of Weinberger and Ross, who differentiated between 'directives' and the 'the linguistic form which expresses a directive', cf. only Alf Ross, *Directives and Norms* (New York: Humanities Press, 1967), 34 ff. Notably, though, Ross' understanding of the term 'norm' differs significantly from Alexy's. For a well-written description of the central tenets of the semantic concept of norms see esp. Jan Sieckmann, "Semantischer Normbegriff und Normbegründung," *Archiv für Rechts- und Sozialphilosophie//Archives for Philosophy of Law and Social Philosophy* 80 (1994).

162 Alexy, *TG*, 46.

163 Ibid, 88, 90. That idea bears some resemblance to Raz's account of norms, who generally regards mandatory norms as 'exclusionary reasons', i. e. reasons for actions. Cf. Raz, *Practical Reason*, 73 ff.

164 Alexy, *TG*, 88, 90. The concept of prima-facie duties and -rights was first developed in: William Ross, *The Right and the Good*, see esp. 19–21. Cf. also id, "Prima Facie Duties," in *Moral Dilemmas*, ed. Christopher Gowans (Oxford/New York: Oxford University Press, 1987).

165 Alexy, *TG*, 77–79. Cf. Ulfrid Neumann, "Die Geltung von Regeln, Prinzipien und Elementen," in *Regeln, Prinzipien und Elemente im System des Rechts*, ed. Bernd Schilcher, Peter Koller, and Bernd-Christian Funk (Wien: Verlag Österreich, 2000), 119–121; Carla Huerta, "Normkonflikte im Lichte der Prinzipientheorie," in *Grundrechte, Prinzipien und Argumentation*, ed. Laura Clérico and Jan Sieckmann (Baden-Baden: Nomos, 2009), 186–190.

166 Dworkin, *TRS*, 26–27.

of the rules or by installing some rule of precedence between the two, whereas principles are by their very nature bound to conflict with each other. These conflicts of principles are then resolved by means of balancing.[167] Principles are said to command that something ought to be realised to as high a degree as possible relative to the legal and factual possibilities. They were thus primarily referred to by *Alexy* as 'commands of optimisation'.[168] This characterisation or choice of words had been subject to much criticism.[169] Responding to this criticism he later preferred to describe principles as an 'ideal ought',[170] leaving untouched the general idea that they have both an ideal and a practical nature.

Furthermore, there is wide agreement amongst proponents of a principle theory that rules, in contrast to principles, can only either be followed or not be followed. *Dworkin* states in this respect that rules were only 'applicable in an all-or-nothing fashion'[171]. The difference between his account and *Alexy*'s lies in the details concerning this point. The latter explicitly disagrees with *Dworkin*'s assertion that all instances of a norm, i. e. all cases where it either applies or an exception has to be installed, could at least theoretically be numbered.[172] For *Alexy* norms by their very nature have to remain vague to a certain degree, certainly in their respective periphery.[173] On the other hand, on various occa-

[167] Ibid, 26; Alexy, *TG*, 77. On the nature of these balancing processes see also: Nils Jansen, "Die normativen Grundlagen rationalen Abwägens im Recht," in *Die Prinzipientheorie der Grundrechte*, ed. Jan Sieckmann (Baden-Baden: Nomos, 2007), esp. 45–57.

[168] Alexy, *TG*, 75.

[169] Jan Sieckmann, *Regelmodelle und Prinzipienmodelle des Rechtssystems* (Baden-Baden: Nomos, 1990), 65; Poscher, 2010, 350–351; Klaus Günther, *Der Sinn für Angemessenheit* (Frankfurt a. M.: Suhrkamp, 1988), 268 ff.

[170] Robert Alexy, "Ideales Sollen," in *Grundrechte, Prinzipien und Argumentation*, ed. Laura Clérico, Jan Sieckmann (Baden-Baden: Nomos, 2009), 21.

[171] Dworkin, *TRS*, 24.

[172] Dworkin claims that at least theoretically all cases of application of a norm could be listed, whereas Alexy apparently assumes that norms necessarily remain vague to a certain degree, maintaining fuzzy or "furry edges" (the latter term being borrowed directly from Dworkin, *TRS*, 6). Properly understood, there is no inconsistency here at all. Dworkin is not strictly wrong with his claim. It could in pure theory be possible to list all cases of application of a norm. Already the idea is just not very useful, though, because if anyone could list all cases of application of any norm, there would no longer be the need to have *norms* in the first place. It is as if you were saying "it is theoretically possible for a human to know everything, provided he or she has enough brain capacity", which might be true in theory, except such a being would hardly be referred to as a human any longer. Norms exist in order to reduce complexity; they are a practical necessity. They are an intermediate product lying between ideas and their practical application. Furthermore, they are the content of linguistic statements. As such they are necessarily general and vague; Alexy is right on this point. On the other hand, to be general *means* to only *generally* apply to certain cases, i. e. not necessarily apply and that means there can possibly always be circumstances in which a norm – despite being a norm – does not apply due to circumstances which are not foreseen in the norm itself. It is at least always possible that C_P is more extensive than C_N.

[173] Cf. also Hart, *Concept of Law*, 122, where Hart refers to this phenomenon as the 'open texture' of rules.

sions he refers to them as being 'definite'[174], which does seem a bit surprising already at first glance. We will return to this point later on. Without planning to dwell further on the apparent differences between *Dworkin*'s and *Alexy*'s account, we can at least concede some kind of common denominator for Principle Theory as a line of thought with regard to its underlying account of rules: Both theorists see rules as containing normative *fixtures* within what is legally and factually possible, notwithstanding the fact that they have to be applied in an individual case by means of subsumption.[175] In any case, there is unanimous agreement amongst principle theorists that rules can either practically be followed or not be followed, whereas principles need to be applied by means of *balancing* them with other principles.[176]

As a standard example for an actual constitutional right whose nature as either a principle or a rule would be disagreed upon by proponents and opponents of a principle theory, we shall consider the freedom of expression/freedom of speech, which will remain our standard example throughout the whole chapter.[177] Simplified, the dispute between the two theoretical factions can be summarised as follows: When A insults B in terms of the law, A's freedom of expression conflicts with B's personality rights. Proponents of a principle account claim that in such a case two principles conflict and that this conflict needs to be resolved by means of balancing the two in order to come to a judgement. Depending on the gravity of the insult and other practical circumstances, sometimes the former, sometimes the latter principle would prevail. Their opponents – in accordance with *Alexy*'s terminology we shall refer to them as proponents of a 'rule account'[178] – would claim that finding a verdict in this case is not a matter of balancing two (possibly even non-legal[179]) quantities, but

[174] See inter alia Alexy, *TG*, 92.

[175] Cf. Thomas Schmidt, "Vom Allgemeinen zum Einzelfall," *Zeitschrift für philosophische Forschung* 66 (2012).

[176] A short side note: The general idea of balancing as a means to overcome conflicts of principles is adopted here from Principle Theory. However, it is explicitly not argued that balancing is an entirely rational process that can be executed precisely by means of (quasi-) mathematical formulae. For rather unfortunate attempts to do so cf. only: Carlos Pulido, "The Rationality of Balancing," *Archiv für Rechts- und Sozialphilosophie//Archives for Philosophy of Law and Social Philosophy* 92 (April 2006); Lars Lindahl, "On Robert Alexy's Weight Formula for Weighing and Balancing," in *Rights: Concepts and Contexts*, ed. Brian Bix and Horacia Spector (Farnharn/Burlington: Ashgate, 2012), 559. Essentially, balancing means creating a relation of precedence between two conflicting goods/principles with respect to the (relevant) facts of a case, i. e. balancing means making a decision, which requires reason and normative argument, cf. below sec. 4., b, bb) and 4., c) cc). Correctly understood it is thus somewhat adverse to the idea of a rationalisation and formalisation of decision-making processes by means of transferring them to a formalised, mathematical language.

[177] Cf. inter alia Jan Sieckmann, *Recht als normatives System*, 24 ff.; Nils Jansen, *Die Struktur der Gerechtigkeit* (Baden-Baden: Nomos, 1998), 92 ff.

[178] Alexy, *TG*, 106 ff.

[179] Roughly, Dworkin understands principles as an impact of morals on law. In light of

simply finding the right legal rule to govern the case or to apply to the case, e. g. by adding an exception to one of the existing, yet conflicting rules. If there is no valid rule to be found whatsoever, the decision in this case shall be left to the discretion of the judge.[180] In conclusion we can state that even though *Dworkin*'s and *Alexy*'s positions might differ in detail in quite a few (not unimportant) aspects,[181] their fundamental norm-theoretical claims are almost identical. Both assume the existence of abstract principles as a subcategory of norms in a legal system. In contrast to rules these principles are characterised by having a *prima-facie* normative weight, which is supposed to make them suitable for balancing processes in so-called 'hard cases', in which a solution cannot be found by merely applying a legal rule.

bb) Central Points of Criticism

Consequently, what will our critique of Principle Theory concentrate on? Mainly these are two points, which will be sketched now and then spelled out more clearly subsequently: First of all, by distinguishing only rules and principles *Dworkin*, *Alexy*, and their followers show surprising disregard for a rather central element of normativity, which we already elaborated and which can and should be distinguished from *general* norms, namely concrete prescriptions. So, in the following sections we shall take a closer look at the interdependent relation of abstract principles and concrete prescriptions, paying special attention to the role norms or rules play in the overall process. Secondly, even though the general existence of phenomena with the basic logical features of principles as *Dworkin* and *Alexy* describe them will not be contested, the categorisation of principles as a subcategory of norms[182] is all but convincing. By giving careful attention to both terms and their respective features, I aim to show that their 'principles' are actually another element of a normative system entirely different from norms, namely what we earlier referred to as abstract reasons or which could also be referred to as *values*. Thus, we will need to have a closer look at the dividing line between principles (or values[183]) as allegedly axiological or

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the yet-to-be-defended thesis that law itself consists of proper normative systems (see below sec. II, 5), d)), Weinberger's assertion that such principles which are relevant for legal decisions are not external, but imminent ("system-relative") legal quantities appears preferable, see Ota Weinberger, "Revision des traditionellen Rechtssatzkonzepts," in *Regeln, Prinzipien und Elemente im System des Rechts*, ed. Bernd Schilcher, Peter Koller, and Bernd-Christian Funk (Wien: Verlag Österreich, 2000), 60.

[180] Dworkin, *TRS*, 17, 31 ff.

[181] For a critical analysis of the differences between these two theories see Robery Alexy, "On the Concept and the Nature of Law," *Ratio Juris* 21 (September 2008).

[182] Alexy, *TG*, 72.

[183] Or possibly 'interests' (see above). In claiming that Alexy's principles are actually values and not norms, our critique is at least similar to the teleology-objection to Principle Theory, most famously advanced in: Jürgen Habermas, *Faktizität und Geltung* (Frankfurt a. M.: Suhr-

evaluative quantities in contrast to norms as allegedly deontic quantities and also at possible criteria for making this distinction.[184] As both mentioned points of criticism intertwine in various ways, I will not stick too strictly to the order provided here but there will be a few unavoidable overlaps.

cc) Terminological Issues

As indicated, abstract reasons could be and are usually referred to as 'values'. In other contexts, the respective, pre-normative, abstract quantities to be considered in normative reasoning are described as someone's (critical or well-understood) 'interests'. Yet already terminologically it appears preferable to retreat from these labels to a more neutral term such as 'principles'. This is so due to a blurring of the lines between meta-ethics and substantive normative ethics at this point: With regard to value judgements, at some point every normative theory has to explain the relation between the evaluating subject and the object worthy of being defended. The moral intuitionist has to concede that even if there were objective, *a priori* values in existence they would still have to be perceived and regarded as such.[185] For the moral relativist on the other hand all values are relative, i. e. they depend only on the perception and judgement of the subject.[186] Still, it is always a certain object and its features that the subject has to refer to. Thus, without wanting to imply that 'value' is a strictly intuitionalist term or 'interest' necessarily relativist, there appears to be a danger in generally using one of these terms for the structural phenomenon of an abstract intersubjective good as they at least seem to point in a certain direction defining the relation between subject and object, which should entirely be the task of a substantive normative theory. Whilst the term 'interest' seems to be more

kamp, 1992), 310–311. Habermas' account significantly differs from ours, though, especially with regard to the central claim of a "binary […] encoding" of all norms (ibid, 311). See also Jürgen Habermas, *Die Einbeziehung des Anderen* (Frankfurt a. M.: Suhrkamp, 1996), 367 ff.

[184] For a brief but well-written introduction to the debate about the relation of axiology and normativity or of "the evaluative and the deontic" see: Michael Zimmerman, "Value and Normativity," in *Oxford Handbook of Value Theory*, ed. Iwao Hirose and Jonas Olson (Oxford/New York: Oxford University Press, 2015).

[185] Generally, Moral or Ethical Intuitionism rests on the claim that "basic moral propositions are self-evident – that is, evident in and of themselves – and so can be known without the need of any argument" (Philip Stratton-Lake, "Intuitionism in Ethics," in *Stanford Encyclopaedia of Philosophy*, ed. Edward N. Zalta (Stanford University, 1997-), https://plato.stanford.edu/archives/win2016/entries/intuitionism-ethics/). For prominent contemporary intuitionist accounts cf. inter alia the works of Robert Audi, Jonathan Dancy, or Russ Shafer-Landau.

[186] Moral Relativism as a meta-ethical approach essentially holds "that the truth or justification of moral judgments is not absolute, but relative to the moral standard of some person or group of persons" (Chris Gowans, "Moral Relativism," in *Stanford Encyclopaedia of Philosophy*, ed. Edward N. Zalta (Stanford University, 1997–), https://plato.stanford.edu/archives/win2016/entries/moral-relativism/). Notable recent accounts in meta-ethical moral relativism include the works of J. David Velleman and Gilbert Harman.

subject-oriented, the term 'value' has a rather object-oriented connotation. For our purposes it therefore appears preferable to use the term 'principle' as a kind of conceptual superordinate as it is more neutral in terms of compatibility with possible substantive theories of value or interest.

b) Principles, Norms and Prescriptions

As indicated earlier, in this section introductory thesis T1 shall be analysed, which concerns how Principle Theory errs by claiming that principles are directly applicable as reasons for concrete actions or judgements. After a few general preliminary theoretical remarks in aa) and bb), we will therefore critically review *Alexy*'s theory with regard to thesis T1 in subsection cc).

aa) Prescriptions as Distinct from Norms and Principles

To begin with we need to ask ourselves: why is the analysis of our normative practice so often confined to only norms or rules? If one looks into the relevant literature, it would appear almost trivial to state that by analysing a norm system or a normative system we are looking into the logic and/or nature of *norms*. But does that really suffice? In fact, at a closer look it seems rather surprising that the law of a community as an example for a special kind of normative system[187] is constantly referred to only as a "set of […] rules"[188] or (speaking for principle theorists) possibly a set of rules and principles. The central point in this respect is that norms, a normative system, and normativity in general can only be adequately grasped and explained by and through its *application*, through agents actually complying or not complying with rules and/or principles by performing concrete actions.

(1) Normativity as a Process

In short, a normative system is not an aggregate of norms or norm statements, not simply a set of rules, but it is best understood as a constant inductive-deductive process pivoting around the evaluation of concrete cases/actions. On the level of application or of concrete actions we can find concrete prescriptions at work – a phenomenon to be discriminated carefully from rules in terms of their generality, as we will find presently. Additionally, with regard to discriminability the same goes for principles as abstract ideas of the good in relation to norms. Hence, it does not suffice to merely distinguish 'norms' and 'norm statements'. Indeed, we should be concerned with drawing a clear line between the form and the normative content of statements. Thus, I suppose *Alexy*'s intention

[187] Disregarding for a moment that the law of a community in total can probably not be characterised as merely one normative system, see above II, 1.

[188] Dworkin, *TRS*, 17.

to distinguish more clearly between norm and norm statement is praiseworthy. There are various ways to formulate different normative demands. Discussing the nature of norms, we should analyse the content of such sentences, not debate over matters of form. Yet, how are we to identify the substantive content of a norm statement? As a simple reformulation of a statement appears all but helpful, we should generally avoid using linguistic criteria – such as 'sentences containing a notion of ought' or similar phrases – but rather analyse the varying normative content of different normative phenomena and their formal, deontological structure. Hence, it is not enough to restrict ourselves to the analysis of only 'norms' on the substantive level, but we should be worried about working out structurally different kinds of normative content behind different forms of statements. Consequently, in contrast to a semantic concept of norms which restricts itself to the content of a *norm* as containing one of the deontic modalities (F), (O) or (P) as *Alexy*'s account apparently does,[189] I argue that it is preferable to describe the normative content of a statement as anything directly or indirectly aimed at guiding or judging conduct. These different kinds of normative content then comprise everything from most abstract ideas, goods or principles to most concrete prescriptions.

Once more in other words: Law is often – most often only implicitly – characterised as the mere sum of normative elements like rules (and possibly principles), which are then used or applied in order to determine "which behaviour will be punished or coerced (…)"[190]. *Alexy*, for instance, names "two dimensions" of norms, namely rules and principles, which he also sees as the constituting features of a normative system.[191] In a nutshell, the assumption that the nature of law can be grasped by dealing with it as a set of general rules alone is as common as it is ultimately malicious for legal theory. By describing a normative system as a set of abstract rules or norms, we unnecessarily restrict ourselves to investigating only a snapshot in time. If we want to gain an adequate understanding of law we need to think of a normative system as something less static, we need to add a temporal dimension to our understanding of it. In order to correctly grasp law and normativity in general we need to capture it as a constant and dynamic inductive-deductive *process*, a reciprocal going back and forth between abstract ideas and their practical application. A normative system does not simply consist of rules, nor even of rules *and* principles. Such a system becomes comprehensible only as a constant development, a process reciprocating between the most concrete, i. e. concrete judgements regarding specific actions, and the most abstract, i. e. abstract ideas of the good. With regard to structural elements within this process we should then distinguish not two, but

[189] Alexy, *TG*, 72 (in German): "*[Normen] lassen sich mit Hilfe der deontischen Grundausdrücke des Gebots, der Erlaubnis und des Verbots formulieren*."

[190] Dworkin, *TRS*, 17.

[191] Alexy, "Ideales Sollen," 33.

(at least) three different phenomena: first, prescriptions as governing specific actions. Second, abstract ideas of the good, that is to say, principles. And finally, everything that exists in between, what is usually made out as the essential and sole constituent parts of a 'norm system': norms or rules.[192] A norm thereby relates to both other elements, as it can be described both as a *generalised* prescription as well as a principle *put into relation* with other (possible) principles or simply a general relation between various principles.

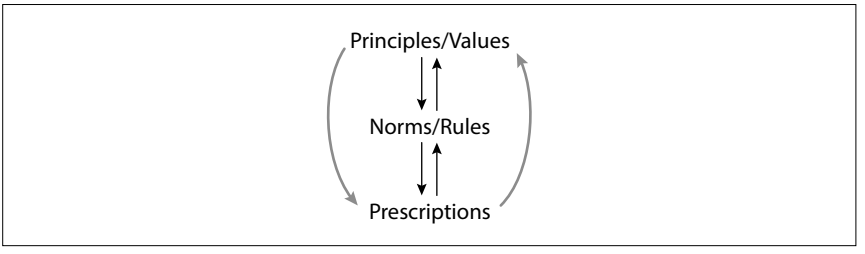

Figure 9: Functionality of a Normative System as an Inductive-deductive Process.

(2) Structural Features of Principles, Norms and Prescriptions

All three elements of normative systems have in common that they direct some kind of normative content towards the addressed agent in question, which varies in specificity and, accordingly, in applicability. However, their structure is at least comparable: They all make a normative statement or demand under the condition that a certain set of circumstances applies. The level of specificity in the circumstances that needs to apply may thereby vary (considerably). Yet, the two-fold structure of conditional circumstances and respective normative content is pervasive. As a basis for further investigation I will thus start off by sketching what I believe to be the different structures of principles, norms and prescriptions.[193] This shall serve as a short introduction only. An incremental explanation of the nature of the three elements will ensue. Principles, to begin with, appear to bear the following formal structure:

$$[\text{Principle Q}] = \text{under } C_Q\ [Q]$$

'C' stands for the entirety of relevant circumstances to consider.[194] Principles demand their general consideration in case an action affects the principle in

[192] The terms 'norm' and 'rule' are used in an interchangeable fashion. Focussing on the basic, structural features of normative phenomena, they appear to be equivalent. The exact reasons for this terminological choice will be laid out presently in secs. II, 4), b), bb) and cc).

[193] Duly note that the different structures are not presented in the strict language of formal logics, but rather ought merely to serve as illustrations.

[194] Concerning the relevance and irrelevance of circumstances cf. once more sec. II, 1., b), bb).

question, that is, if the relevant circumstances are present – for example, in the case of the freedom of expression, whenever someone expresses his or her opinion on something. Supposing these relevant circumstances exist, principles demand that the applicant of the system ought to consider Q as being of general normative importance. Essentially, this is what *Alexy* means by referring to principles as 'commands of optimisation'[195]. However, at most they imply a command or an obligation to behave in a certain way by finding a verdict or choosing a right course of action. Certainly, with respect to the actual normative matter in question, e. g. whether to verbalise the insult thought of, the principle itself cannot be 'translated' into a normative demand in the sense of (O), (F) or (P). Hence, the normative demand of principles is not immediate in the sense that one could align one's conduct to it. They are not directly applicable in the sense of being practical reasons for actions, just because their normative content Q lacks the necessary *relational form* of practical reasons. This thought will be explained in more detail presently. For the moment we shall continue by contrasting the formal structure of principles with that of prescriptions:

[Prescription P]-duty = under C_P [Q>/<XY]

The normative content of prescriptions is a concrete relation of precedence between different possible objectives or different principles. Thus the implied *concrete* normative demand is immediately directed at the applicant in this case. The subscripted '$_P$' thereby stands for 'practical', because with a prescription one takes into account a conclusive set of practical information, of practical circumstances, i. e. 'C_P' implies that '*all things considered*', in a real-life scenario, one ought to perform the prescribed (obligatory) action. Importantly, that implies the entirety of possibly relevant circumstances, but goes one step further. C_P refers to those circumstances which are deemed normatively relevant within the respective system by the respective authority.[196] Consequently, under 'C_P' one definitely ought to behave according to the normative content prescribed. Thus, prescriptions with a structure as described above can only be concrete obligations (O) or prohibitions (F). The formal structure of the deontic modality (P) would have to be noted differently, e. g. like this:

[Prescription P]-permission = under C_P [Q = XY].

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[195] Cf. also Alexy's modification in this respect by drawing a questionable distinction between 'commands of optimisation' (German "*Optimierungsgebote*") and 'commands to be optimised' (German: "*Gebote zu optimieren*"): Robert Alexy, "On the Structure of Legal Principles," *Ratio Juris* 13 (September 2000): 304; id, "Struktur der Rechtsprinzipien," 38–39. Cf. also Sieckmann, *Recht als normatives System*, 22–23; id, "Grundrechte als Prinzipien," in *Die Prinzipientheorie der Grundrechte*, ed. Jan Sieckmann (Baden-Baden: Nomos, 2007), 19.

[196] See above, sec. II, 1), b), bb): only the normatively relevant circumstances matter in order to formulate a prescription. The preliminary step to take into account as many circumstances as possible (see above) is thereby necessarily implied.

Finally, the structure of norms unsurprisingly lies somewhere in between the former two:

[Norm N]-duty = under C_N ^{n}[Q >/< XY] or under C_N ^{n}[Q = XY].

As with prescriptions, the normative content is that of a *relation of precedence*,[197] only this time not a concrete but a general one. The superscripted '^{n}' is thereby supposed to imply that the relation of precedence offered by the norm is only valid *normally* or usually, that is, under regular conditions. Whereas all norms are general in this respect, the level of generality of norms can of course greatly vary. Especially, the principles relevant for a certain decision need not even all be specified. It suffices to put one relevant principle into relation with other *possible* considerations in general. A very abstract norm could for example demand that 'normally under circumstances C_Q principle Q should prevail over other possible considerations': [Norm N1] = under C_Q ^{n}[Q>XY]. A norm becomes ever more specific the more reasons/principles and the more other relevant circumstances it takes into account. A more specific norm could then demand that 'normally, given the circumstances C_{AB} and the additional circumstance X, principle A should prevail over principle B': [Norm N2] = under C_{ABX} ^{n}[A>B]. An example: If C_A stands for 'whenever someone expresses their opinion' and C_B likewise for 'whenever someone's personality rights are affected' a possible norm could read: 'In case someone insults someone else the freedom of expression should prevail over the other's personality rights, provided that the expression is taken as an act of political discourse or satire, and not merely with the intention to degrade the other.' This latter specification regarding additional accompanying circumstances would then be C_X. What all norms have in common, no matter how specific they are, and which thus marks their most important feature in contrast to principles and prescriptions, is that they all contain an element of uncertainty with regard to the outcome of a certain case. Norms retain a certain *prima-facie* expectation with regard to conduct. They are not definite; they only apply usually or normally. In other words, their central distinctive feature is the lack of specificity of the implied normative demand. Importantly, due to the relational form of their implied normative content norms are nevertheless directly applicable, i. e. viable as practical reasons. With regard to the normative content they contain the same formal structure as prescriptions. If the circumstances in the checking routine of the norm match the circumstances in a practical case, norms are simply applied. In other words, in regular/ordinary cases they are easily convertible into prescriptions. Moreover,

[197] All that said before regarding the difference between permissions and duties applies analogously to rules/norms as well as prescriptions. Strictly speaking, permissions do not imply a relation of precedence, but one of coequality. Therefore they are a normative exemption for the addressed agent. Importantly, they do imply a relation, which clearly separates them from principles as abstract quantities. See also below sec. II, fn. 198.

one could say they are simply utilised as prescriptions. What happens, however, when we find circumstances in practical cases that are not implied in the checking routine of the norm, but which we think we should consider in finding a judgement? What happens in these so-called 'hard cases'? We shall consider this decisive problem shortly. For now, let us continue focussing on the abstract distinction between rules and principles a bit longer and analyse more carefully the conceptual dividing lines between principles, norms and prescriptions.

bb) From Principle to Prescription

How exactly does one come from principles to prescriptions and the other way around? What are the necessary mental steps to take? As an entry point for the ensuing discussion and in accordance with the foregoing remarks, I presume that in order to come from a set of principles to a certain prescription there are two distinguishable mental steps to take which also mark the aforementioned conceptual dividing lines between principles and norms on the one hand and between norms and prescriptions on the other. These are: *relationing* and *concretisation*. Whilst the former stands for the transition from abstract to practical reasons, the latter does so for the transition from general normative demands/requirements to prescriptions or concrete normative demands.

In detail: For a start, 'concretisation' marks the threshold between principles/norms and prescriptions. How can that be so in light of the fact that norms (as has also been stated earlier) can already greatly vary in terms of concreteness? In short, a prescription is concrete because its element C_P, in contrast to C_N or C_Q, describes a set of circumstances that is inevitably bound to a *specific practical decision* in one particular case. Thereby all relevant circumstances are necessarily included, notwithstanding the fact that the definition of these circumstances, of what actually qualifies as relevant and considerable, is a relative one – relative to the values protected by the system in question, that is, to the will of the authority in question (see above). In other words, both principles and norms only become concrete by being applied. Yet, through application they become a formally different element altogether, namely a prescription. Thus ultimately, we may understand concretisation as application.

Apart from that, norms and prescriptions differ from principles in containing a relation of precedence as their normative content. Hence, in contrast to principles as abstract reasons they are *applicable* because and insofar as their content thus mirrors the structure of actions as practical relations of precedence. This thought is crucial and needs to be clarified: Discussing actions earlier, we found that performing an action means deciding between different options of conduct, even if they are not fully specified by the agent. Thus, by performing an action we inevitably judge certain possible options over others, thus also certain objectives over others. In other words, we inevitably, even though often

unknowingly, put different (possible) objectives into a relation of precedence. Consequently, a reason to act in a certain way can never simply be an abstract reason as an abstract quantity, but must imply a practical *priority* of certain reasons over other (at least possible) considerations. In other words, a reason to act, a practical reason must represent a relation of precedence in order to suit the logic of actions. Accordingly, a single idea/abstract principle can by itself not possibly be motivating for an action. It cannot function as a reason for a practical decision. Only when considered in relation to other specific or merely possible objectives, i. e. when put into relation, it can become such a practical reason.[198] In sharp contrast to principles, norms and prescriptions are capable of providing reasons for practical decisions just because, already by their very nature, they contain a relational normative content.

general <	principles	= under C_Q [Q]	abstract
	norms/rules	= under C_N ^{n}[Q > XY]	> relational
concrete	prescriptions	= under C_P [Q > XY]	

Figure 10: Structural Features of Normative Elements.

cc) The Impracticability of Principles

So far we only considered very generally why and to what extent principles and rules/norms differ. Now it is time to return to our object of study and transfer these thoughts to *Alexy*'s account of principles. Where exactly does his theoretical model fail? Essentially, *Alexy* makes two assumptions that are ultimately inconsistent: On the one hand he explains the nature of norms and the connection between norms and 'ought'[199] with reference to the three deontic modalities.[200] Thus, norms in the Alexyan sense imply a generalised statement about the normative demand ascribed to an action or to a general type of action. Detached, this assumption is for the most part in accordance with our account so far. On the other hand, *Alexy* claims that principles are not merely reasons for rules,

[198] Remembering the normative structure of permissions (P) above, we now find that any norm (P) can never be itself motivating for an action precisely because it lacks the necessary relation of precedence in its normative code, which only obligations and prohibitions contain. Accordingly, the normative meaning of permissions was not unjustly compared to a state of normative indifference earlier. In a negative sense, much the same applies to the deontic modality (D), sorted out earlier. Another point that hopefully becomes clearer now is the nature of so-called 'self-addressed commands' (see above): Intrasubjectively a direct motivation to act can only be offered by an obligation due to the positive relation of precedence offered by it.

[199] Not in the sense of an obligation, but in a very general, nominalised sense (German: "*Sollen*") referring to normative precepts in general.

[200] Alexy, *TG*, 43–44, 72.

but can be reasons for concrete normative judgements as well.[201] This claim is consistent with his claim that principles are a subcategory of norms. And this is precisely where *Alexy*'s version of a principle theory fails: Either he is right with the claim about the applicability of principles, their ability to serve as reasons for actions and concrete judgements. Yet, in this case there would be no real need to distinguish between principles and rules in the first place, at least not on a norm-theoretical level with regard to distinct structural features. They would differ only in their degree of generality.[202] A principle would then be nothing but a very general type of norm, whilst in fact we pointed out the variation in generality as one of the very characteristic features of norms in general (see above). Alternatively, *Alexy* could uphold the claim that only conflicts of principles, due to their ideal and abstract nature, can be resolved by means of balancing. Yet, in that case principles as exactly these abstract ideas cannot at the same time be reasons for concrete normative judgements, because, in contrast to rules, they would not bear the necessary relational form (see above). If the latter was true for principles, which I think we should assume, then certainly the 'ideal ought' of principles is wider than the 'ought' of norms.[203] In other words, when *Alexy* counts principles as a subcategory of norms, he errs because the 'ought' in his 'ideal ought' cannot possibly be the same thing as the 'ought' in norms or prescriptions, because it describes a reason that is non-relational.

Additionally, given the role that prescriptions play in normative reasoning alongside norms, when *Alexy* refers to rules as 'definite' he seems plainly mistaken. Even a relatively specific rule like 'Do not cross the red lights' is far from being definite. It has to be applied and subsumed in any particular case. In other words, it has to be concretised to become definite. And once it has been, it has already become something different altogether, namely a prescription. The lights-rule for example would normally be understood as 'Do not cross the red light, except in case of acute emergency and only if possible without endangering other people'. Yet, even when specified like this, one would still have to define what kinds of emergencies qualify as valid emergencies. Would you be allowed to cross the light if you brought a woman in labour to a hospital? How about if you carried someone with a stroke or a seizure? How about a broken finger? The possibilities are endless, and we find that the norm is far from being definite and that this is so due to its very nature as being a norm. We can decide whether a rule is applicable only in connection to the facts of a specific case. Only then does a norm actually become 'definite'. Only then does it become a prescription. *Alexy* fails to point out the difference between rules and concrete

[201] Ibid, 72.

[202] Ibid, 73. For similar criticism see Raz, "Legal Principles," 838, and (already) Esser, *Grundsatz und Norm*, 51.

[203] Cf. Weinberger, "Revision Rechtssatzkonzept," 63–64.

prescriptions; sometimes he even seems to confound the ideas entirely.[204] Negligence of the level of application presumably then led him to a somewhat defective understanding of the other elements, norms and principles.

For illustration let us apply the foregoing theoretical considerations to an example from legal practice, a standard example for principles by principle theorists: constitutional rights. Are such rights best perceived as rules or as principles? In this respect we need to be aware that we are not looking for criteria to specify and categorise different positive *laws* into either rules or principles.[205] The task of legal theory is finding the different structural elements that play a role in the process of law and legal decision-making. So, from their outer appearance almost all laws could be characterised as containing *rules*. This goes for fundamental rights as well. Of major importance in this respect is yet again the fact that the level of specificity in putting a principle in relation does not have to be very high to transform it into a rule. Let us once more use our standard example, 'freedom of expression': We can perceive this 'right' as an abstract good such as 'The idea that people are allowed to speak their mind is generally a good thing'. This implies that free speech is a good thing independent of other possible considerations. However, without adding any other specific quantities to the normative equation we can just as well formulate this right as a (very general) norm simply by saying: 'As a rule, that is, normally, one should be allowed to speak his or her mind'. That way we already establish a normative relation, namely by implying that the idea of free speech will *normally* outweigh other conflicting considerations. Thus, it already becomes applicable. The difference between norms and principles is subtle then, but in terms of structure quite clear nonetheless. Norms are either generalised prescriptions and/or principles put into a general relation of precedence. Once more in other words: If you consider Article 5 of the German *Grundgesetz*, which states "Everyone has the right to express and spread his or her opinion"[206], it is all but wrong to interpret this statement in the following way: Under regular circumstances, or, in general, one should be allowed to express and spread his or her opinion. From what we said so far, that would make the statement a norm. Does this finding conflict with our initial assumption that certain rights are best understood as principles? It could only do so if principles were in effect useless for practical normative reasoning. However, in the ensuing section c) we will find that it is fairly often principles which actually are at work behind constitutional rights in reaching a decision/a practical judgement – thus at least in 'hard cases'.

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[204] Alexy, *TG*, 88; id, "Ideales Sollen," 33.
[205] Raz, "Legal Principles," 825.
[206] In German: *"Jeder hat das Recht, seine Meinung […] zu äußern und zu verbreiten […]"*.

dd) Conclusion

'To do X' implicitly means for the acting agent to judge option X as preferable in relation to other option. A practical reason, i. e. a reason for someone to act in a certain way, therefore needs to be a reason that offers a relation of precedence between different (possible) abstract reasons. Principles as such abstract reasons can therefore never be directly motivating for actions. They are not directly applicable to any practical judgements. Hence, Principle Theory's rejection of T1, i. e. the thesis that principles as abstract reasons are *not directly applicable* in the sense of implying the possibility to serve as a reason for an action or a concrete judgement, needs to be regarded as misguided.

c) The Problem of 'Hard Cases'

If it were really as easy as we have seen to convert a principle into a norm, namely by merely asserting that a certain principle would usually outweigh other non-specified considerations, then the pressing question is, of course: what do we need principles for anyway? Let me reframe the problem investigated in this section: Above, in introductory thesis T2, a general normative significance of abstract reasons has been alleged. Why and to what extent should we assume such a significance of principles in addition to that of norms? This question is decided over the matter of so-called 'hard cases', i. e. such cases in which we cannot reach a unanimous conclusion solely by applying an existing norm, either because the case is not regulated at all or because there are conflicting rules that, if applied, would come to contrary results.

aa) Principles as Normative Properties?
The Relation of Axiology and Normativity

Beforehand, supposing a general normative significance of principles as abstract ideas of the good, we ought to give some attention to the general theoretical distinction between axiology and normativity and the alleged permeability between these two levels. So far principles were on the one hand said to be axiological quantities, but at the same time said to have a 'normative significance' with respect to the evaluation of actions. So, even if I were able to convincingly expound the distinct norm-theoretical structure of principles in comparison to norms and their role in the solution of hard cases in the following sections, there is another, admittedly rather bold claim implied in T2, namely that anything deemed 'good' is in some way (however indirectly) aimed at guiding or judging conduct[207] – a claim that shall be upheld, yet qualified. The predominant view is that not everything deemed good has in some way to be acted towards. An ex-

[207] At least in the sense of a "pro-tanto ought", cf. Jansen, *Struktur der Gerechtigkeit*, 62.

ample to support this claim could be that of a meteor rushing towards the earth, threatening to kill all life on the planet.[208] In this respect it is asserted that even though one might think of that as a generally bad thing, it has no implications on what anyone actually *ought to do* in this situation, given that no one could in fact change the outcome of the situation.[209] Thus, one objection against including axiological quantities into a normative system could be that normativity would get too demanding that way. However, the fact that one might in effect not be able to take any action against a certain outcome does not have to affect the normative requirements of the situation. If human life in general is seen as a good thing, then presumably it follows that one generally ought to behave in a favourable way towards it.[210] Thus, in our example, if one *did* have the chance to actually stop the meteor he or she certainly ought to do so. Such a view is not only in conflict with a common understanding of axiology as not (directly) related to conduct, but at the same time with the equally common claim 'ought implies can'.[211] A strong and intuitively plausible argument for this position is that it would be simply absurd to demand something from an agent which she (or anyone for that matter) simply cannot do. This argument entails, though, that we cannot or should not distinguish between the prescription of a concrete normative demand in a certain situation and the possibility to ascribe blame or accusation, i. e. the question of whether under the given circumstances a misconduct can sensibly be reproached. Examples for cases in which we are used to sparing reproach or accusation are the incapacity to make decisions, e. g. due to a psychotic episode, the inability to attain the end in question (e. g. saving the world in our meteor-example), and possibly also the case of true dilemmas in which there is simply no other valid option left (see above). Ultimately, a distinction between normative demand and reproach is not necessary, but certainly possible.[212] Obviously the normative demand would then imply a much weaker

[208] Cf. Quante, *Einführung Ethik*, 30–32, esp. 31.

[209] Ibid, 31.

[210] See above fn. 207.

[211] Immanuel Kant, "Critique of Practical Reason," in *Practical Philosophy*, ed. Mary J. Gregor (Cambridge: Cambridge University Press, 1999 [1788]), 163–164: "He judges […] that he can do something because he is aware that he ought to do it and cognizes freedom within him, which, without the moral law, would have remained unknown to him". For a more recent approach to this fundamental principle see Peter Vranas, "I Ought, Therefore I Can," *Philosophical Studies* 136 (2007): 167–216. Notably, Vranas regards the implication as a conceptual necessity.

[212] For a much more sophisticated account arguing for a similar severing of the *conceptual* ties between 'ought' and 'can' see: Michael Kühler, "Demanding the Impossible," in *The Limits of Moral Obligation*, ed. Marcel van Ackeren and Michael Kühler (New York: Routledge, 2016). Kühler claims that due to their specific "direction of fit", statements about obligation are independent of statements about the ability to fulfil these obligations. Hence, if one ought to do X, yet for some reason cannot do X, "this only entails that the corresponding 'ought' *will*, maybe necessarily, remain unfulfilled" (ibid, 123). Instead, Kühler interprets the principle 'ought implies can' as a "complex moral principle based on considerations of fairness"

sense of 'ought', but it counts in favour of it that a lot of our thinking in practical normative contexts seems to follow these two consecutive steps. For example, when A kills B but was in a state of incapacity at the time due to an acute psychosis, we tend to make a (legal/moral) judgement like 'Naturally, A ought not to have killed B, but we cannot blame him for it.' The point is: It is not *per se* inconsistent to say 'you ought to stop the meteor', even though you practically will not have any chance of stopping it. It might not be sensible to do so, which is why we spare you the reproach despite your non-compliance with the *a priori* demand.[213] Thus, regardless of whether you want to rely on a stronger or a weaker sense of 'ought', the inclusion of axiological quantities into the realm of normativity does not raise the demandingness of the latter. Only because something is 'good' it does not mean that we put blame upon us in case we do not attain it as an end.

Another objection to the inclusion of axiological quantities in the realm of normativity lies at hand: It is widely held that there is a 'variety of goodness'.[214] Even if 'moral goodness' were to have influence on our actions, there are other types which are not supposed to have such influence, for example 'instrumental goodness' like when someone says 'this is a good bike' or 'this is a good screwdriver'.[215] I suppose, things are or we make them good, because and only because they should in some way affect our views and opinions and thus ultimately our actions towards them. That is, if it is true, which I believe it is but I am afraid I will not be able to conclusively explain here, that 'to be human means having to act'[216], what are views and opinions on anything good for if

(ibid, 127). For a more elaborate version of this position cf. also Michael Kühler, *Sollen ohne Können?* (Münster: Mentis, 2013).

[213] Leaving aside the fact that probably there would be no more 'we' left once the meteor landed. Besides, a similar argument, namely that an obligation becomes meaningless without corresponding actual ability to fulfil it, is provided in: Richard Hare, *Freedom and Reason* (Oxford: Clarendon, 1963), 51–66. Based on Strawson's account of semantic presupposition (Peter Strawson, "On Referring," *Mind* 59 (July 1950): 320–344), Hare claims that 'ought' only *semantically presupposes* 'can' and thereby offers a considerably more modest account of a conceptual tie between the two notions than Vranas does (see above fn. 211).

[214] Cf. Georg von Wright, *The Varieties of Goodness* (London: Routledge, repr. 1972 [1963]).

[215] A short side note: The 'variety of goodness' described here is analogous to the variety of reasons described earlier, including normative reasons s. str., but also prudential, aesthetic, conceptual reasons, etc. All of these reasons can be practical reasons for action, i. e. also conceptual reasons. For instance, the statement "Mr Weissinger advocates a choice theory of rights" clearly describes an action of mine. The reasons for this action might indeed be manifold, yet I daresay that they were mainly conceptual reasons. That is, the reasons for endorsing a certain concept are such reasons that provide for the quality of this concept or of concepts in general. They are not normative in a stricter sense, nor of any other kind.

[216] Cf. Ralf Ludwig, *Kant für Anfänger* (München: Deutscher Taschenbuch Verlag, 1999), 9 (in German): "*Mensch sein heißt handeln müssen.*" This quote is regularly associated with Kant directly. Notably, it is not an actual quote of Kant's, but merely a didactic statement that has been used often enough in the context of Kantian texts to get ascribed to Kant himself

not to have some kind of an effect on our practical decisions towards them? This goes for all 'varieties of goodness', even for instances of 'good' that are usually not associated with normative requirements s. str. If one claims 'this is a good screwdriver' it is implied that the object in question has features which make it suitable to handle screws. Obviously, there is no direct normative implication in this statement, certainly not in the form of a command or any other immediate normative requirement. However, the normative content of the statement is merely hidden, which is to say it depends on the circumstances, because it is implied that in case you *were* in need of using a screwdriver, you ought to use this one as it fulfils the respective technical requirements (provided of course there are no better screwdrivers at hand either).[217]

To conclude: Discussing normative systems and normative demands, we need to be clear about the general functionality of a normative system, i. e. especially we need to know all discriminable structural elements of it and how they interact. In this respect we can and should distinguish axiological quantities (= values/principles) and deontological quantities s. str. (= norms and prescriptions). As basic elements of normativity in general, both norms and principles are ultimately concerned with the evaluation of conduct, only on different levels of abstraction. In this respect it is unclear why theorists usually feel the necessity to establish or explain some kind of logical priority between deontological and axiological categories,[218] when one could just as well see them as related concepts mutually dependent on each other in the overall inductive-deductive process of normativity.

bb) Rule Account vs. Principle Account

What happens when a decision has to be made in an unclear legal or moral matter? What happens when norms or principles *collide*? How do we solve 'hard cases'? As indicated before, according to *Alexy*'s analysis of the problem we can *a priori* distinguish two opposing accounts here: the rule account (RA)

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by times. In a way, this quote encapsulates a thought developed earlier, namely that one cannot not perform actions, see above sec. II, 3., b), aa), (1). Cf. also Joseph Singer, "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld," *Wisconsin Law Review* 82 (1982): 1059: "[…] making choices is what human beings do".

[217] Naturally, a normative system of law or morals will not provide you with an answer to the question of which screwdriver you should best use. There will be a rather specific normative system though that is concerned only with this question and which is (or at least can be) consistent with superordinate systems like law/morals etc. Cf. above the general remarks on plurality of normative systems in sec. II, 1.

[218] See only Zimmerman, "Value and Normativity," 15–25, with further references. Cf. also: Detlef Horster, *Ethik* (Stuttgart: Reclam, 2012), 107–110; Mark Schroeder, "Value Theory," in *Stanford Encyclopaedia of Philosophy*, ed. Edward N. Zalta (Stanford University, 1997–), https://plato.stanford.edu/archives/fall2016/entries/value-theory/, sec. 3, with further references.

and the principle account (PA).[219] Proponents of RA claim there are generally only rules that can be applied or that collide in hard cases, the latter with the effect that either one rule needs to be invalidated or that an exception is added to one of the rules. Proponents of PA, in contrast, believe to be able to prove both the existence of and the necessity for principles as an independent normative phenomenon by showing that rules do not possess the capacity to collide with each other. Thus, PA implies a juxtaposition of norms and principles in normative reasoning,[220] whilst RA entirely denies the existence of principles as meaningful properties in drawing normative conclusions. On the basis of our insights about normative systems so far, we shall find that the general assumptions of proponents of RA regarding the application of norms are all but wrong. RA's explanation of the functionality of such a system is at best fragmentary. Hence, we will reach the conclusion that the idea of such a system is better grasped by including the idea of principles. Let us have another look at our standard example to clarify the opposing claims: O verbalises a statement, which P finds insulting. Here O's right to express his opinion as one principle (P1) collides with P's personality right as another (P2). The applicant of a normative system – whether a judge *ex post* or O himself *ex ante*, i. e. before performing the action – has to come to a conclusion about what is or was the overall right thing to do in this situation. We learned earlier that the form of this final decision can be described as e. g. 'under C_P [P1 > P2]'. RA and PA differ in describing how one reaches this result. RA claims there are only two norms effective in this case, one that claims 'One should normally be allowed to express their opinion freely.' or 'under C_{P1} ^{n}[P1 > XY]' and another that claims 'Normally one should not perform actions that affect the personal feelings or the honour of another person.' or 'under C_{P2} ^{n}[P2 > XY]'. In order to decide which option of conduct is preferable, the applicant needs to choose which one of these two rules should be applied under the given circumstances. Following from that choice we could then add an exception to the neglected rule and thus have another, more specific rule to use in future cases. On the other hand, PA claims that something entirely different happens in hard cases: According to PA the applicant of the system does not choose between different norms, one of which she simply applies, but in cases in which not one norm applies, we take into account all relevant abstract reasons, balance them with respect to the actual facts of the case and thus form a decision. The result is a practical prescription then, from which we gain a new, more specific norm by means of generalisation.

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[219] Alexy, *TG*, 104 ff.

[220] Hence, this categorisation and the terminology used here differs significantly from Alexy in this respect: PA is not to be understood in the sense of a *strict* principle model, which pertains to be able to eschew rules entirely, but rather as what Alexy called a combined "rule/principle-model" (Alexy, *TG*, 117).

Before we dwell on the advantages and disadvantages of RA and PA, let us elucidate where exactly they differ by drawing on another, similar, dichotomic pair of theses, which is entirely made up at this point solely for argumentation purposes, i. e. in order to eventually show where RA fails. The two theses to be introduced regard the permeability between axiology and normativity or the manner in which practical normative conclusions are found. First, one could purport a 'division-thesis' or a 'two-step-thesis' such as the following: Principles/values play a role for normative processes only on a superordinate level. Principles are put into relation in order to ascertain norms. Norms are then applied to practical cases. Yet, next to norms principles have no proper role to play in normative reasoning s. str. Contrary to that, one might purport another thesis, a 'unity-thesis' or 'action-centred-thesis' such as this: Principles need to be put into relation to serve as practical reasons, yet this happens not on an abstract theoretical level but in light of and with respect to the facts of a concrete case. In this sense, principles are directly relevant to drawing normative conclusions.

cc) Fallacies of the Rule Account

Where exactly does RA fail? An apparent inconsistency in RA is the idea of an 'adding of an exception' to one of the conflicting rules in hard cases. A new norm, which implements an exception to one of the rules that had existed so far or which invalidates one of the conflicting rules, does not simply appear out of thin air. As indicated earlier, prior to the norm comes the decision in the practical case. The rule account tries to avoid this detour over the level of application when in fact it cannot. The new norm is won from an inductive conclusion from the concrete evaluative judgement in the single hard case. Yet, how is this concrete judgement won? When two norms collide it is certainly not the case that one of them is simply applied arbitrarily. A proponent of RA needs to draw on the idea that the judge uses his or her discretion to choose one of the conflicting rules in question to be the one to govern the case. But what are criteria for this, the judge's decision? Surely they are not the ones provided by the system in question. Nor is the decision 'criteria-free', an act of arbitrary discretion. In effect, in the example case the judge necessarily either prioritises P1 over P2 or P2 over P1. This act of prioritising based on the facts of the individual case is not performed by applying or not applying norms, but essentially this is the balancing process that proponents of PA claim happens in hard cases.

Put differently and in more detail: Is the judge's verdict in hard cases a criteria-free, gratuitous decision between two norms or a reasoned decision for one principle and against another? Presumably, the latter description makes more sense given our perception of actions and judgements as we cannot understand the discretion, which a judge is supposed to have in hard cases according to RA, without the notion of prioritising. In other words, if the judge chooses norm 1

over norm 2 he sets a relation of precedence between these two norms under the practical circumstances of the given case. Both norms are as such applicable to practical cases, so a decision between the application of either norm 1 or norm 2 should not be a theoretical problem. In fact, though, one does not choose between two choices – one *makes* a decision. And a decision itself *is* the setting of a relation of precedence. Put simply, deciding is defining a relation of precedence. A glimpse at the formal structures of norms and principles emphasises this idea: When judge J is caught in a conflict between following either N1 = 'under C_{P1} ^{n}[P1 > XY]' or N2 = 'under C_{P2} ^{n}[P2 > XY]' and eventually chooses to follow N1, according to RA he would have to set the following new relation of precedence:

'under C_P [(P1 > XY) > (P2 < XY)]'

It is at best superfluous, though, if not logically questionable, to describe this newly won relation of precedence as a relation between different relations. The formal statement above can effortlessly be reduced to the following form familiar to us:

'under C_P [P1 > P2]'

This form makes more sense, because here not different relations, but different quantities, different values or objectives are being related. And it is these reference objects of norms and prescriptions which are principles. In other words, we make better sense of practical judgements in hard cases by not merely describing them as criteria-free, arbitrary choices between different norms as different predefined reasons, but instead as a concrete act of relating different abstract reasons and thereby the definition of a concrete relation of precedence. The idea of discretion as some kind of decision without being backed by reasons is at best misleading. If we choose between two possible reasons, naturally we do not need another additional reason for choosing one side, but the reason we side with simply is the reason we need. However, by doing so we rate this chosen reason in some way better than the neglected one. We relate them and this practical relating essentially *is* deciding. Hence, the boundary between discretion as a gratuitous choice and a decision actually in favour of something and against something else dissolves. We cannot decide without reasons (either reasons regarding what to choose or reasons from which to choose), and therefore we cannot decide without defining a relation of precedence. And when we relate reasons, it is merely a simplification to identify not norms as the relatable quantities (which are themselves generalised relations) but rather the objectives that actually are related within these norms, namely principles.

A seeming weakness and implausibility of PA is that it might appear to bypass the level of norms entirely, whereas the general importance of norms, which is that they reduce complexity and thus make a state of affairs intelligible

for us, is rather undoubtable.[221] If PA were understood in this strict, exclusive sense, namely that we only needed principles in order to draw normative conclusions, as a theory it would indeed be implausible. In fact, PA has a decisive advantage over RA in this respect due to its being inclusive. It affirms and reinforces the existence of principles but does not generally regard norms as less important than principles. It regards principles as relevant in hard cases and norms in regular ones. Thus, it rather is RA which seems implausible by *a priori* and entirely excluding principles from normative theory. In order to clarify this point, let us reconsider our dichotomy between 'division-thesis' and 'unity-thesis': The central weakness of both notional accounts lies in their implied claim for exclusivity. Once again, the practical importance or necessity of general rules for our social coexistence shall not be called into question. However, the undeniable importance of rules for normative practice is not subverted by admitting that there are certain cases which cannot be solved simply by applying rules. Normative practice happens to be a fruitful juxtaposition of both kinds of normative reasoning purported in the 'division-thesis' and the 'unity-thesis' – a juxtaposition of the mere application of norms (mere concretisation) in regular cases and a specific balancing process of conflicting principles in hard cases (relationing and concretisation).[222] Hence, the inclusivity of PA is its decisive advantage in comparison to an overly exclusive RA.

dd) Conclusion

To conclude: The meta-ethical claim argued for is that any normative system necessarily contains both norms and principles, i. e. there is a natural juxtaposition of two different kinds of normative conclusions. Sometimes we simply apply norms, sometimes we go the hard way and weigh conflicting principles according to the special circumstances of a single case.[223] Which way to go, what best to do in each case, furthermore what exactly qualifies a case to be a 'hard case' – all this is not a matter of discretion, though. It is no longer a meta-ethical problem at all but it is a key issue for any normative theory to provide for. This question is reflected in the stress ratio between equity and legal certainty/predictability which legal systems in practice exist in. It is in this stress ratio that different substantial ethical theories lay different foci. Whereas deontological theories tend to emphasise the importance of predictability and thus the persistence of rules, the opposite usually goes for consequentialist theories which tend to aim at a maximum of equity.[224] For consequentialism the identification

[221] Cf. Alexy, *TG*, 104 ff.

[222] Hence, there is a dichotomy between 'division-model' and 'unity-model' of normative reasoning only if each one would imply a claim for exclusive validity.

[223] Alexy, *TG*, 117 ff.

[224] For an instructive article (in German) with regard to the differences between both traditional lines of theory (with a focus on the assessment of action consequences) cf. Jörg Schroth,

of 'hard cases' is then mainly a matter of effort, of endeavour. The purpose of judging actions justly, and that is equitably, were inherent to any normative system and would remain as a necessary task. Although truly just judgements would remain an unreachable ideal for us, one which could only ever be approximated, it is one which we can and should at least approximate. For deontological ethics the question of whether we are dealing with a hard case is no question at all. Generally, one ought to follow the existing rules. However, deontology also somehow has to deal with the fact that normative systems develop and change over time, that they evolve in the light of new, unforeseen cases. To explain the emergence of new and more specific rules for the future, deontological theories also need the idea of unprecedented decisions in hard cases and thus of principles, even though they could of course reduce them to a minimum – to *unknown* cases, for example.

d) Conclusion

To sum up: When *Alexy* speaks of principles he mostly refers to and has in mind constitutional rights, which themselves are mostly formulated as norms. Structurally, in legal reasoning these parts of the constitution often function like principles as explained here, as abstract arguments and quantities in a balancing process with the aim of reaching a practical decision in so-called hard cases. It is the great achievement of principle theories in general and *Alexy* in particular to point out this specific norm-theoretical feature of principles. His distinction between principles and rules is defective, though. Basically, he claims that principles are norms due to the fact that they most often come in the form of 'rules', like basic constitutional rights, whereas the semantics of norms significantly differs from that of principles. Correctly understood principles are not a somewhat 'aimed' or directed 'ought', but, just like *Alexy* points out himself, an 'ideal' one. Hence, in contrast to what *Alexy* explicitly claims they are not (directly) applicable in the sense of serving as a practical reason. Furthermore, the deficiency of *Alexy*'s account is owed to his separation of normative elements into only two different kinds, rules and principles, whilst we are in fact in need of distinguishing at least three basic elements with principles, norms and concrete prescriptions. Supposedly, disregard for this latter category is primarily responsible for many of the misunderstandings within normative theory.

Accordingly, with regard to rights as our overarching object of study we may now accept the following: If we for now suppose that rights actually are reasons, there is no reason *a priori* not to think they could be both practical reasons (norms or prescriptions) and abstract reasons (principles), in each case append-

"Deontologie und die moralische Relevanz der Handlungskonsequenzen," *Zeitschrift für philosophische Forschung* 63 (2009).

ant to a certain entity.[225] The foregoing remarks on how we draw normative conclusions should thereby help us distinguish a bit more clearly between rights in the former and rights in the latter sense.[226]

5. Normative Systems II: The Multiplicity of Normative Systems

We are now almost ready to engage in the actual, theoretical debate about rights. One more thing beforehand, though: At this point the foregoing explanations regarding the notion of 'normative systems' need to be supplemented and refined, based on the insights won thus far about their inner functionality. In doing so we will not solely attend to the notion of a normative system as such, but mainly to the phenomenon of a (factual or even necessary) multiplicity of normative systems in normative practice. Despite the fact that our analysis of rights is for the most part limited to the inner functionality of one specific system, there are two reasons why it seems nevertheless appropriate to proceed in this way. First of all, the premise to restrict the analysis to one system would undoubtedly be strengthened if we were able to demonstrate that normative systems in general are an adequate means to map normative practice as a whole. This point goes especially for the two excursuses under c) and d), which bear no direct relevance for the topic of rights, but whose purpose is to advocate for the cogency of the general theoretical frame. The second reason is that an understanding of the vertical extension of normative systems in terms of justification, which we shall attend to presently, is absolutely vital for an adequate understanding of *Hohfeld*'s scheme of fundamental legal positions later on, precisely with regard to its two levels referring to a relation of super- and subordination of normative systems.[227] In order to avoid misunderstandings we will have to distinguish this

[225] To what extent exactly this insight applies to Interest and Choice Theory of rights, i. e. whether their respective rights definitions comprise both kinds of rights, practical and abstract, is a matter to which we will give careful attention in sec. III, 2., c) and d).

[226] In this context we are able to adequately classify Shafer-Landau's specificationist account of rights, see Russ Shafer-Landau, "Specifying Absolute Rights," *Arizona Law Review* 37 (1995). What he describes as 'absolute rights' are in fact principles cut to length according to practical manifestations of a principle, according to practical decisions in which the principle in question prevails. Hence, his idea of rights that are absolute in their respective area of application but in constant need of being further specified is mirrored by our concept of a yet-to-be-specified norm (in sharp contrast to an abstract principle). Thomson on the other hand appears to understand rights as general arguments, as principles that can be *infringed* upon, rather than as a principle whose boundaries are already practically confined, see Judith J. Thomson, "Self-Defense and Rights," in *Rights, Restitution, and Risk – Essays in Moral Theory* (Cambridge, MA: Harvard University Press, 1986): 37 ff. Cf. also William Parent and William Prior, "Thomson on the Moral Specification of Rights," *Philosophy and Phenomenological Research* 56 (December 1996): 837–845.

[227] It is exactly to this degree that rights cannot be understood as strictly limited to the logic of one system alone.

idea of a vertical extension in terms of justification linked with the Hohfeldian scheme from a vertical extension in terms of validity, i. e. the idea of creating an order amongst a plurality of divergent normative systems by imposing superordinate, i. e. primarily valid, systems.

a) Introduction: Multiple Normative Systems in Practice

In order to get a rough idea at first of what is meant with the notion of 'multiplicity' of normative systems in general, consider the following example, which also demonstrates that the law should not be understood as a single system: Playboy P cheats on his girlfriend G. First of all, criminal law does not forbid such an action, at least no criminal law in any reasonably liberal society. However, if P and G were engaged to be married at the time the action could, depending on the respective legal rules, lead to civil remedies.[228] Furthermore I presume most people would find P's action to be morally wrong. Thus, morals understood in this very wide sense of a general social opinion only for the moment, P's action was forbidden in this overall social context. However, within another, qualified social context, amongst Q's drinking buddies for instance, the idea of cheating on one's girlfriend under certain circumstances could be generally approved of, let alone be obligatory depending on the appeal of the affair. Amongst P's family members, though, P's behaviour might once more be strictly disagreed upon. Finally, P himself, being a hedonistic character, might have come to the conclusion that cheating in this case was (at least) permissible within the confines of his personal value system. Unsurprisingly, what we are discovering here are not inconsistencies or different value judgements within one normative system, but rather very different normative systems altogether. We can identify different areas of the law, different moral codes, different rules within different social groups, but also differing individual beliefs and values. All these represent different normative systems. The fact that they produce different prescriptions concerning the same action leaves the inner consistency of each system untouched. Instead, one might say the evaluation of an action is context-dependent.[229]

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[228] As would be the case in German family law, where both parties could reclaim engagement presents and expenses made in expectation of a marriage in such a case.

[229] Neil MacCormick, "Wrongs and Duties," in *Rights and Reason*, ed. Marilyn Friedman et al. (Dordrecht: Kluwer, 2000), 141. Cf. also Joseph Raz, *The Authority of Law* (Oxford: Clarendon, 1979), 153–157, where Raz refers to different "points of view" regarding the judging of an action.

b) Vertical Extension of Normative Systems: Justification and Plurality

Apart from being a factual phenomenon in social practice, the multiplicity of normative systems can also be explained in theory. The normative practice of any reasonably developed community necessarily has a multitude of different layers, multiple levels in vertical as well as horizontal order, all of which represent normative systems. Precisely, as indicated earlier, one can distinguish two ways different normative systems can relate to each other in terms of super- and subordination: One refers to the justification of normative content, to the idea of authority as sketched earlier. In this respect a superordinate system is not concerned with the same actions as a subordinate one but rather with actions creating or altering the content of the respective subordinate system. The other refers to a primacy in validity of a superordinate to a subordinate system with regard to an evaluation of the very same action. As much shall be demonstrated in detail in two separate steps: First, under aa), we shall attend to the problem of justification of normative judgements or normative content and therewith the aspect of a vertical order of normative systems in the former sense. In this context we will find that there is an infinite regress of justification regarding normative judgements in theory, which in practice needs to be limited or 'capped'. As mentioned before, a correct understanding of this multi-level structure will prove to be absolutely crucial for a proper assessment of the Hohfeldian scheme and its different levels in the second main part of this book. Subsequently, under bb), we will find why and to what extent there is also a necessary extension of normative systems in the opposite direction, i. e. a somewhat practical necessity to presuppose a *plurality* of divergent subordinate systems.

Like the claim for comprehensiveness in consideration of circumstances, the claim for a necessary multiplicity of normative systems is also supposedly meta-ethical and therefore normatively neutral, which shall be demonstrated under cc), where we shall simultaneously sharpen our understanding of 'normative consistency'. Especially, we will find that the multiplicity-claim does not – as some may now assume – favour positions of moral pluralism; that is, it is not equivalent to a rejection of a monistic unity-thesis of morality, i. e. the claim that morality or normativity ought to be understood as a whole due to one highest, guiding principle.[230] This would not be the counter-claim to my thesis as I am not at all claiming that there are different ways to normatively assess the world and we have no way of saying which one is better than the other. The actual counter-claim to mine would be that there was in effect only *one normative system*. Such a contention, however, would necessarily be false. First of all, if

[230] For an excellent overview of the pluralism-monism-debate in value theory see Chris Heathwood, "Monism and Pluralism about Value," in *Oxford Handbook of Value Theory*, ed. Iwao Hirose and Jonas Olson (New York: Oxford University Press, 2015). For a brief, but well-written introduction to the debate see Schroeder, "Value Theory," sec. 2.2.

we suppose one system, we therewith suppose this system's authority, which is (at least typically) exercised within the confines of another, superordinate system. This problem could be avoided with reference not to a person, an agent exerting authority, but with reference to a divine/natural/intrinsic and therefore an *a priori* persistent reason. However, a subordinate extension, our second point, is practically inevitable, i. e. even if there were no superordinate systems, there certainly are subordinate systems to any one intersubjective system. These subordinate systems need to fill the normative gap that arises due to the delegation of normative competence to the individual, which, as we saw earlier, cannot be avoided by any practical normative system. This point shall be explicated in detail in the following section.

aa) Justification: The Infinite Regress of Justification

Earlier, in sec. II, 3., the necessary juxtaposition of authoritatively imposed content and individual competence within a singular normative system was pointed out. From this intra-systemic relation of permitted individual decisions and prescribed practical reasons we can and should distinguish another fundamental dialectical relation between decisions and reasons regarding evaluative judgements in general. Precisely, one cannot pre-theoretically determine which one has priority between the two, that is to say, determine which one was first, as both are mutually dependent on each other. Loosely based on Hegelian ideas of dialectics, neither decisions nor reasons can be prior to the other in terms of meta-theoretical priority, but rather 'one is the truth of the other'[231] as each presupposes the existence of the other on the next higher level of justification. In detail: Whether a certain normative matter or normative problem is solved by the provision of some reason (content) or by someone's solitary decision (competence) – presumably, in both cases it is impossible to determine which was first in terms of an *ultimate* justification. That is, every normative content could in theory be retraced to some act of competence, an authoritative decision for or against it. In turn, every such act relies on the fact that determining the normative content was permitted, that is, not forbidden, in the first place, i. e. that the definatory power was ascribed by not making any specific demands in the form of obligations or prohibitions from an even higher, superordinate system. In other words, the superordinate authoritative act[232] of ascribing duties or permissions demands another normative content-basis, i. e. a (protected) permission to do so, which in turn asks for another superordinate authoritative act of

[231] Georg F. W. Hegel, *The Science of Logic* (Cambridge: Cambridge University Press, 2010 [1812]), 503 ff., 652.

[232] Insofar as authority is exercised through actions, and not already by means of an *a priori* persistent reason, see above sec. II, fn. 6, as well as below the respective remarks on 'sole immunities'.

definition, and so forth. Hence, we find ourselves in an infinite regress of justifying normative judgements.[233] Roughly speaking, for every duty we may question the respective authority ('who says so?'), whilst for every act of personal authority or competence we may question the reasons for providing this competence ('what is the substantial basis?'). Hence, there is a natural, vertical extension of normative systems in terms of justification. Thereby the (personal) authority regarding a subordinate system is nothing but a position of competence in a respective superordinate system. An example from legal practice: A has a duty to pay taxes for owning a car. Supposedly, it has been decided by the respective democratic legislature in A's community that car owners should pay taxes. Thus, the parliament itself as the relevant authority for tax law had a permission, a competence to enact this kind of rule. This competence, though, had to be granted to parliament by a higher authority to start with, namely by the people as the actual sovereign. That is, through the act of electing the legislature it was given the respective permissions to issue tax laws. Electing has to be permitted as well, though. Yet, there is no higher, personal authority to grant a people the competence to elect its own leaders, thus we need to assume this fact as a somewhat intrinsic, persistent value, which should not be further questioned. We could alter the example to the extent that not an elected parliament, but a monarch reigns as an absolute sovereign. Historically, the absolute authority of such monarchs was justified by the will of god as a higher being, rather than the will of the people. Thus, in such a case the ultimate justification some-

[233] Hans Kelsen also recognised such a regress of justification with regard to legal norms, see: Hans Kelsen, *Reine Rechtslehre*, ed. Matthias Jestaedt (Tübingen: Mohr Siebeck, 2008 [1934]), 74–76; id, *Reine Rechtslehre* [1960], 196–227. Famously, he tried to resolve it by reference to a hypothetical "*Grundnorm*" (*Reine Rechtslehre* [1934], 77; *Reine Rechtslehre* [1960], esp. 204–209). Roughly, the idea is problematic in my view because it introduces a 'hypothetical basis' for some not-further-disputable norm/principle, whereas such a (however skilful) stunt does not appear to be necessary at all. In contrast, as we shall see presently, the problem of a regress of justification is, or rather eventually *has to be*, resolved simply *by determining* a highest, non-disputable norm/principle. Such could, for instance, be the democratic principle that every valid legal norm must be ultimately retraceable to a democratic decision of the people as the sovereign. Now, one could refer to this necessity – either the principle itself or the act of determining it – as the '*Grundnorm*', and it is an open question, which cannot be followed here, whether Kelsen could (in some parts) be interpreted that way. However, it is sufficient to describe the necessity to terminate the regress as a *practical* necessity, which forgoes any (further) hypothetical assumptions. Unfortunately, apart from these few and crude remarks, it is impossible to discuss Kelsen's most influential and still controversially discussed theory in an adequate fashion in this context. Addendum: To those unfamiliar with Kelsen's work it will appear strange that both the first and second edition of his '*Rechtslehre*' are cited in this context. Notably, as Jestaedt correctly points out, Kelsen revised and extended his 1934-work to a degree, where it is fair to say that first and second edition are no longer the same book, see Matthias Jestaedt, introduction to *Reine Rechtslehre*, by Hans Kelsen, ed. Matthias Jestaedt (Tübingen: Mohr-Siebeck, 2008 [1934]), li.

how can be regarded as an act, even though an act by an ideal being, rather than as an intrinsic good.[234]

What we learn from these examples is that the regress of justification is only infinite in theory. In normative practice the pre-theoretical, dialectical relation between decisions and reasons describes a stress ratio that has to be resolved by any substantive theory one way or the other. Precisely, the infinite regress can only be – and indeed has to be – limited or 'capped' by ultimately either asserting/implementing an inaccessible, persistent reason or an ultimate decision/individual judgement. Thereby the structural problem of the infinite regress is not strictly speaking solved, but in a way only 'chopped' due to practical needs. At some point in justifying our moral claims we simply need to commit ourselves to some ultimate decision (dictum, decree, etc.) or to some ultimate, indisputable (possibly 'natural') reason. In (German) legal practice we are familiar with both phenomena. We leave most areas of law to the discretion of the democratic sovereign and in certain matters we regard the ultimate judgement of a highest (often constitutional) court as ultimately binding, whereas we are also used to thinking of certain legal standards, e. g. the right to vote, the freedom of expression, or the prohibition of death penalties, as generally inaccessible to human discretion.[235]

Hence, we conclude: Normative systems are essentially defined over their content, the values they protect, the reasons and thus the duties they provide. They provide us – at least to some degree – with answers to the questions 'what is valuable, i. e. worthy of protection or worth to be promoted/enabled?' and consequently 'what are we/am I to do?' Yet, it is a more than just question to raise what role we as capable agents play in bringing these reasons up in the first place, as reasons do not seem to simply float around in the air around us. In this respect, we already became familiar with two positions earlier, presented in their extreme forms here. In a nutshell, relativists claim that all values, all reasons are relative and depend entirely on our judgements, whilst intuitionists purport a priority of reasons, which we only encounter by means of moral intuition. The central point in this respect is that these conventional meta-theoretical models actually cross the line to substantive normative reasoning by asserting some kind of priority of decisions over values or *vice versa*. If they were to remain strictly meta-ethical theories none of them could ever deliver a convincing solution to the problem of justification, because structurally there is simply no priority to unravel without crossing the border to normative reasoning, without us actually *committing* to one side and thereby 'cutting off' the infinite regress

[234] Thus, one may also find that asking questions regarding ultimate justification eventually leads into questions of metaphysics, of transcendental philosophy.

[235] Essentially, as much describes the fundamental conflict between the ideas of democracy as the rule of the majority (or its elected leaders) on the one hand and a 'rule of law' on the other. See also above sec. II, fn. 6.

as described above. Ultimately, this is far from surprising as normative reasoning is about making judgements, starting with fundamental ones like this. Now, certainly not implied by these remarks is the claim that it is generally superfluous to argue about matters of ultimate decisions or ultimate reasons due to the impossibility to determine a meta-theoretical priority. On the contrary, these substantive arguments are something we simply cannot even avoid engaging in. They are decisive matters for any community to attend to: Which values do we regard as inaccessible? Which are open to our (better) judgement? Only there is no use in arguing over this issue on a purely descriptive, meta-ethical level.

bb) Plurality I: The Fact of Competing Judgements in Subordinate Systems

In normative practice the relation between different normative systems is not simply one of justification in vertical order. Rather we often find conflicts of different systems regarding the same action. Importantly, the possibility of such conflicts is already implied in the issuance of permissions. In detail: We remember that every normative system needs to strike a balance between predefined content and areas of individual competence (see above). A normative system in practice which does not include permissions as a systemic element[236] is simply not imaginable (see above). However, already due to acknowledging that certain normative matters are left to individual judgements one also needs to acknowledge a factual multiplicity of normative systems, because with regard to these normative matters left undetermined, different, incompatible judgements can and will be made in respective subordinate systems. An example: In liberal societies there is a legal permission for everyone to practice any religion, i. e. for everyone to live one's life in accordance with that religion whose rules one sees fit. That is, in effect wide areas of permitted behaviour are provided by the law, in which everyone can submit to whatever 'subordinate' rules/normative systems provided by specific religious or other social groups they agree with. How is this order of super- and subordination determined, though? Surely, in an already existing hierarchical structure it is simply determined by the next highest authority and ultimately by the highest (accepted) authority, i. e. in the aforementioned example the electing people as the democratic sovereign. However, it is noteworthy that this predetermination only functions theory-immanently, i. e. naturally the question regarding the legitimacy of the (highest) authority, that is, questions regarding the relation or the order of super- and subordination between various possible (highest) authorities are substantive ones, which cannot be answered by a meta-theory. An example: Suppose A is faced with a religious obligation regarding action X, whereas the law forbids this very action. With good reasons we generally regard the law as the superordinate system and

[236] Not as *valued* permissions in the form of liberties, see therefore below secs. III, 1., a), cc), (2) and III, 2., b), bb), (2).

A's religious obligation as subordinate (and therefore as void).[237] Yet, we can only do so based on a substantive theory that deploys such an order of the law over particular religious rules, which is not necessary but for which we need the aforementioned good reasons.

The notion of possibly differing, subordinate judgements shall be illustrated once more with the aid of the following example: Suppose M's partner N is fatally ill and M could save N's life by donating a vital organ, i. e. M could save his partner's life by sacrificing his own. Suppose further that the law permits him to do so. What would be the right thing to do? In order to decide in favour of one option as opposed to the other, M needs to have *reasons*. In this case there will probably not be established social practices, like the rules of a certain social group, which provide rules regarding what to do; the decision will ultimately be a personal one. Different persons will come to different judgements according to their individual priorities. The point is: If they do, we can say that these decisions are born from different subordinate normative systems – in that case from different intrasubjective normative systems – one of which implies a practical precedence of one's own life over one's partner's life and the other system *vice versa*.[238]

cc) Plurality II: The Possibility of Joint Validity or Four Kinds of Normative 'Consistency'

Proceeding from the notion of competing or conflicting prescriptions from different subordinate normative systems, by analysing our normative practice one quickly finds that different judgements regarding the same action are not necessarily always in horizontal order, but rather they can accrue from systems standing in a relation of super- and subordination – this time not in terms of justification, though, but in terms of validity. Importantly, through this primacy different prescriptions do not necessarily exclude each other, but under certain conditions they can be jointly valid. Demonstrating why and how this is the case is the same as refining the notion of normative 'consistency', which we shall thus attend to in this section. Earlier we identified 'consistency' as a central trait of any one normative systems. At that point, in sec. II, 1., we were only concerned with the inner structure of one such system. We clarified the notion of 'specificity' of actions and a normative system's central trait as its labelling each of these specific actions with only one equally specific normative demand: (O),

[237] For a detailed analysis of these kinds of conflicts see presently sec. cc).

[238] A short side note: Surely not every permission within a normative system, e. g. any legal permission, is itself normatively relevant in the sense that one has to have other *normative* reasons s. str. to perform the permitted action. However, if we regard it as an action in the first place we may nonetheless require of the agent to produce reasons more generally for performing it, which can of course be aesthetic, instrumental, etc., and as such normative reasons only in the widest sense of the term, see above sec. I, 1., b), aa).

(F) or (P). For better discriminability (and as indicated earlier) we shall refer to this requirement regarding the inner constitution of a single system as its *homogeneity* henceforth. Yet, homogeneity does not appear to be the only thing people refer to concerning normative consistency, especially not if we were to endorse the theoretical framework of a multiplicity of such systems. Hence, we may ask ourselves: What do we (and what can we) mean by talking of 'consistency' in normative contexts apart from and in addition to 'homogeneity'? My assumption is that we should carefully distinguish (at least) three additional kinds, which shall for better discriminability be named satisfiability, compatibility, and coherence. In detail: Generally, as indicated in the foregoing section, the notion of 'homogeneity' must be distinguished sharply from any state of affairs in which an agent is faced with different competing prescriptions, imposed by different normative systems, with regard to the same action. How do these different demands relate to each other? Apparently, in case an agent is faced with both an obligation (O) and a prohibition (F) to perform an action X, she is faced with somewhat 'inconsistent' demands. One is *per se* not able to comply with both an obligation and a prohibition with regard to the same action. Similarly, also (O) and (P) as well as (F) and (P) do seem to be mutually exclusive to some degree. An action cannot be forbidden and permissible at the same time, at least not if both prescriptions are linked with equal claims for consideration or validity. However, at a closer look there does seem to be a crucial difference between the relation (O)–(F) on the one hand and (O)–(P) or (F)–(P) on the other. Whilst (O) and (F) exclude each other necessarily – compliance with one automatically leads to violation of the other – this does not go for the other two. One is indeed able to comply with both an obligation or prohibition *and* a permission, if only one complies with the former.[239] In other words, in sharp contrast to an obligation combined with a prohibition, a duty and a permission are jointly *satisfiable*. Precisely, two or more distinct prescriptions, imposed by distinct normative systems, are satisfiable if it is possible for them to be jointly complied with by the same agent irrespective of a possible primacy in validity.

Admittedly, without reference to a possible super- and subordination, satisfiability by itself appears to be a rather useless theoretical tool. Hence, in order to make sense of it, we need to apply it to the notion of a super- and subordination of normative systems in terms of validity. Roughly, questions and claims for validity equate to the questions of whether a system ought to be (primarily) applied and by whom. To begin with, it is worth acknowledging that different prescriptions can relate to each other both in horizontal and vertical order, whereby the superordinate system is entailed by a claim of primary validity

[239] In doing so, we assume that the legitimate alternative to the forbidden/illegitimate option of conduct matches with the legitimate alternatives implied in the respective permission, which does not necessarily have to be the case in different systems. We shall presuppose this fact at this point for the sake of simplicity.

within a certain community. Let us imagine such a community, e. g. the population of a country. Normative systems applied amongst this community are each accompanied by a certain claim for validity, which can be either universal, i. e. it is supposed to apply to every member of the community, or particular, i. e. it is supposed to apply to a specific group of people within the greater community. By virtue of these thoughts we are now equipped to introduce our third manifestation of normative consistency: compatibility. Distinct concrete normative demands, imposed by distinct normative systems, are compatible if it is possible for them to be jointly valid within the same normative community. At first glance, compatibility appears to have two manifestations then: (a) Conflicting prescriptions in horizontal order are compatible if the respective validity claims are not universal but particular, and if they address separate groups within the greater community. (b) Additionally, due to their general satisfiability, permissions and duties are compatible in case there is a *superordinate* permission and respective *subordinate* duties. If the superordinate system issues an obligation or a prohibition, then (O)–(P) and (F)–(P) are still satisfiable, yet incompatible because in both cases, by exercising the permission, one would violate the respective obligation or prohibition, which one has to obey *primarily*.[240] If, for example, the law of a modern, pluralistic society imposes some prohibition, subordinate moral permissions and obligations are certainly incompatible and thus void, because due to their subordinate status they have to defer to the prohibition. Notably, (a) and (b) are not independent, but they are rather two sides of the same coin. A normative system that regards its validity claim as particular implicitly acknowledges a superordinate permission to judge and to act otherwise. Equally, the fact that a permission is superordinate implies that all subordinate normative demands can at best be linked with a particular validity claim.

Let us illustrate these thoughts by employing the following example: Supposedly, there are all kinds of established moral convictions regarding the issue of full-face veiling of women in public. Whilst a considerable part of mainly Muslim women (and men for that matter) regard it as obligatory (at least for themselves, possibly also for women in general), quite a few opponents, concerned mainly with the issue of gender equality, advocate a legal prohibition instead. Additionally, a traditional liberalist would probably have to regard the matter as decision that should be made by every woman herself, thus urging the action to be legally permitted. Clearly, the substantive issue cannot and shall not be discussed here. The point is simply a technical one: If a community does ban a conduct like veiling by means of a legal and thus superordinate prohibition, it

[240] In the case of a superordinate prohibition if one decides to perform the legitimate option X, and in the case of a superordinate obligation only if one decides to perform a legitimate alternative option.

makes distinct demands incompatible and thus ultimately invalid. By contrast, if we suppose a permission (P) as the primary, superordinate rule then each individual agent can comply with the permission and the duty simultaneously, i. e. follow the respective obligation or prohibition – insofar as they accept the particularity of their conviction in the entire legal community. In other words, *superordinate* permissions are compatible with *subordinate* obligations/prohibitions because agents are now able to comply with both the superordinate permissions and their particular normative convictions. Finally, whilst the notion of compatibility merely describes a relation between multiple, distinct prescriptions, the state of an *entirety* of normative systems in vertical and horizontal order, in which no incompatibilities occur, shall be described as *coherent*. Thus, a multitude of normative systems can be coherent insofar as the imposition of a superordinate permission reconciles the competing particular normative positions on a lower level and to the extent that each of these positions discards any claim for universality, which in practice appears to be one of the biggest problems in pluralistic societies.[241]

The relation between coherence, compatibility, satisfiability and homogeneity is undoubtedly a delicate one. The four manifestations of normative consistency are structural presuppositions and theoretical tools that can be integrated and executed by every substantive normative theory in different ways. Hence, we ought to distinguish carefully: For a multitude of systems to be compatible or coherent, the systems involved must obviously be homogenous. Thus, intrasystemic homogeneity is a precondition for the other three.[242] Moreover, as a condition for unambiguous normative judgements within one normative system it is nothing but a *practical necessity* in any normative context, to be provided by *any* substantive moral theory. We can surely disagree about the evaluation of a certain conduct within a moral community. Yet, to deny the necessity of homogeneity would mean to accept it as reasonable for a judge to speak two different verdicts in one case, one allowing and one condemning the action in question. As much would clearly be senseless. The point here is that in order to disagree about normative judgements we first need to make definite judgements. As much (and nothing else) is implied in the notion of homogeneity. Hence, a lack of it would in effect make normative reasoning itself pointless and void. In other words, the notion of homogeneity amounts to nothing more than a practicability of normative judgements, i. e. an *exclusivity* of the fundamental deontic modalities (O), (F), and (P) in a specific context.[243] On the other hand,

[241] Especially when it comes to religious rules, which unfortunately a lot of people tend to perceive as universal and not as particular.

[242] In this respect it appears important to note once more that any one system as such could never be coherent, because the concept of coherence as presented here already presupposes a multitude of normative systems.

[243] That is, with respect to judging a certain action on the basis of any given set of values.

satisfiability is solely a technical term, which simply describes the relation between conflicting prescriptions; thus it is nothing that a substantive theory could possibly achieve or aim at. By contrast, compatibility as well as coherence describe states of affairs that *could*, but do not necessarily have to be provided or aimed at by a substantive theory. In other words, a substantive theory can surely allow for different concrete normative demands or different judgements to be and to remain incompatible. If coherence is thus not achieved by a superordinate permission, the result would simply be a set of *incompatible* normative demands. Accordingly, compatibility and coherence are normatively pre-shaped concepts, because to some degree they draw on the undoubtedly substantive idea of *tolerance*, which is implied in the notion of different, yet jointly valid normative demands in horizontal order.

To conclude: Based on the foregoing remarks we can establish an important point regarding the nature of our theoretical framework and the dispute between pluralists and monists mentioned earlier.[244] Namely, the theoretical presupposition of a multiplicity of normative systems does not imply whether it is a good thing that different value judgements with regard to the same normative matter exist. In other words, the theoretical framework offered here is strictly normatively neutral. Hence, both radical pluralists as well as strict monists could make use of the model of multiple normative systems. The monist would have to claim that (1) not every normative system actually in existence is a good or appropriate normative system and that (2) overall coherence could at least be established between all appropriate normative systems due to a uniting highest system or a highest principle. Pluralists, on the other hand, have no problem availing themselves of this model, whatsoever. They would simply claim that for certain (or most, or all) normative matters there is no consolidating principle, there simply is disagreement or incompatibility. Thus, what the pluralist has to reject is the idea of (overall) coherence. This poses no problem for our theory, as the multiplicity claim regarding normative systems does not, as we have just seen, *demand* coherence, but simply describes a state in which it could be possible for coherence to occur. Once more, either theory certainly cannot reject the idea of homogeneity within one system. Apart from that, we find that our multiplicity claim does not tend to any side; it is strictly neutral in the debate between moral pluralists and monists.

Given a necessary multiplicity of systems surely this can be regarded as a rather weak claim and, supposedly, there is nothing to reply in my defence to that.

[244] See above fn. 230.

c) Excursus I: Supererogatory Actions

With recourse to the multiplicity-thesis we are now able to make sense of a category for evaluating actions, which we bypassed earlier in order to be explained more adequately now: supererogatory conduct. In the relevant literature regular attempts can be witnessed to try to explain the phenomenon of supererogatory behaviour, i. e. actions that exceed normative expectations, that are literally 'above what is asked for' in connection to (as one amongst equals with) the standard operators of deontic logic.[245] We will see that none of them are convincing, and the reason for their failure lies before us now. In contrast to our fundamental second-level deontic modalities (O), (F), (P) and (D), the notion of supererogatory behaviour cannot be explained within the logic of only one system, but rather all the more fittingly with reference to a multiplicity of systems and to our standard modalities.[246] Plainly, a supererogatory action is one that an agent has a permission (P) to perform in a reference system, whilst the same action is regarded (by the agent herself or otherwise intersubjectively) as the performance of some form of 'higher' or rather somehow more important obligation (O). Put differently, agent A acts in a supererogatory way if she exceeds the obligations strictly demanded of her by a reference system by following a self-imposed obligation. In the reference system the action cannot be subject to a prohibition, but for the exceeding action to still be regarded as legitimate/positive it must be subject to a permission (P). Additionally, the exceeding action needs to be regarded as favouring a specific reason, which, due to the lack of predefined reasons with a permission, is neither imposed by the reference system nor excluded by it either. Consequently, the notion of supererogation cannot be understood if not with reference to another normative system which prescribes the action in question to A by means of an obligation – this can be another intersubjective normative system or (at least) an intrasubjective moral code, i. e. the personal moral convictions of A that 'force' her to perform the action in question. In short, supererogation describes the relation between two normative judgements from two

[245] A few notable examples for treatises regarding the notion of supererogation: James Urmson, "Saints and Heroes," in *Essays in Moral Philosophy*, ed. Abraham Melden (Seattle: University of Washington Press, 1958); Joel Feinberg, "Supererogation and Rules," *Ethics* 71 (July 1961); Roderick Chisholm. "Supererogation and Offence: A Conceptual Scheme for Ethics," *Ratio* 5 (1963); Paul McNamara, "Supererogation, Inside and Out: Toward an Adequate Scheme for Common-Sense Morality," in *Oxford Studies in Normative Ethics Vol. 1*, ed. Mark Timmons (Oxford: Oxford University Press, 2011).

[246] Similarly, the problem regarding the possibility of 'rights to do wrong' (averse to the idea: John Mackie, "Can there be a right-based moral theory?" *Midwest Studies in Philosophy* 3 (1978): 351; supportive: Jeremy Waldron, "A Right to Do Wrong," *Ethics* 92 (October 1981): esp. 31–37) can be met by reference to the multiplicity of normative systems. Hence, within one system it is clearly impossible to obtain or exercise a right and commit a wrong. Yet, it is perfectly possible to exercise a right provided by one system, the same act being judged as a wrong within another system.

normative systems presupposing that (a) the judgement based on the reference system is a permission, (b) this judgement is the primarily binding one, yet that (c) the judgement based on the other system, i. e. the obligation in question, is the somewhat *better* one. Evidently, the notion of supererogatory behaviour is quite a problematic concept then, because it raises just concerns as to why the judgement in (c), being regarded as the overall better one, should not be more binding, i. e. superordinate in terms of validity, than the one in (a). It presupposes a meaningful difference between what is ultimately one's obligation to do and what would be best to do. Arguably, this is a possible substantive claim but far from being a necessary theoretical one. Thus, supererogation is an essentially substantive phenomenon generally explicable with reference to the instruments available to us. Yet, it does not seem to be a necessary, let alone a particularly useful tool for all conceivable substantive normative theories.

d) Excursus II: The Relation of Law and Morals

Finally, by availing ourselves of the idea of a multiplicity of normative systems I believe we are even able to shed some light on one of the most central and traditionally most heated debates in legal philosophy: the concept of law and therewith the relation of law and morals.[247] My aim is thereby surely not to offer a conclusive account of the nature of law, but rather I would like to demonstrate possible ways in which the ideas of an infinite regress of justification and of a plurality of normative systems could be made fruitful in the future in order to gain an adequate understanding of law as a much more complex phenomenon.

Presumably, the idea of law is very closely linked with the idea of a primacy in the validity of certain normative systems over others in normative practice. In a nutshell: The law of a certain community is believed to be the sum of normative systems that provide binding rules for the members of this community, whereas binding means something like 'not further disputable/challengeable'.[248] That does not mean that all legal rules need to apply to *all* members of

[247] If it actually could, it would surely be a great argument in favour of the idea of multiple normative systems as the theoretical model. Therefore, I will allow myself to propose some ideas about this issue at this point, despite the rather obvious fact that the following implementations are not (closely) linked to our topic of rights any longer. Thus, if you are interested only in rights, feel free to skip this section. If you are interested in law and morals on a broader scope, please read on. For an instructive piece of work on the relation of law and morals see, for instance, Heinrich Geddert, *Recht und Moral* (Berlin: Duncker & Humblot, 1984). For a shorter introduction see Hans Jörg Sandkühler, "Moral und Recht? Recht oder Moral?" in *Recht und Moral*, ed. Hans Jörg Sandkühler (Hamburg: Meiner, 2010).

[248] This notion of 'bindingness' entails a whole set of serious problems. For instance, does it necessarily imply the possibility of enforcing a legal obligation or prohibition by means of coercion? Or does it suffice to characterise legal 'bindingness' as the lack of possibilities to further question or discuss certain judgements? If so, how can we reasonably distinguish law

the community. On the contrary, we would probably all regard the obligations arisen out of a binding contract as legal obligations. These are by their very nature relative to the parties involved. Thus, a community's law is a law not due to the fact that it actually applies to everyone irrespective of the circumstances, but rather because it is binding to whomever it does apply to by virtue of being a law and because it is one element in a sum of legal systems, each of which are binding for their addressees and which *in their entirety* are aimed at being coherent. Thereby the latter feature of coherence is seen only as a necessary, not a sufficient one for the law of a community.[249]

Certainly, there are more than a few points to discuss about this most rough definition. Only to begin with, why is the law (at least as we know it) best understood not as only one normative system, but rather as the sum of various systems of a specific type, namely legal ones? As much shall be elucidated by the following example, which also serves as another more specific example for the extension of normative systems in terms of validity: A enters into a contract with B to sell him an (non-fungible) item Q for 80 €. Shortly after that, B enters into a contract with C to resell Q for 100 €. Before A is able give Q to B (or directly to C), D approaches A with an enormous offer. He offers to buy Q from A for 150 €. A agrees to D's offer, i. e. she also enters into a contract with D to sell Q to him (instead of B). Provided all persons involved are fully capable and the law in question values autonomy and the general possibility to form legally binding contracts, the legal situation seems to be the following: A has formed contracts with both B and D. Also B has formed a contract with C, though which is not of our concern right now. We can infer that A *should* have an obligation both towards B and towards D to hand over Q. Obviously, A cannot fulfil both obligations, though. The normative demands are not satisfiable. By definition the respective contracts A–B and A–D are different normative systems. Moreover, as implied earlier, I believe they are best understood as independent *legal* normative systems. This may seem surprising at first, but in fact it is what autonomy (in terms of private law) is essentially all about, namely the freedom to shape one's life at one's own convenience by entering into contracts and thus giving oneself one's own 'laws'. Essentially, this is what *Hart* meant by famously calling the autonomous agent a "small-scale sovereign"[250], i. e. being the actual norm issuer on a certain, however small scale. By creating binding

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from other moral codes like the rules of a religious community, which surely also regard their rules as 'binding'? I am afraid these central and important questions about the role of coercion and state power for any concept of law will have to be left unanswered here, as they would demand an intensity and depth of investigation which I simply cannot provide in this context.

[249] As much should already be clear from the examples in sec. bb) above. By contrast, the very notion of a coherent entirety of normative systems in a pluralistic society would require legal as well as moral systems. Hence, we need to find different criteria to separate these two, which we shall attend to presently.

[250] Hart, *LR*, 192.

rules in an intersubjective context one creates one's own 'laws'. Back in our example the conflict can only be resolved through some kind of superordinate normative system. Here different ways of resolution are imaginable: First, we could think of a substantive criterion to resolve the conflict. For instance, we could set a temporal criterion (1.1): In this case only the earlier formed contract would be valid. Evidently, the argument here would be the protection of legitimate expectations on the side of B. One could imagine other substantive criteria, for instance economic ones (1.2): We could let only that contract be valid which produces the best economic result (for seller A or the overall economy), which would in our case clearly be the latter contract between A and D. The argument here would make a point for an ideal allocation of resources in an economy, which would be produced if D paid the highest price. Apart from these and other possible substantive criteria there is an entirely different way to resolve the problem, which is the way the German legislature – and most legal systems I am aware of – did solve it: (2) not by means of a substantial predefinition, but by means of a superordinate permission. That is, objectively we recognise both contracts as valid, i. e. as legally binding. Both provide the parties with rules and obligations, which cannot be outweighed by one another. Meanwhile the conflict between the incompatible normative demands is resolved not by some predefined rule but by A's deciding for herself which obligation she wishes to fulfil.[251] If she is led by an economic reasoning she will certainly choose to fulfil her contract with D, because then she would (probably) have to disburse B with the 20 € of lost profit, but would nevertheless make an overall profit of 50 €. She could, however, just as well decide to honour her prior agreement with B and give the item to him instead.[252] We see that with solution (2) a decision with regard to the evaluative conflict between 'protection of legitimate inter-

[251] Not uncommonly the term 'conflict' is quite frequently used in this context. However, one should be very careful not to confound obviously distinct normative phenomena, all of which are frequently labelled as 'normative conflicts'. Roughly we can divide the notion of normative conflicts into two main categories, the latter of which can be specified more clearly. To begin with, we can distinguish intra-systemic and inter-systemic conflicts. The standard intra-systemic conflict is the one between different competing principles. As we learned the occurrence of such conflicts is a vital part of the functionality of any such a system. Our second main category comprises such conflicts that arise between distinct intersubjective systems – that is, between different, *incompatible* normative demands. Thus a special kind of inter-systemic conflict is one between an intrasubjective normative system and an intersubjective one, i. e. between the individual's self-addressed command to perform a certain action and the rules of a community. This conflict means nothing but the breach of a norm by an individual agent. In a way, this is the most fundamental type of normative conflict. This is also the one conclusion that can, without further ado, be drawn from the normative status of an action X, (L) or (IL). Namely, such a conflict describes the fact that the performance of a certain action conflicts with the normative content of the system in question. On the nature and different possible forms of 'normative conflicts' cf. also David Martinez Zorilla, "The Structure of Conflicts of Fundamental Legal Rights," *Law and Philosophy* 30 (2011): 733 ff.

[252] Provided she had a change in mind in the meantime, because otherwise such a motiva-

ests' on the one hand and 'maximum profit' on the other is delegated to the individual agent. The point is, however, that this last solution, favouring individual autonomy or individual responsibility, is all but necessary. It is the lawgiver of a community that has to decide a priori whether to predefine a certain content for such situations, as in cases (1.1) and (1.2), or to delegate the decision as in case (2). In any case, this – the lawgiver's – decision requires reasons. These could be the arguments we noted earlier – (1.1) protection of legitimate interests, (1.2) maximum profit or (2) individual autonomy.

Let us now assume the lawgiver in question decides, as the German legislature did, to route for solution (2) and strengthen autonomy. What is it that makes *this* rule law and not one that is in favour of (1.1) or (1.2)? Naturally, the lawgiver's judgement could be criticised on the basis of a dissenting judgement, i. e. on the basis of other normative systems in favour of solution (1.1) or (1.2). Provided we have the aim to find *the* right way to solve the problem, there is certainly no way to avoid dissenting opinions on the matter. The point is, however: The possibility of reasoned dissenting opinions/judgements does not actually pose a theoretical problem for a concept of law or for the lawgiver, because this is precisely where the true purpose of *the law* of a community lies: In contrast to all other possible normative systems, it is the law's very purpose to put an end to the potential infinity of normative conflicts through the infinite possibilities to challenge normative judgements. The law of a community *concludes* these discussions about conflicting normative judgements by imposing ultimately valid systems, by making definite judgements with regard to certain matters, which then are binding for all respective addressees. Admittedly, this comprehension of law might appear more original than it actually is. In fact, it is heavily influenced and (for the most part) perfectly consistent with *Hart*'s ideas about the nature of law. Surely, on my account only such systems can be legal ones – can be law – which are recognised and accepted as such. To that extent law can indeed only be described with reference to social facts, as *Hart* famously claimed. This recognition and acceptance is the task for the relevant authority in question. Thus, in order to actually determine what the law of a community *is* we need more than a (purely) descriptive account of law. Above all, we need a substantive political theory concerning reasons for exerting authority and a set of standards, defined by this authority, for which rules or which normative systems count as legal ones and which do not. In this respect, our account adopts *Hart*'s modest legal positivism. In addition, our account entails only the following thesis: No matter what the political authority or the standard for recognition of legal rules is, law is by definition *the* set of rules within a community which marks an outer boundary of disagreement, which produces

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tion would seem unlikely as she probably would not have entered into a contract with D then in the first place.

judgements that by definition need to remain indisputable by their addressees – not in the sense of being immune to criticism, of course. On the contrary, legal judgements as normative judgements are by their very nature open to outward criticism. Therefore 'indisputable' is solely meant in the sense of 'not unilaterally changeable'.[253] In short, to reach judgements with regard to agents' actions is a practical necessity. We cannot afford to keep quarrelling about reasons for or against a certain judgement. At some point a community needs to find one definite, concluding judgement to settle matters. To do so is to find the community's law. Once more in other words: The central and most salient trait of the social phenomenon described as 'law' is that it addresses demands which are ultimately binding for those they are addressed to. That is, the law of a community imposes duties that unquestionably have to be obeyed by their addressees, whereas it leaves room for moral duties to fill the regulative gaps. That does not mean that moral systems are generally inferior to legal ones. Clearly, from the point of view of the law they are subordinate in terms of validity as the purpose of legal systems is to ensure a certain degree of normative certainty in communal life through their ultimate validity. Yet, the decisive question, whether the legal rules in question are actually *just* rules depends on an evaluation of the law from a point of view outside of it, i. e. from some kind of *moral* standpoint.

Surely, these last remarks can only become clear if we scrutinise the exact relation between law and morals and clarify the notion of 'morality' as such. So, based on a descriptive account of law as just sketched, how can the relation between law and morals best be described? In fact, it appears to be more subtle than (conventional) positivist or non-positivist[254] theories suggest. Generally, positivists claim there is no necessary connection between law and morality. Non-positivists, on the other hand, claim there *is* such a necessary connection between law and morality, i. e. they claim that for something to be called law it has to have some minimum moral content. We now find that both are correct in certain respects. The dissent mainly lies in a defective understanding of the concept of 'morality'. If it is supposed to refer to the entirety of rules, the entirety of normative systems effective within a community (which I think is a rather appropriate way to grasp the concept), then it would seem strange to distinguish legal from moral systems in the first place as legal systems are normative systems just like any others and as such a part of 'morality' thus understood.

[253] At least not without a change in the law itself. As much is (correctly) demanded for cases of retrospective retribution by Hart himself, see Hart, "Separation of Law and Morals," 77.

[254] Still often referred to as 'natural law theories'. As this term seems to imply that non-positivists are bound to suppose there is some fundamental normative truth to be found in 'nature', which seems to be a claim far more than necessary for a modern non-positivist theory, this more traditional terminology is avoided here. Cf. Robert Alexy, "Some Reflections on the Ideal Dimension of Law and on the Legal Philosophy of John Finnis," *The American Journal of Jurisprudence* 58 (2013): 98; id, "Concept and Nature of Law," 288.

This similarity of legal and 'moral' systems would thus seem to point towards a non-positivist position. Or should we rather perceive 'morality' as some kind of higher normative truth which (as a conceptual matter) provides its applicant with the plain right reasons, *the* correct way to behave in a situation, in contrast to law as the factual set of rules prescribed by an authority, irrespective of its 'correctness'? In that case 'morality' would, of course, be something inherently different from law. The result is at least equally strange, though – to presuppose that there is some higher normative measure, some 'morality' which is by definition not only different from, but rather qualitatively superior to the law, would imply that law is by definition to some degree unjust.[255] Our approach avoids both problems. In fact, there *is* a strict dichotomy between law and morals but it only originates from the very act of defining certain normative systems – out of the entirety of systems, out of all of morality – as legal ones and thereby at the same time making all other ones 'moral'. In this respect, a central positivist claim is strongly supported: Law and morals, understood in this way, are indeed by definition *distinct*. Morality understood in this way cannot mean a standard that is necessarily closer to some normative ideal, to a higher normative truth such as 'justice' than the law is. Neither can the law be, of course. In fact, 'morality' could only refer to normative measures that are *different* to legal ones – in effect, not (necessarily) in content. Thus, a central non-positivist claim is also implicitly acknowledged: Namely that law necessarily has a 'moral' content – it consists of normative systems marked as legal ones and normative systems are shaped and defined by their normative content, the values they promote and protect.[256] In this respect, law and morals have in common that they both represent (a set of) normative systems. Once more: The notion of 'morality' is best understood as the entirety of a community's normative systems, comprising both law and morals s. str. However, this seems to overtly contradict a central non-positivist claim: Namely that it is essentially morality that provides us with means to criticise possibly 'unjust' laws. This would presuppose, though, that judgements based on 'morality' are by definition better than those based on the law. This could only be so if moral judgements were by definition closer to an ideal of justice as the law could *by definition* get. Such an understanding of law and morals is essentially flawed. Not because it presupposes that there is (or could be) a higher standard, an ideal of justice, but because it equates this ideal with the notion of 'morality'. Because now morality is supposed to be (a) a higher standard (possibly the highest) for normative truth, i. e. justice, and (b) an instrument offering practical guidance and practi-

[255] Saying this it is not implied that such an ideal could not exist, only that it would better be referred to as 'justice' rather than as 'morality'.

[256] In this respect, Alexy is entirely correct that a legal (normative) system – as any normative system – cannot "forbear from claiming to be morally correct" (Alexy, "Some Reflections," 101).

cal judgements; however, both are not possible at the same time. As a pure ideal the notion of justice cannot immediately be helpful for us in practical normative reasoning. At best we could avail ourselves of it as some kind of ultimate aim for practical reasoning. In order for it to serve as a basis for criticism of practical normative judgements, it needs to take the form of such judgements as well. In order to criticise possibly unjust legal judgements, we cannot use an abstract concept of justice but at best only practical moral judgements derived from some such a concept. Practical normative judgements, however, are *per se* imperfect. Now, were we provided with a specific idea of justice, we could of course mark those normative systems that come closest to it as 'moral' one. There is no reason, however, why these could not also be legal ones as well. In a nutshell: Moral rules or morality can provide us with a standard to criticise law. However, morality cannot demand that this standard is closer to an ideal of justice without presupposing certain practical implications this ideal has and thus making its own claim entirely redundant. In other words, there is nothing which *a priori* makes 'morality' a better or superior set of rules than the law of a community. Neither, of course, is the law necessarily just. It is simply 'the law' and as such different from moral rules. In this respect, my endeavour could be regarded a truly positivist one, at least to the extent that I fully agree that a proper, scientific approach to the social phenomenon of law is best made by at first 'demystifying'[257] the concept of law – a theoretical road paved masterfully not least by scholars like *Hart* and *Kelsen*.[258]

[257] H. L. A. Hart, "Bentham and the Demystification of Law," *The Modern Law Review* 36 (January 1973). See also: David Dyzenhaus, "Consent, Legitimacy and the Foundation of Political and Legal Authority," in *Between Consenting Peoples*, ed. Jeremy Webber and Colin Macleod (Vancouver: UBC Press, 2010), 172; Kai Nielsen, *God and the Grounding of Morality* (Ottawa: University of Ottawa Press, 1991), 69. For a very similar aim, namely the rationalisation of the law as a social phenomenon, yet in different ways, see esp. Kelsen, *Reine Rechtslehre* [1934]. Cf. in this respect also: William Ebenstein, "The Pure Theory of Law: Demythologizing Legal Thought," *California Law Review* 59 (1971): 617; Peter Koller, "Meilensteine des Rechtspositivismus im 20. Jahrhundert: Hans Kelsens Reine Rechtslehre und H. L. A. Harts 'Concept of Law'," in *Reine Rechtslehre im Spiegel ihrer Fortsetzer und Kritiker*, ed. Ota Weinberger and Werner Krawietz (Wien/New York: Springer, 1988). For a brief, but well-written introduction to Kelsen's central theses see Andreas Kley and Esther Tophinke, "Hans Kelsen und die Reine Rechtslehre," *Juristische Ausbildung* 2 (2001).

[258] Despite the obvious differences in their theories, which we are not able to discuss here in detail, already due to their being the most prominent and influential legal positivists of the 20th century, they are arguably worth being mentioned in the same breath in this context.

III. The Theory of Rights

At the outset of our investigation we conceded three fundamental criteria for the scope of rights or for an intensional definition of the term right. These were for something to be normative, advantageous, and appendant. Our preliminary task has then been to clarify the feature 'normative' by singling out the constituent atomic features of any normative system and how they relate to each other. With all said so far, we are now equipped with something like a manual for these systems, a rough map of normative systems. As constituent elements we mainly identified the following: principles (values), norms and prescriptions. Thus, we can now ask ourselves which of the elements fulfil the other two criteria, namely being appendant to a certain entity and functioning in favour of it. Thus, our task in this section will be to show which elements possibly qualify as 'rights' or to work out possible manifestations of the scope. Very roughly, my thesis is that, based on the scope, a right could either be a legally or morally protected individual competence, i. e. a normative definatory power assigned to an individual agent, or any (other) reason appendant to the entity deemed a 'right-holder'. Evidently, the classification of possible rights is far too vague in this form and not fit for the complexity of the subject matter. Thus, in order to extrapolate all possible manifestations more clearly it appears useful not to simply rely on mere deduction or to start from scratch, but rather to employ already existing analytical models and schemes regarding the logic and form of rights and develop our own position in comparison to these, highlighting commonalities as well as disparities. And thinking about sophisticated analyses regarding the logic and structure of rights, clearly "the beginning of wisdom, though not the end lies in"[1] the analytical framework laid out by *Wesley Newcomb Hohfeld*.[2]

[1] Sumner, *MF*, 18.

[2] See also: Hillel Steiner, *An Essay on Rights* (Oxford: Blackwell, 1994), 59; Carl Wellman, *An Approach to Rights* (Dordrecht: Kluwer, 1997), 63; George Rainbolt. "Rights Theory," *Philosophy Compass* 1 (2006), 1; Hubert Schnüriger, *Eine Statustheorie moralischer Rechte* (Münster: Mentis, 2014), 24.

1. Hohfeld's Scheme of Fundamental Legal Entitlements

At the beginning of the 20th century, in two seminal papers American jurist *W. N. Hohfeld* developed a system of fundamental legal positions, which heavily influenced legal theory and does so still to this day.[3] His initial intention was to make sense of an irritatingly diverse usage of the term 'right' in judicial practice.[4] Withstanding much criticism over the years, the overwhelming majority of the modern-day theory of rights is still based on the fundamental structures provided by *Hohfeld*'s analysis. As indicated above, our main aim in this section will be to work out possible manifestations of the scope of rights. In order to do so, we shall avail ourselves of *Hohfeld*'s scheme as the result of a supposedly similar endeavour. Thereby it is crucial to understand the scheme not as a catalogue of different rights to be directly utilised in normative practice e. g. by a legislature, but rather as what it was originally intended to be: a precise analysis and description of necessary deontological structures.[5] If this understanding is correct, then we ought to expect accordance between *Hohfeld*'s model and our approach. For some parts, e. g. the nature of claim-rights and duties and their strict correlativity, we will find that this is indeed the case. However, in other parts we shall critically revaluate and revise the traditional scheme in accordance with the theoretical framework laid out so far, which will eventually lead us to presenting a scheme that works with (almost) all the familiar Hohfeldian terminology – though quite often bearing a significantly different meaning. Roughly, my thesis is: Despite the fact that *Hohfeld*'s fundamental positions, as traditionally understood, can be arrayed in an overall consistent fashion, their features often fail to fulfil the basic requirements of the scope of rights. Consequently, almost all of *Hohfeld*'s 'entitlements'[6] have to be significantly strengthened in order to qualify as possible rights. It shall be emphasised that these results will not be presented as a total renunciation of the Hohfeldian logic and terminology, but should rather be seen as a productive advancement of *Hohfeld*'s scheme, some of whose core theses will remain untouched, as we shall find.

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[3] Wesley N. Hohfeld, "Some fundamental legal conceptions as Applied in Judicial Reasoning," *The Yale Law Journal* 23 (1913); id. "Fundamental Legal Conceptions as Applied in Judicial Reasoning," *The Yale Law Journal* 26 (1917). As the titles already suggest, they were not intended as two separate papers, but the latter was supposed to be a continuation of the former. In fact, Hohfeld repeats many of his arguments in his 1917 paper, basically an extended version of his paper from 1913. Thus they are, in fact, best regarded as one cohesive work.

[4] Hohfeld, "Some fundamental conceptions," 30 ff.

[5] Kramer, *RWT*, 22. Cf. also Jonathan Gorman, *Rights and Reason* (London/New York: Routledge, 2014). Gorman fittingly describes Hohfeld's work as "an exercise in analytical jurisprudence" (ibid, 87).

[6] The term is not originally Hohfeldian, but (like the terms 'first-order' and 'second-order', see below sec. III, fn. 10) borrowed from secondary literature, see esp.: Henry McCloskey, "Rights," *Philosophical Quarterly* 15 (1965): 115; Kramer, *RWT*, 8. Cf. also Pierre Schlag, "How to do things with Hohfeld," *Law and Contemporary Problems* 78 (2015): 188.

We shall proceed as follows: In sec. a) *Hohfeld*'s scheme will be introduced and presented, both with reference to his original text and to the most cogent, conventional interpretations such as those of *Kramer* or *Sumner*, both of which were and are able to defend the scheme against most (misled) traditional criticism. Already in sec. a) we shall try to harmonise *Hohfeld*'s model of legal entitlements with the insights we made so far about the functionality of normative systems.[7] Thus, as a basis for a productive development of Hohfeldian logic we initially aim at the best possible understanding of *Hohfeld*'s scheme in the context of normative systems. Consequently, in sec. b), we will critically review and, where necessary, revise the findings under a) according to our primary aim of identifying all manifestations of the scope of rights. It is worth emphasising once more that this specific aim does not necessitate a strictly hermeneutic analysis of *Hohfeld*'s original text with the aim of uncovering the best possible interpretation, but rather we will make eminent use of Hohfeldian logic and terminology to further develop our own concept of rights.

a) Hohfeld and the Logic of Normative Systems

After a rough introduction to Hohfeldian terminology in sec. aa), we shall point out a number of central axioms and theses underlying the Hohfeldian scheme in sec. bb), whereas finally, in sec. cc), each entitlement and its respective correlative will be scrutinised.

aa) An Introduction to Hohfeldian Terminology

In total, *Hohfeld* identified eight fundamental legal incidents or positions, which can be arrayed in various ways. Four of them are his so-called 'entitlements', i. e. legal positions that are supposed to be in some way (more or less) advantageous for their holder A.[8] For *Hohfeld* these were claim-rights, liberties, powers, and immunities. Evidently, it is these entitlements which we are most interested in as they seem to be the most likely candidates to meet the requirements of the scope. According to *Hohfeld*, each of these entitlements can be matched

[7] The relation of the concepts of 'entitlement' and 'right' is arguably in need of clarification: The concept of 'entitlement', in contrast to that of 'right', will only serve for analytical purposes in this context. It shall describe all manifestations of the scope of rights, i. e. all positions that could *possibly* be called a right. Accordingly, the features 'normative, advantageous and appendant' not only form its scope, but rather they are its conclusive features, whereas they only represent the scope of the yet-to-be-conclusively-defined concept of a right. Thus, the term should certainly not be understood as "merely a verbal synonym for 'right'" (Rex Martin and James Nickel, "Recent Work on the Concept of Rights," *American Philosophical Quarterly* 17 (1980): 170).

[8] Hohfeld limited his analysis to *legal* positions. Yet, it is widely agreed that the Hohfeldian logic applies to all kinds of normative relations, see only Kramer, *RWT*, 8. Slightly critical in this respect: Sumner, *MF*, 20.

with four respective fundamental legal positions held by some (other) person B. These are duties, no-rights, liabilities, and disabilities. All four stand in different logical relations to the entitlements. Each of them is supposed to be 'correlative' to one specific entitlement and 'opposite'[9] of another. That implies, of course, that each entitlement has both a correlative and an opposite. Hence, the relation between the positions can be illustrated in two different tables, one of correlatives and one of opposites:

Correlatives			
Claim-right	Liberty	Power	Immunity
Duty	No-Right	Liability	Disability
Opposites			
Claim-right	Liberty	Power	Immunity
No-right	Duty	Disability	Liability

Figure 11: Hohfeldian Correlatives and Opposites.

An important theoretical feature of the scheme is that the entitlements are supposed to work on different levels. *Hohfeld*'s 'first-order entitlements'[10] claim-rights and liberties are generally concerned with the plain conduct or the actions of agents, whether these actions are allowed, to what extent, and towards whom. His 'second-order entitlements' powers and immunities are supposed to be concerned with the (lack of) normative control over those first-order entitlements or other second-order entitlements.[11] Another fundamental feature of the Hohfeldian scheme, as convincingly demonstrated by *Kramer*, is that some of the entitlements are concerned with or defined by the normative demands on the right-holder's own conduct (liberties and powers), whilst others are defined by the demands on the conduct of the person holding the correlative positions (duties as opposed to claim-rights, disabilities as opposed to immunities).[12] In other words, *Hohfeld* essentially distinguishes between active (liberties/powers) and passive (claim-rights/immunities) entitlements.[13]

[9] Hohfeld's notion of 'opposites' is in philosophical terms best understood as 'contradictories', see: Sumner, *MF*, 19; Kramer, *RWT*, 8. For an elaborate, yet ultimately not entirely convincing critique of Hohfeld's unclear use of the concept of 'opposites' cf. also Halpin, 1997, 32 ff.

[10] The terms 'first-order' and 'second-order' are thereby not originally Hohfeldian, but this (rather fitting) terminology is once more directly adopted from Kramer, *RWT*, 20.

[11] Sumner, *MF*, 31. The distinction between first-order and second-order entitlements/rules is famously mirrored by Hart's distinction between primary and secondary rules, see Hart, *Concept of Law*, 79–91. Critical in this respect: K.-K. Lee, "Hart's Primary and Secondary Rules," *Mind* 77 (October 1968).

[12] Kramer, *RWT*, 13 ff.

[13] David Lyons, "The Correlativity of Rights and Duties," *Noûs* 4 (February 1970): 48.

bb) Central Axioms and Theses

There are a number of axioms and assumptions underlying the logic of the scheme, all of which are supposed to be consistent with one another. Therefore, before we begin analysing each entitlement, we ought first to be certain about the significance for *Hohfeld's* scheme of these fundamental assumptions.

(1) Correlativity-Axiom

First of all, *Hohfeld*'s analysis is strictly constrained to bipolar relations, i. e. for every possible 'right-holder', that is, for every incumbent of an entitlement A there is always some entity B, which is the incumbent of a normative position correlative to the entitlement in question.[14] Importantly, this correlativity of positions in normative relations is a correlativity by definition. So, as *Kramer* correctly clarified, it is rather pointless to try to establish a priority between Hohfeldian duties and claim-rights, for instance. Whenever some entity A has a Hohfeldian claim-right, some person B has a Hohfeldian duty.[15] Within Hohfeldian logic these are, by default, two sides of the same coin.[16]

A common objection to the explanatory adequacy of this correlativity-axiom is simply to claim that legal relations are far too complex to be described by only bipolar relations, i. e. that a reduction to bipolar relations is an oversimplification.[17] In this respect, *Hohfeld*'s critical work shall be decidedly defended, though also slightly modified.[18] In fact, breaking down undeniably complex normative relations into bipolar relations is what helps us to make sense of such relations in the first place. This is especially so due to the fact that the Hohfeldian correlativity-axiom ought to be understood in a modest way and, as such, not limited to individual agents as the only relevant entities. Thus, it allows for a very wide range of bipolar relations to be described properly. That is, the overall explanatory adequacy of the Hohfeldian scheme is maintained mainly by almost not at all *a priori* specifying who or what qualifies to be both a pos-

[14] Kramer, *RWT*, 24.

[15] The idea of a correlativity of right and duty was not originally Hohfeld's, cf. only John Salmond, *Jurisprudence or the Theory of the Law* (London: Steven & Haynes, 1902), 222. It was Hohfeld's achievement, though, to clearly spell out the assumed interdependent relation and distinguish more sharply between *claim*-rights and other allegedly advantageous positions.

[16] Kramer, *RWT*, 24. Kramer vividly illustrates this idea with reference to a slope, that one could either perceive as going upward or going downward depending only on the perspective, the slope, however, remaining the same.

[17] Cf. only: Joseph Raz, "On the Nature of Rights," *Mind* 93 (1984): 199–200; Neil MacCormick, "Rights in Legislation," in *Law, Morality, and Society – Essays in Honour of H. L. A. Hart*, ed. Peter Hacker, Joseph Raz (Oxford: Clarendon, 1977), 199.

[18] The idea of a strict correlativity is only necessary if one's aim is to determine concrete/ultimate advantageousness. It is possible to describe more general normative phenomena that do not accord with the correlativity-axiom, yet still meet the requirements of the scope, see below sec. III, 1., b) aa).

sible 'right-holder' A and/or the other entity B holding the correlative position. For a start, the scheme allows not only for agents but also for non-agents to qualify as possible 'right-holders'.[19] For instance, in the case of a claim-right, we are interested mainly in B's action and the reason for B's having a duty. It suffices that A is somehow associated with the reason for B to be under a duty. Thereby it is implied – at least in the case of plain claim-rights – that A could be virtually any entity at all, i. e. *Hohfeld* readily accepts the possibility of rights of the incompetent, animal rights, etc.[20] In turn that implies an important point about the notion of the 'appendance' of rights: The holder of any entitlement does not have to be an agent nor even an individual, but does have to be *one specific entity*. Most importantly, this does not exclude, but rather supports the idea of e. g. group rights, to the extent that the group as such is regarded as a single entity.[21] The correlativity-axiom merely implies the impossibility of one right belonging to more than one definable entity. How this entity is defined is not predetermined by Hohfeldian logic. So, whilst in the case of claim-rights and immunities A could be virtually any entity, B, on the other hand, as the incumbent of the correlative position 'duty' or 'disability', is necessarily an agent. This is because in these cases we are interested to know what (another) agent (apart from A) is allowed or not allowed to do towards or with respect to A as our potential right-holder. Nevertheless, also the entity B remains unspecified from the start. Thus, depending on the context, we could think of B not only as an individual agent with duties etc. but just as well B could be understood as a group of agents or possibly 'the state'. In other words, B does not have to be an individual agent, but merely an entity that can be accredited decision-making ability, e. g. through bodies of a company or public institutions. As much can best be demonstrated with reference to an example: the general right to life. This example serves as evidence of how *Hohfeld*'s scheme effortlessly provides for the existence of rights that exceed bipolar relations too strictly interpreted as relations between two individual agents. We usually think of one's right not to be killed as an 'absolute right', i. e. as a right against anyone.[22] Hence, one could understand this right as an aggregate of a single person's rights against all

[19] As much goes at least for those entitlements that are defined via an action of B, i. e. claim-rights and immunities. In order to hold a liberty or a power, A necessarily has to be an agent, of course.

[20] Cf. below sec. III, 2., a) and c).

[21] Edmundson, *Rights*, 100–101; Alan Anderson, "The Logic of Hohfeldian Propositions," *University of Pittsburgh Law Review* 33 (1971–1972): 30.

[22] Notably, 'absolute right' is by no means equivalent to 'abstract right', but it refers to a practical reason that simply applies to everyone within a certain community. The question of whether we can also understand abstract, appendant principles such as 'the right to life' as possible rights in the sense of manifestations of the scope – thus deviating from Hohfeld's scheme in terms of correlativity and restriction to practical reasons – will be dealt with below in secs. b), aa), and b), bb), (1).

other individuals B not to be killed. Additionally, one could just as well insert for entity B (holding the correlative position as opposed to our potential right-holder A) the entirety of agents within a community; that is, everyone addressed by the normative system in question. Obviously, with regard to the specific action of killing not the entirety, but rather every single agent capable of acting, is addressed by the duty not to kill A. Nevertheless, the entirety of agents could be addressed insofar as it is capable of performing actions as well, which it might be to the extent that the individual agents agree on laws, that is, to the extent that they empower officials to act on their behalf in a democratic process. Thus, the right of A against everyone else could have the content that everyone else or the state, would be under a duty not to issue rules that would permit killing A. Thus, the only condition that the entity B needs to fulfil is being capable of making a decision or being capable of performing actions. The state would fulfil this condition by allowing officials – civil servants, policemen, members of parliament – to act on its behalf. Accordingly, the Hohfeldian analysis is all but restricted to rights between two parties, e. g. the parties of a contract in private law, but it is also applicable to the rights of an individual agent against the state as an artificial, jural person. Ultimately, critical claims regarding a theoretical oversimplification due to the scheme's focus on bipolar relations lose much of their force in the light of the aforementioned flexibility.[23]

One ought to be careful not to confuse the correlativity-axiom with a much stronger assumption that could be called the 'fundamentality-thesis', which can be found (at the very least implicitly) in some literature on *Hohfeld*.[24] Therein it is claimed that not only is *Hohfeld*'s analysis restricted to bipolar relations but also that the proposed structures represent the most fundamental and universal ones to be found in intersubjective normative practice. In other words, according to the fundamentality-thesis Hohfeldian relations are not only supposed to describe bipolar relations that convey an entitlement to one of the parties involved, but rather the scheme is believed to offer the smallest, irreducible elements for a normative system in general. In this respect the fundamentality-thesis exceeds the correlativity-axiom. We shall attend to the cogency of this fundamentality-thesis in sec. b) below.

[23] I am well aware of the fact that I am not able to defend the correlativity-axiom in this context against all criticism that has been levelled at it, which would call for an investigation much more comprehensive than I could reasonably provide for here. Luckily, such vigorous defence of the correlativity-axiom has been offered by Kramer in his outstanding essay 'Rights without Trimmings', see Kramer, *RWT*, 24 ff. Thus, for a large part I need to rely on the cogency of the defence provided there, which I believe to be in line with the (few) arguments brought forward here.

[24] See only below sec. III, fn. 60.

(2) Advantageousness-Axiom

The second central axiom, which usually goes unmentioned, possibly due to being regarded as almost trivial, is the idea that being an entitlement has to mean being in some way positive or advantageous for its holder. *Hohfeld* himself pointed out in this respect: "[…] the word 'right' is used generically and indiscriminately to denote any sort of legal *advantage*, whether claim, privilege, power, or immunity."[25] Thus, he explicitly regarded all four of his 'entitlements' as *somehow* advantageous, even though it is not conclusively determined whether some might be more or more immediately advantageous than others.[26] For our purposes the advantageousness-axiom is probably the most vital point, because only presupposing this feature of entitlements would we actually be able to identify certain parts of the Hohfeldian scheme as manifestations of the scope of rights. What exactly does make an entitlement advantageous, though? And are there varying degrees of advantageousness? These are crucial questions, which we shall address in further detail in sec. b) below. For now, we shall only state that *Hohfeld*'s scheme contains certain positions that are overall positive for the ones obtaining them, whilst others are regarded as overall negative positions.

(3) Exclusivity and Discriminability

A central and often made claim about the four entitlements is that there are no necessary implied relations between them, i. e. even though there might be regular overlaps or coincidental occurrences of entitlements in practice, in theory each entitlement is alleged to have its exclusive area of application.[27] In other words, it is assumed that for each entitlement one can at least theoretically make up cases/actions, in which the entity A in question holds only this entitlement and no other. Henceforth we shall refer to this as the 'exclusivity-thesis'. Implied in this rather strong exclusivity-thesis is a similar, yet considerably weaker contention, namely that, even if there were necessary entailments between certain entitlements, each entitlement can by its features be clearly distinguish-

[25] Hohfeld, "Fundamental conceptions," 717 (emphasis added). Cf. Carl Wellman, "Legal Rights," in *Uppsalaskolan – och efferat* (Stockholm: Almqvist und Wiksell, 1978), 213.

[26] See also Sumner, *MF*, 32: "Within each pair one of these positions is a normative advantage, the other a normative disadvantage". Quite in contrast to these and also his own words (see above sec. III, fn. 25), Hohfeld asserts that a liability can be "agreeable" for its holder (id, "Some fundamental conceptions," 55, at fn. 90). Hohfeld's exposition is rather vague in this point. If he would have meant "agreeable" in the sense of advantageous one would probably have to reject this thought due to the fact that duties are *prima facie* neither advantageous nor disadvantageous for the ones they are prescribed to, see below sec. b), bb), (2), (d).

[27] Kramer, *RWT*, 14. There Kramer claims an 'absence of any kind of entailment' between claim-rights and liberties, which is supposed to encompass powers and immunities as well.

ed from any other entitlement. This would not preclude (necessary) implicatory relations between the entitlements, yet it would demand clear criteria to distinguish them from one another. Hence, this shall be referred to as the 'discriminability-thesis'. Admittedly, the latter is a thesis which is not usually found in the literature on *Hohfeld*, but it is introduced at this point solely in order to be employed as an alternative to the possibly too rigid exclusivity-thesis later on.

(4) Parallelism of First-Order and Second-Order Entitlements

Regarding the relation between the two levels of first-order and second-order entitlements, *Hohfeld* and proponents of his scheme make another fundamental claim: The deontological relations between the respective first-order positions – correlations and oppositions – are supposed to be mirrored by, that is, be parallel to those on second-order.[28] We shall therefore refer to this idea as the 'parallelism-thesis'.

(5) Restriction to Practical Reasons

Finally, another central aspect about *Hohfeld*'s scheme is its restriction to legal incidents and thus to the practical application of rights – in other words, its restriction to actions and therewith to rules and prescriptions.[29] Precisely, we conceded that some of the entitlements are concerned with A's own actions, whilst some are concerned with those of B. Hence, we are able to infer that in every case a Hohfeldian bipolar relation is defined by reference to a certain *action*. Accordingly, the scheme is only concerned with *practical reasons* and leaves out abstract reasons/principles from its logic entirely.

cc) Fundamental Legal Positions and Normative Systems

Finally, let us now engage in a punctual analysis of each of the Hohfeldian entitlements regarding the question of to what extent they can be matched with our deontic modalities. For a clearer understanding of each of the entitlements we will analyse them in close connection with their respective correlatives.

(1) Claim-Rights and Duties

For various reasons it seems advisable to start with claim-rights[30] – by *Hohfeld* regarded as the most basic kind of rights and famously referred to as 'rights in

[28] See inter alia ibid, 21: "Just as a liability is the absence of an immunity, so a no-right is the absence of a right; […]".

[29] Carl Wellman, "Legal Rights," 214.

[30] Often this position is referred to only as 'claims' (see only above sec. III, fn. 25), or simply as 'rights', as Kramer does it. For the sake of terminological clarity, i. e. to distinguish

the strictest sense'[31]. As pointed out earlier, based on other, most sophisticated and for the most part cogent *Hohfeld* interpretations, which correctly regard claim-rights as being concerned with the actions not of A as the incumbent of the entitlement but rather with those of B,[32] we will disregard all those positions which aim to describe the incumbent's own actions with the label 'claim-rights' from the start without further consideration.[33] On the contrary, if claim-rights are mainly defined by the corresponding actions of others, it seems appropriate for an adequate approximation of this concept to start off with a clarification of the correlative concept of duties, which seems more easily graspable to begin with.

Just like our understanding of duties more generally, the concept of a duty in the Hohfeldian sense is best understood as comprising both positive or supportive obligations and negative or defensive prohibitions, i. e. for B to have an obligation to assist A in doing something is for B to have a duty towards A (to do X), just as for B to be under a prohibition not to assault A is for B to have a duty towards A (not to do X).[34] As demonstrated earlier, the idea common to both obligations and prohibitions in contrast to permissions – and as such the reason for summarising them under the term 'duty' – is they both address some predefined normative content at an agent (in the case of claim-rights at the agent B).[35]

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them from 'rights' as the linguistic label for our resulting concept, we shall stick to the (admittedly cumbersome) term 'claim-right' henceforth.

[31] Hohfeld, "Some fundamental conceptions," 30.

[32] Kramer, *RWT*, 13; Sumner, *MF*, 25: "I cannot have claims *to do*, only claims *that others* do." See also: John Finnis, *Natural Law*, 200; id, "Some Professorial Fallacies about Rights," *The Adelaide Law Review* 4 (1972): 379.

[33] Most prominently Joel Feinberg asserted that a juridical claim entails a liberty of a person to do X, see Joel Feinberg, "The Nature and Value of Rights," *The Journal of Value Inquiry* 4 (1970). Cf. also: Albert Kocourek, *Jural Relations* (Indianapolis: Bobbs-Merrill, 1927), 21; Margaret Gilbert, "Giving Claim-Rights Their Due," in *Rights: Concepts and Contexts*, ed. Brian Bix and Horacia Spector (Farnharn/Burlington: Ashgate, 2012), 303. Such an understanding of claims/claim-rights may be linguistically possible, but it is most certainly not in accord with the terminology of Hohfeldian logic. And even though Feinberg does not explicitly mention Hohfeld as a resource, his reference to the distinction between claim-rights and "liberties, immunities, and powers" evidently bears such a strong resemblance that misunderstandings are imminent. Certainly, the notion of a Hohfeldian claim-right should not be mistaken with the 'act of claiming' a right (Feinberg, "Nature and Value," 251; id, "Duties, Rights and Claims," *American Philosophical Quarterly* 3 (April 1966): 137, 143–144). Also Hart's theory of rights was slightly flawed in this respect, certainly when he came to the (somewhat premature) conclusion that all Hohfeldian entitlements can be described as "legally protected choices" (H. L. A. Hart, "Definition and Theory in Jurisprudence," in *Essays in Jurisprudence and Philosophy* (New York: Oxford University Press, 1983), 35).

[34] Cf. Kramer, *RWT*, 9.

[35] The use of the term 'duty' in this context is comparable to the concept of 'mitzvot' in Judaism. Here the term 'mitzvah' is also a generic term for commandments/duties in general, which comprise both positive obligations (Hebrew: *mitzvot aseh*) and negative prohibitions (Hebrew: *mitzvot lo ta'aseh*).

Importantly, the notion of a *Hohfeldian duty* entails more presuppositions than that of a *duty simpliciter*. Precisely, it never suffices for someone solely to have an obligation or to be under a prohibition for someone else to have a Hohfeldian claim-right. The decisive feature of *Hohfeldian* duties is the correlativity of duty and claim-right. In contrast to duties simpliciter the (predefined) practical reason behind a Hohfeldian duty needs to be appendant to the entity A itself, i. e. it needs to be directly associated with A.[36] This point is so decisive because only by acknowledging the additional condition of appendance is the bipolar normative relation between entities B and A – A having a claim-right and B having a correlative Hohfeldian duty – established.[37] An example: Normally we would assume that B's duty not to harm A corresponds to A's right not to be harmed. However, B could just as well be under an obligation not to harm A as the emanation of e. g. a divine commandment, which A may only profit from subjectively, i. e. from A's point of view. This advantage would then be no more than a mere reflex, though, and certainly not an advantage intended by the system in question.[38] As little as A would have a right in the example, B would be under a duty in the Hohfeldian sense, but it would merely be a duty simpliciter. Hohfeld's concept of duties demands a conceptual link between the reason for a duty and the entity having an advantage from it – in other words, they demand the reason's *appendance* to A.[39]

(2) Liberties and No-Rights

We remember: In contrast to claim-rights, liberties are supposed to be concerned with the actions of the possible 'right-holder' A herself. With regard to the deontological structure of liberties there are two main problems that we have to be

[36] Sumner, *MF*, 24; David Lyons, "Rights, Claimants, and Beneficiaries," *American Philosophical Quarterly* 6 (July 1969): 174.

[37] In practice, the question of whether a claim-right exists might be problematic in a way that cannot be adequately dealt with in this context. Namely there will often be a whole bundle of reasons for a specific duty in practice. Preliminarily, we may assume that a claim-right exists if the reason appendant to A is the decisive, prevailing reason for prescribing the duty. However, in a lot of practical cases it might be unclear and hard to determine which reason was the decisive one.

[38] Cf. below sec. III, fn. 92.

[39] This thought retraces another debate in legal theory regarding the 'directionality' of duties; see in this respect inter alia: Simon May, "Directed Duties," *Philosophy Compass* 10 (2015); Marcus Hedahl. "The Significance of a Duty's Direction: Claiming Priority Rather than Prioritizing Claims," *Journal of Ethics and Social Philosophy* 7 (2013). Instructive on the notion of 'directional duties': Gopal Sreenivasan, "Duties and Their Direction," *Ethics* 120 (April 2010); Stephen Darwall, "Bipolar Obligation," *Oxford Studies in Metaethics* 7 (June 2012). The idea of an 'appendance of a practical reason' as used in this context can be understood as tantamount to the (correlative) idea of directional duties. The issue of under which conditions exactly a duty *is* directional or, in other words, when a reason *is* appendant, is not an object of this investigation and generally needs to be determined by a substantive normative theory.

concerned with: (a) the nature of liberties as either permissions or merely legitimate actions or the question regarding a necessary differentiation between unilateral and bilateral liberties or weak and strong permissions and (b) the problem of whether there is a necessary link between liberties and claim-rights – a problem which in the literature on *Hohfeld* evolved around questions like that about a liberty's possible or even necessary 'protective perimeter'[40] consisting of claim-rights or the possibility of so-called 'unprotected liberties'[41].

(a) Unilateral and Bilateral Liberties

Presumably, it is generally agreed that for A to have a liberty must mean for A to somehow be allowed or permitted to do something. Thus, in terms of our deontic modalities there are two ways to interpret a Hohfeldian liberty: either as a permission (P) or as a single option of conduct that is merely legitimate (L). As indicated earlier, this distinction is mirrored by the common distinction in jurisprudence between unilateral and bilateral liberties.[42] Based on our earlier findings about the logic of normative systems and the relation of the two levels of deontic modalities, it shall be argued at this point that the talk of 'unilateral' liberties in order to distinguish them from bilateral ones is ultimately misled. Surely, it is all but impossible to refer to legitimate options of conduct as unilateral liberties and to permitted actions (as such) as bilateral ones. Indeed, if the action is legitimate, it is (at least) in conformity with the system in question, and one is thus allowed to perform it. Already on a terminological level there are two rather strong arguments against such a two-fold account of liberties and in favour of a limitation of the term liberty to permissions in the sense of (P). The first argument regards the theoretical relation of the two phenomena. The common differentiation of liberties into unilateral and bilateral ones insinuates that both are of the same kind and that they differ only in their *strength* to some degree – a point that becomes even clearer by considering the analogous distinction between *weak* and *strong* permissions.[43] However, as we saw earlier, the difference between legitimacy and permissibility is not one of degree or 'strength' but rather one of distinct theoretical perspectives. As demonstrated earlier in sec. II, 3., the unidimensional modalities (L) and (IL), concerned with single options of conduct and not with the decision-structure of actions as such, are not fit for any normative conclusions other than determining con-

[40] Hart, *LR*, 179.

[41] Alexy, *TG*, 203; Peter Koller, *Theorie des Rechts*, 2nd ed. (Wien: Böhlau, 2001 [1992]), 103.

[42] See esp. above sec. II, fn. 76. Cf. also above sec. II, 3., a) and b).

[43] For the claim that the difference between weak and strong permissions is one of 'degree' see also Arend Soeteman, "Weak and Strong Permission in the Law," in *The structure of law: proceedings of the 2nd Benelux-Scandinavian Symposium in Legal Theory*, ed. Åke Frändberg and Mark van Hoecke (Uppsala: Iustus, 1987), 29. See also above sec. II, fn. 76.

formity or non-conformity of an action with the normative system in question. For statements regarding the normative status of an action being either (L) or (IL), one needs to take an external perspective on a normative system.[44] That is, if an action X were legitimate (L) – i. e. if it were the object of a 'unilateral liberty' – we could neither infer that it is obligatory (O) nor that it is permissible (P) as both could be the case. In other words, a bilateral liberty is in fact not a *surplus* in granted freedom in comparison with a unilateral liberty as the terminology seems to suggest, but rather they simply represent different theoretical points of view regarding the same action. The second argument draws on the relational structure in the Hohfeldian scheme itself. Implied in the scheme is the idea that duties and liberties are mutually exclusive, i. e. with regard to a certain action one either has a duty or a liberty as the 'opposite' or the absence of a duty. We learned earlier that there is indeed an exclusive relation in action evaluations, namely between duties simpliciter and permissions – explicitly not between the existence of a duty and the mere legitimacy of the action. Hence, a Hohfeldian could only make sense of the claim regarding an exclusivity of duties and liberties by acknowledging that liberties ultimately represent permissions in the sense of (P).[45] To conclude: Even though it is not strictly speaking impossible in terms of terminology, even for Hohfeldians it appears preferable to regard only permissions as liberties and thereby distinguish more sharply between first-level legitimacy (L) and second-level permissibility (P). Besides, 'unilateral liberties' can as such not be advantageous for their holders and thus lack a basic quality of any possible right – a point that will concern us below in sec. b), bb), (2).

(b) Liberties and Protective Claim-Rights: Introduction

The finding that liberties should be read as (bilateral) permissions does not immediately supply us with an answer to the question of what the mere fact that A *has* such a permission means for B. More specifically: Does the fact that A has a permission to perform an action X entail any duties for B towards A and accordingly any claim-rights for A? *Hohfeld*'s answer to this question – and that of most Hohfeldian scholars alike – is clear and simple: No, it does not. He thereby offers a somewhat reduced account of liberties as plain or 'naked' permissions.[46] Being plain or 'naked' permissions the only thing these Hohfeldian liberties entail for B is the following indirect effect: If A has a permission to do X she necessarily does not have a duty, i. e. neither an obligation to do nor a pro-

[44] See above sec. II, 3., b), aa), (2).

[45] Thereby the validity of the argument is independent of the fact that there is indeed only a mutual exclusivity between duties simpliciter and permissions and not between Hohfeldian liberties and Hohfeldian duties, as we will find presently.

[46] Jeremy Bentham, *Works Volume III*, ed. John Bowring (Edinburgh: Simpkin, Marshall & Co., 1843), 218. Cf. also Hart, *LR*, 181.

hibition not to do X, which evidently entails the impossibility for A to be under a duty *towards B*. This in turn entails that B can have no claim-right against A, which led *Hohfeld* to fittingly describe B's position as a 'no-right'. As a purely logical deduction this reasoning is indisputable. In order to elucidate the role of Hohfeldian liberties in legal and moral reasoning consider the following (standard) example[47]: A walks along a deserted alley at night and sees a derelict 50 € note lying on the ground. At the same time, B also sees the note approaching it from the other side. Now, supposedly, A has a liberty – towards B and towards other people in general – to pick up the derelict note. However, B is not under a duty to let A pick it up, but in fact B has the same liberty, namely to pick up the money. If, however, B has the same liberty as A, then A's liberty is 'unprotected' in relation to B, i. e. it is not protected by a respective claim-right towards B for him to refrain from impeding A's action, in this case to not pick up the note himself. Thus, in a way A and B are in a state of *allowed competition* to pick up the note. Due to the immense importance of properly understanding this competition aspect of *Hohfeld*'s concept of liberties we shall have a look at another, similar example: the freedom of trade or the case of competition on free markets. Imagine A runs a small business, e. g. a bakery. Suppose she does so in a legal system that generally honours the principle of 'freedom of trade'. Then we can assume that A has liberty to run her shop. However, that does not seem to imply for legal practice that A is able to raise any claims against B opening his own bakery right down the street or possibly even right next to A's. In this sense, A's liberty (to run her own business) does not necessarily entail any claim-rights against other parties not to interfere with her business by way of competition, possibly even to the extent of ruining A if all of A's former customers now prefer to buy their bread from B.

Finally, another example – this one originating from *Hohfeld* himself – which helps to demonstrate the independence of Hohfeldian liberties and claim-rights is the famous shrimp salad.[48] The initial situation is this: B owns a shrimp salad and A would like to eat it. *Hohfeld*'s claim is the following: Even though in practice perhaps a bit strange, there is nothing theoretically inconsistent in B giving A the permission to eat the salad, yet not giving her a respective claim-right to do so, i. e. putting herself under a duty to let A eat the salad. And even though B would be permitted to impede A from eating the salad, A's normative situation is supposed to be somewhat improved: Whereas before she was not even allowed to try and eat the salad, she now allegedly is. Put differently, whilst before she was under a duty not to eat the salad, she now is no longer.

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47 Hart, *LR*, 180. The example is only slightly modified here.

48 Hohfeld, "Some fundamental conceptions," 41. For a detailed analysis of this and other, similar examples see also: Judith J. Thomson, *The Realm of Rights* (Cambridge, MA: Harvard University Press, 1990), 51 ff.

This fact alone is regarded by *Hohfeld* as advantageous for A independent from the fact that B is under no duty to let A actually carry out her action, i. e. that B is permitted to take all kinds of countermeasures.

(3) Powers and Liabilities

Powers, like liberties, are concerned mainly with A's own actions. According to *Kramer* someone holds a power that "can expand or reduce or otherwise modify, in particular ways, his own entitlements or the entitlements held by some other person(s)"[49]. Put a bit differently a power means "that one can change a legal relation through a volitional act or omission"[50], through a practical decision. In contrast to liberties and claim-rights, *Hohfeld*'s second-order powers are not determinable with reference to the evaluation of the action in question, that is, with reference to the deontic modalities. However, they are in a way merely *factual* abilities to bring about changes in one's own or others' normative positions, whereas in this context 'factual' means that having a power merely implies the ability to perform actions which themselves do not have to be normatively assessed. Hence, the ability[51] implied in a Hohfeldian power can be described as normative, yet only with regard to its effects, not with regard to its provenance. In other words, according to *Hohfeld* the central feature of a power is the normative effect the factual performance of an action has, irrespective of the normative demand associated with this action, i. e. irrespective of it being object of a permission or a duty.

Importantly, powers can only be exercised by an agent, by means of an action. In this respect it has been often and correctly pointed out that the mere causation of changes in legal relations, the simple fact of something having a normative effect cannot be the only defining feature of powers, as the content of normative systems is generally dynamic and often influenced by events outside the control of agents. An example by *Harris* is a lightning hitting a tree, creating the duty of bystanders (or at least of firefighters) to put out the fire.[52] Clearly the lightning does not exercise a power. Hence we learn that the sole criterion of 'having a normative effect on the content of the system' cannot be the only one for something to qualify as a power. In other words, the change in normative requirements brought about by exercising a power is in every case a

[49] Kramer, *RWT*, 20.

[50] Visa Kurki, "Why things can hold rights: reconceptualizing the legal person," in *Legal Personhood: Animals, Artificial Intelligence and the Unborn*, ed. Visa Kurki and Tomasz Pietrzykowski (Wien/New York: Springer, 2017), http://ssrn.com/abstract=2563683, 6. Page reference refers to the version available online.

[51] Hohfeld, "Some fundamental conceptions," 45.

[52] James Harris, *Legal Philosophies* (London: Butterworths, 1980), 81. See also: Kramer, *RWT*, 102; with a similar example: Campbell, *Rights*, 208–209. Cf. also Andrew Halpin, "Rights, Duties, Liabilities, and Hohfeld," *Legal Theory* 13 (2007): 37.

matter of decision of an agent incumbent with the respective power. As much is commonly accepted.[53]

The intended role of Hohfeldian powers in normative reasoning can be elucidated by referencing the following two examples: First, suppose A is a soldier and part of a chain of command. G, the general, wants B, another soldier, to do X, but she is not able to give the order directly to B. Thus, G orders A, being superior to B, to order B to do X, that is, to pass on the respective order. Now, even though A is obviously under a duty to give the order to B, she also seems to have a power in relation to B. Clearly, A's order creates a duty that B would not have had without A's action and, independent from the fact that A would violate her own duties if she did not comply, B is liable to A's discretion in this respect. Consider also the second example, a typical case from private law, well known to jurists as a so-called *bona fide purchase*: A borrows an item Q from D. Without D's permission A sells Q to B, who believes A to be the lawful owner of Q and objectively has no reason to believe otherwise. In most legal systems (at least those which I am aware of) in such a case B will gain the property of Q despite the fact that A was actually not allowed/entitled to sell Q in the first place. Selling Q to B is clearly forbidden for A. Yet, at the same time the change in legal relations, i. e. the transfer of the property from D to B, is (apart from additional requirements like B's good faith) dependent on A selling Q to B as a volitional act, i. e. A deciding to sell Q. Thus, A appears to have the ability to change the normative requirements in this situation by her discretion. A seems to have an ability to bring about the normative effect of a change in ownership – and therewith a Hohfeldian power – despite being forbidden to perform the very same action.

Let us also consider the concept correlative to powers: liabilities. Due to their strict correlation with powers the concept of liabilities appears rather straightforward. Consider as an example a consent into bodily injury: A allows B to cut him open with a knife – hopefully because B is a surgeon and A needs to undergo surgery. In this case A has a power over B, who might or might not want to cut open A, regarding B's (pre-existing) duty not to cut open or otherwise hurt A. B cannot decide for himself whether to be allowed to cut A, but the decision regarding whether B should be under a duty not to do so or whether he should be permitted to do so lies solely in the hands of A. In that sense B is exposed to A's exclusive ability to alter the normative demand in question. Accordingly, B is 'liable' to A with regard to his preliminary duty not to cut A, who in turn has the 'power' to define this specific normative matter, that is, to control the practical reason in question.

[53] Kramer, *RWT*, 102, with further references.

(4) Immunities and Disabilities

Due to a similarly strict connection to the notion of powers, we can finally be reasonably brief about immunities and disabilities at this point. Quite simply, entity A has a Hohfeldian immunity in case B lacks a power regarding a certain normative matter with effect on A, that is, in case B lacks the power to bring about any changes with regard to a pre-existent (first-order or second-order) normative position of A. This lack of power on B's side is, in turn, labelled by *Hohfeld* as a disability. Hence, an immunity implies the absence of a liability, just as a power implies the absence of a disability.

b) Critical Appraisal of Hohfeld's Scheme

As indicated earlier, our goal in the ensuing sec. b) is to make an adjustment of the findings regarding *Hohfeld*'s scheme to the proper aims of our approaches, i. e. we opt for a critical review of the entitlements laid out so far with respect to the question of whether they are able to meet the requirements of the scope in their thus far presented form. Wherever this is not the case we shall adjust the respective entitlement accordingly.

aa) Advantageousness and Appendance

Preliminarily, we ought to clarify the notions of advantageousness and appendance in general in order to consequently apply these thoughts to each of the previously presented entitlements. Above all, we need to ascertain the meaning of the notion of an 'advantage'. That is: When can we generally assume that a position is normatively advantageous for its holder and are there different degrees of advantageousness which can or should be distinguished? Essentially, I will assume in this respect that for anything to be advantageous for an entity within a normative system, the entity needs to be invested with a reason, abstract or practical, provided by this very system. That entails: The notions of advantageousness and appendance are very much mutually dependent. More precisely, within a normative system any conjuncture is (intersubjectively) advantageous for an entity if and only if there is a (practical) reason provided by this system that is directly appendant to the entity – either due to ascription or due to already being intrinsic.[54] In other words, an advantage exists if a reason, and there-

[54] If a state of affairs is supposed to be 'advantageous' in some way, it has to be the case that there is an advantage *for* someone or something, i. e. it needs a reference object or a 'holder'. As a consequence, we can identify two ways to determine rights or entitlements: In theory, we start off with a minimal normative system that simply contains some predefined normative requirements with regard to the behaviour of the agents addressed by it. In order to acquire 'rights' in this system we could either start with a reason, i. e. the normative content of a principle, norm or prescription, as a necessary element of this and any system and 'append' it to a certain entity in the sense of ascribing it to this entity or a feature of this entity. On the other

with ultimately and possibly a reason for the imposition of duties on others, lies in the entity itself.

There are a number of things to clarify about this idea of advantageousness. First of all, and as already indicated, the idea can only be correctly grasped *within* the normative system that is investigated, i. e. from the perspective of the respective authority, that is, from an intra-systemic standpoint and explicitly not from that of the entity that is *supposed* to have an advantage.[55] This idea to take the 'intersubjective standpoint' and not the subjective one by questioning the advantageousness for A is of crucial importance. It is best explained and demonstrated, however, with direct reference to the specific entitlements. Thus, we shall return to it in more depth mainly in sections (2), (b) and (3), (a).

Secondly, how are we to understand the necessity of an *appendance* of reasons? Generally, a normative system provides reasons, abstract and practical ones. By definition, these reasons represent what is deemed good, positive, worthy of being achieved by the respective authority. Thus, from an intra-systemic standpoint the notion of 'advantage' for anyone or anything is necessarily linked with that of reasons. However, plain reasons are for a start only *addressed to* agents. *Individual advantage* is not necessarily provided for in a normative system. In order to determine this kind of advantage we need the notion of appendance. The reason in question (abstract or practical) needs to be associated with the entity in question. Importantly, neither the notion of advantageousness nor that of appendance limit the range of rights to practical reasons only, i. e. an abstract reason appendant to an entity meets the requirements of the scope just as a conclusive reason does. In this respect the scope of rights is considerably wider than *Hohfeld*'s scheme with its restriction to 'practical rights' (see above).

Yet, as much entails a crucial question: How determinate does the 'advantage' for an entity accompanied by a certain position have to be in order for this position to be qualified as a 'right'? In other words, should we not prefer to limit the scope of rights to such positions that are *ultimately advantageous*, i. e. to such reasons that become practical as conclusive reasons for someone else's *actual* duties and not just those which are general or *prima facie*? Indeed, the fact of whether a conjuncture is in effect advantageous for its holder can, strictly speaking, only be determined with reference to practical prescriptions or con-

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hand, one could start with a certain entity or a certain feature of an entity and regard it as being invested with intrinsic value. This insight might seem trivial; it should be helpful though for a clearer understanding of the notions of 'appendance' and 'advantageousness' of rights and their mutual dependence. Furthermore, it should decrease the scope of our analysis, because by explaining the role of 'advantageousness' for any concept of rights, which is what we are planning to do, an implicit explanation for the feature of 'appendance' is also provided.

[55] See, for instance, Raz, "Nature of Rights," 195 ff., where Raz refers to a subject's 'critical' interests as opposed to or rather independent of his or her subjective wishes/preferences. See also Sumner, *MF*, 40, with further references.

clusive reasons. With norms it could only be determined in a generalised form that allows for exceptions. Put differently: Earlier we stated that the Hohfeldian analysis is restricted to practical reasons. These can be the content of concrete prescriptions and general norms. For instance, if we said 'A has a right not to be harmed by B' we would often mean it not in a conclusive but in a generalised sense, which would imply that there could be circumstances under which B no longer has a duty not to harm A, e. g. if A herself attacked B and B acted in self-defence. Thus, strictly speaking an actual or ultimate advantage for A would lie only in those concrete cases of application in which B has an actual respective duty. Accordingly, an entitlement in the form of a norm can also only be normally advantageous for A. Importantly, this idea of being 'normally advantageous' is supposedly not equivalent to the one *Kramer* refers to by claiming that rights need only be "normally advantageous"[56]. He thereby understands the notion of advantageousness in a way that not all practical manifestations of an entitlement necessarily have to be advantageous but rather only most of them. Hence, according to *Kramer* one might have a concrete right in a specific situation but still not have an advantage from it. Given what has been said so far, this thought has to be rejected. One could reach this result only by determining advantageousness from a subjective point of view, which we clearly should not do (see above). With regard to concrete prescriptions the case seems clear: To generally possess, for instance, a claim-right like A's right not to be harmed surely does not mean that one's claim will be successful in any given case. The claim would be successful, though, if we thought of the position as a *concrete* claim-right, which is necessarily prevailing as a conclusive reason. Such a conclusive reason can by definition not be outweighed or out-reasoned by other considerations.

Does this mean we should restrict our investigation to concrete rights, that is, conclusive reasons? Surely not. Simply, the scope does not prompt such a restriction. Indeed, reasons ultimately exist in order to guide the actions of the addressed agents, i. e. in order to ultimately serve as conclusive, practical reasons. Yet, this is not incompatible with the idea that if an abstract reason is appendant to an entity, this can be regarded as (generally) advantageous for the entity in question. Even though there are no correlative duties to this abstract reason, the requirements of the scope are met nonetheless. Moreover, we are very much used to the language of such abstract rights as we can see from the first example under I, 1., a), bb). Nevertheless, the idea of different degrees of advantageousness – or rather different degrees of determinateness of advantages – can and will help us by comparing the different entitlements, by correctly ordering and classifying them.[57]

[56] Kramer, *RWT*, 93.

[57] Depending on one's perspective, the self-imposed restriction of the Hohfeldian scheme

Before we do so, one final, important side note: The notion of advantageousness as presented here is a necessary requirement only to determine manifestations of the scope of rights. Surely the idea of advantageousness as a necessary element does not have to be shared by other theoretical approaches with distinct theoretical aims. In effect, despite their proposed commitment to 'rights', it is not shared by *Hohfeld* and *Kramer*, at least not comprehensively. Supposedly, they engage in a purely analytical endeavour with the goal of working out distinguishable structures and functions within a normative practice such as the law. In my view, they fulfil this task in a manner deserving approbation and even admiration. However, in order to work out an adequate concept of *rights*, one ought to choose an approach that takes the advantageousness-axiom more seriously. Accordingly, we can detect a fundamental conflict of goals with the original Hohfeldian enterprise, which is also inherited by *Kramer*. On the one hand different (possible) cases of the application of the term right are supposed to be described, whilst on the other hand the advantageousness-axiom is practically neglected. Both are not possible at the same time: An approach can be either purely analytical, interested in fundamental deontological structures, and thus without a specific interest in rights; or one's approach is concerned with rights and therefore one cannot avoid a strict dependence on the advantageousness-axiom as presented above. Put differently, I believe *Kramer* is right that *Hohfeld*'s analysis could be read simply as an 'analytically purificatory'[58] enterprise in deontic logic. If this is so, then we should expect an analysis of the deontological structures in bipolar relations in an abstract way, independent of the aim of identifying possible, individually advantageous elements, i. e. 'rights'. 'Purificatory analysis' surely would be a more than valid theoretical enterprise. Yet, certainly we could not think of the results of such an analysis as more or less strong manifestations of a more general idea of 'rights' then. Precisely, to separate the notion of advantageousness from the concept of entitlements would be analytically purificatory to an extent where the theoretical approach would have to be regarded as inviable if its aim were to elucidate a concept of rights. Put differently, one could try and understand *Hohfeld*'s scheme as an analytical framework for bipolar relations in deontic

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to practical reasons can be regarded as either a strength or a weakness. On the one hand, it does lack comprehensiveness with regard to normative phenomena. In this respect, by excluding principles from the logic of 'rights', his account of entitlements is significantly narrower than the scope of rights we offer here. This does not have to be regarded as a disadvantage in every respect, though. Despite its obvious limitations with regard to explaining normative phenomena, I believe Hohfeld made an admirable point for the practicability of reasons, for the notion of applicability of normative thought, as promoted earlier in this thesis, see also Carl Wellman, "Legal Rights," 214. The bottom line is: The restriction weakens the explanatory power of Hohfeld's account as a meta-ethical theory, but strengthens his initial point to offer a scheme of legal relations, thus of normative relations 'as applied in judicial reasoning'.

[58] Kramer, *RWT*, 22.

logic more generally, as *Kramer* apparently does. Yet, as much would thwart the scheme's very own initial purpose to shed some light on the language of rights more specifically and not just to identify general, atomistic deontological structures without any reference to a right's central feature of being advantageous for its holder.[59]

bb) Revaluation of the Entitlements

Once more: All these very general thoughts are best illustrated with reference to specific entitlements. Thus, let us now return to claim-rights, liberties, powers, and immunities and the question of whether, and possibly to what extent, they meet the requirements of the scope.

(1) Claim-Rights

With regard to claim-rights and duties there is significant agreement between our approach and *Hohfeld*'s. Only the fact that the concept of Hohfeldian duties is more demanding than that of duties simpliciter is not always acknowledged amongst Hohfeldian scholars. For instance, *Kurki* claims that "[f]or every regulated action […] A has either a duty or a liberty, and B has either a claim-right or a no-right"[60]. Allegedly, there is a serious flaw hidden in this assumption as the logic of Hohfeldian duties is simply equated with that of obligations and prohibitions as duties simpliciter. However, as we saw earlier, the notion of a Hohfeldian duty presupposes a connection between the normative demand on B and the entity A, which in terms of fundamental deontic modalities is all but necessary and which is not implied in the notion of a duty simpliciter. Hence, obligations and prohibitions are more basic than Hohfeldian duties. Accordingly, the fundamentality-thesis needs to be rejected. The correlativity-axiom on the other hand not only remains untouched by these findings but rather can be regarded as the very reason for this surplus of presuppositions with Hohfeldian duties. Put bluntly: For an entity A to have a normative advantage *ultimately* and in practice means that there is a bipolar relation with correlative duties of a person B towards A (see above). In this respect *Hohfeld* was right and as much was probably what led him to perceive claim-rights as 'rights in the strictest sense'. However, it is noteworthy that Hohfeldian duties and claim-rights do not necessarily exist in every conceivable normative system – in sharp contrast to obligations and prohibitions as their primary elements.

In contrast to 'liberties' as active entitlements, claim-rights mark the standard form of passive entitlements. Notably, despite the classification in active

[59] We will return to this notion of advantageousness, its general importance and meaning for a more thorough analysis in a critical re-analysis of Hohfeldian powers, see below sec. b), bb), (3).

[60] Kurki, "Reconceptualizing the legal person," 5.

and passive entitlements, the general idea of an entitlement has no necessary connection to the idea of actions or practical reasons. Hence, as indicated earlier, passive entitlements can not only come in the form of concrete prescriptions and norms, but also in the form of principles. Once more: In this respect our approach clearly exceeds *Hohfeld*'s scheme and its restriction to practical reasons as we do not only acknowledge 'A's right not to be harmed by B (correlative to B's specific duty)' but for instance also 'A's general right to bodily integrity' as manifestations of the scope and therewith as *possible* rights, albeit the latter does not refer to a bipolar relation and/or to specific, correlative duties. Nevertheless, it can be regarded as a *passive* entitlement, because it is certainly not a principle which A can act upon, but at best – namely if put into a respective relation with other principles – it could justify duties of others, strictly without reference to what A herself is permitted to do, though. We shall scrutinise the idea of active entitlements and the difference between active and passive entitlement presently in sec. bb), (2), (a) below. For now, we may state that by including appendant principles as abstract rights into the wider scope of rights *Hohfeld*'s correlativity-axiom does not have to be given up, but it merely needs to be qualified: In order to determine an actual, ultimate advantage, we need to rely on the correlativity of A's claim-right and B's specific duty. Thus, the correlativity-axiom is undoubtedly an appropriate axiom when investigating only practical reasons. Moreover, one might say that this axiom and the scheme's self-imposed restriction to practical reasons are mutually dependent. Yet, neither presupposition is a necessary requirement in order for someone's normative position to fulfil the features of the scope, i. e. to be qualified as a *possible* right. In other words, the correlativity with a duty of B towards A is not necessary in order to determine more generally advantageous positions of A such as her abstract 'right to life', which could – without further ado – be qualified as a manifestation of the scope of rights as this scope only asks for advantageousness in general. To be clear, though: Appendant principles can be regarded as manifestations of the scope of rights and even as passive entitlements, yet certainly not as claim-rights, since in accordance with *Hohfeld* these are limited to the realm of practical reasons.

Finally, based on our insights about claim-rights and duties let us consider a long-standing debate in legal theory regarding a possible priority of either rights or duties – with those on the one side claiming a priority of rights over duties (at least in terms of justification of the latter by the former)[61] and those asserting a fundamentality of duties instead, arguing that most 'rights' – more

[61] Dworkin, *TRS*, 171; Mackie, "Right-based moral theory," 350; Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon, 1988), 69 ff. Cf. also this instructive article by Raz: Joseph Raz, "Right-Based Moralities," in *Rights and Reason*, ed. Marilyn Friedman et al. (Dordrecht: Kluwer, 2000).

precisely, *claim-rights* – are mere reflexes of duties[62]. We now find that this question of whether a right necessarily only follows the logical implications of a duty depends not only on how we understand rights, but especially on how we understand duties and their underlying reasons. If we see certain entities, e. g. at least human beings, invested with appendant value, we find that in these cases rights and duties are indeed in a reflexive position with regard to one another. Whenever B has a duty not only with an effect on, but *towards* A, A in turn has a right towards B – and *vice versa*. Whereas if we do not make this assumption of *appendance* of reasons, the idea of duties in the sense of mere obligations and prohibitions might well be seen as more fundamental than that of 'rights' (at least in the sense of Hohfeldian claim-rights). However, in this case there would be no deontological connection to any notion of rights whatsoever and thus strictly speaking also no priority of duties over rights, as rights are necessarily "relational properties"[63], i. e. quantities that presuppose a *normative relation* between two entities, which yet needs to be established (see above). Consequently, in the case of only one agent following e. g. a divine commandment, there is no room and also no need for rights. Thus we may state: There is no priority between claim-rights and directional duties. And, strictly speaking, there is no priority between rights and duties simpliciter either, as with duties simpliciter there simply are no rights that could be inferior.

In this respect so-called 'right-based moralities'[64], as proposed e. g. by *Dworkin* or *Mackie*, essentially ignore the difference between rights as practical or as abstract reasons. In order for their claim regarding a priority of rights over duties to be true, rights would have to be understood as abstract principles. In other words, the underlying idea is this: If rights are principles/abstract reasons and duties are practical reasons implying a relation of precedence, then rights need to precede duties in the sense that the respective right needs to be put into a relation of precedence first in order to become a duty. Two things are objectionable about this reasoning: First, as just demonstrated, *practical* (claim-) rights

[62] As much is famously referred to as the 'redundancy-argument', see inter alia Hans Kelsen, *Reine Rechtslehre* [1960], 132 (in German): "*[Der] als 'Recht' oder 'Anspruch' eines Individuums bezeichnete Anspruch ist aber nichts andere als die Pflicht des oder der anderen. Spricht man in diesem Fall von einem subjektiven Recht […] eines Individuums, als ob dieses Recht […] etwas von der Pflicht des oder der anderen Verschiedenes wäre, so erzeugt man den Anschein von zwei rechtlich relevanten Sachverhalten, wo nur einer vorliegt*". Cf. also Hart, *LR*, 190, 199. Critical in this respect: Kramer, *RWT*, 26 ff.; specifically critical with regard to the idea of claim-rights being the mere 'reflex' of duties: MacCormick, "Rights in Legislation," 199–200. For a differentiated account, which proposes a kind of weak priority of duties over rights see Finnis, *Natural Law*, 205 ff. In a nutshell, he claims that "the concept of duty, obligation or requirement [has] a more strategic explanatory role than the concept of rights" (id, *Natural Law*, 210).

[63] For this rather fitting choice of words see Markus Stepanians, *Rights as Relational Properties* (Berlin: De Gruyter, forthcoming). Cf. also Koller, *Theorie des Rechts*, 95.

[64] See above sec. III, fn. 61.

could never be regarded as prior to duties due to their mutual dependence. Secondly, the assumption that abstract reasons are prior to practical duties presupposes a fact which is not only all but necessary but also in its exclusive aspiration rather false, namely that normative reasoning necessarily *starts* at the level of abstract reasons and *ends up* at practical judgements. We could just as well think of it the other way around. In fact, as much has been attempted to explain in the foregoing section on principles and norms: Normative practice is a constant inductive-deductive process with no proper determinable starting point. Thus, between abstract reasons and practical judgements there is strictly no logical priority to determine. Admittedly, in terms of justification, we may – in fact, we have to – think otherwise. At some point we either need a conclusive reason or a final judgement. So, one may claim a *justificatory* priority of certain (possibly intrinsic) abstract reasons – and thus also of abstract rights – over practical duties,[65] but he or she would need a cogent substantive normative theory in order to do so. Any claim regarding a logical priority of rights or duties has to be renounced decidedly.[66]

(2) Liberties

Earlier we found that – already for terminological reasons – a Hohfeldian essentially ought to understand liberties as (bilateral) permissions, not as mere legitimate acts. More precisely, within the logic of *Hohfeld*'s scheme, liberties ought to be understood as 'naked' or plain permissions.[67] As such they correspond to 'no-rights' for any other entity B. However, I contend that a 'naked' or plain permission can as such never be advantageous for the agent holding it, and thus it cannot qualify as a possible right. Initially, permissions are simply non-evaluated structural features of a normative system. They merely represent the absence of a pre-determined normative content in the form of a duty, which entails a normative exemption for A (see above). Hence, the common claim lies at hand that liberties as plain permissions need to be surrounded by a 'protective perimeter' of claim-rights, which – being 'rights in the strictest sense' – thus provide the necessary advantage for A. This is roughly the Hohfeldian reasoning, which surely allows for a clear separation of claim-rights and liberties. Yet, a decisive question which *Hohfeld* does not take into account is this: Can the fact that agent A has a permission to do X somehow be regarded as advan-

[65] Presumably, as much is what Dworkin aimed at in the first place due to his entirely different methodological framework, cf. above sec. I, 1., b), bb).

[66] We shall return to the delicate relation of rights and duties and the question for a priority either way in sec. e), cc), (3), (c), when discussing the genesis of rights.

[67] Hart correctly claimed that "Hohfeld's 'liberty' or 'privilege' is by his definition a unilateral liberty" (Hart, *LR*, 176). Indeed, Hohfeld originally *intended* liberties/privileges to be understood that way. In this respect, his scheme is in need of a decided revision. Accordingly, and just as correctly, Hart advocated the "bilateral character" of liberties (ibid, 175).

tageous for A in a way that cannot be adequately captured *only* in a language of duties and correlative claim-rights? My assumption is yes, under the supplementary condition that 'individual autonomy' or 'individual freedom' is regarded as a general principle/abstract reason in the normative system in question. Evidently, such an understanding of 'liberties' is bound to blur the lines between claim-rights and liberties to a certain degree, because if liberties are supposed to be effective they cannot simply represent an abstract reason, but they rather need to imply a precedence of the abstract reason of autonomy. Consequently, they imply other agents complying with this reason, thus being under duties towards A, thus A having a claim-right. However, we will find that liberties as *active entitlements* remain clearly distinguishable from plain claim-rights. To be clear, as results of a plain deontological analysis the conventional understanding of Hohfeldian liberties as naked permissions is all but implausible. Thus, by revising the concept of liberties in this section, it is not *Hohfeld*'s supposedly impregnable deductions regarding the relation of his liberties and 'no-rights' that are challenged, but rather the *reductiveness* of his concept of liberties and that of no-rights in turn. We must reject this reductionism when searching for a proper concept of rights. Put differently, *Hohfeld*'s concept is simplifying to a point where his liberties no longer serve a meaningful purpose for a conceptual theory of rights.

(a) Determinateness of Liberties as Active Entitlements

In the light of the foregoing general remarks on advantageousness, one may wonder just how determinate the advantage for A is with such 'liberties' understood as *valued permissions*. In this respect I shall make the following contention: Whilst we should not perceive of liberties as naked permissions due to the necessity to hold some advantage for A, very similar to claim-rights (see above) the term can, correctly understood, comprise both active entitlements in a very general, non-relational way and in a very narrow way, with reference to specific duties correlative to a specific permitted act. In detail: As soon as individual freedom of decision is regarded as a principle, then automatically with every assigned permission we can also detect an appendant reason. As much is a crucial peculiarity in the derivation or determination of active entitlements. Determining an entitlement, we can usually ground our thinking in a certain reason, for which we then need to establish a connection to an entity – either by ascribing the value or by presupposing the intrinsic nature of the value with the entity. In the case of active entitlements this derivation process is in a way turned upside down: To begin with, the general ability to make autonomous decisions is necessarily inherent to or appendant to any agent within the logic of a normative system. Hence, in the case where A has a permission to do something, this inherent ability of hers simply needs to be *valorised* in order for her exercise

of this ability to be regarded as something inherently advantageous. In other words, passive entitlements like claim-rights place reasons at their core, reasons for duties. Thus, the idea of an advantage is naturally provided for by these entitlements; only the notion of appendance or the idea of a 'directionality' of duties needs to be somehow explained.[68] With active entitlements it is the other way around: The notion of an agent's not being under a duty is their core feature, and thus the notion of appendance (of autonomy) is naturally provided for. Only the issue of why the possibility to decide freely should be advantageous for A needs to be somehow accounted for. Surely, we might say something similar e. g. about A's passive 'right to life' – being alive is *a priori* appendant to A, and it needs to be valorised in order to become a right. Indeed, 'A's right to life' and 'A's right to freedom' are structurally similar in this respect: They describe an abstract value appendant to a specific entity. However, the decisive difference between (I) 'A's right not to be killed' and (II) 'A's right to do X' is that (I) is determined only with reference to possible duties of B, whilst (II) is determined *primarily* with reference to A's own action or the fact that she is herself permitted to do X. Hence, it is because A herself has a permission and not because of some appendant or non-appendant reason that, in terms of structure, active entitlements are clearly distinct from passive entitlements. The assumption that a valued permission is thus not simply a subspecies of claim-rights immediately suggests itself.

Once more, what does the difference between active and passive entitlements amount to exactly? As indicated, we can infer from the examples (I) and (II) that active and passive entitlements usually do not show the same degree of determinateness with regard to advantageousness. With claim-rights the correlative duty to A's advantageous position needs to be determinable. With liberties *at least* the permitted action itself needs to be determinable. The existence of such a permission is necessary in order for A's individual autonomy to actually pertain. Now, if A's autonomy is valued, without reference to correlative duties we may say that 'A has a right to do X' because from the intra-systemic standpoint she generally profits from the fact she is allowed to decide freely over performing or not performing X. This does not affect the fact which we learned earlier, that the advantageousness of any normative position is *ultimately* attached to the normative demands on other agents. Thus, if we want to understand liberties analogously to claim-rights in a narrow sense, then the execution of the permitted action has to correlate with a specific duty of another person B, which is essentially based on respect for the specific exercise of autonomy by A – a *respect duty*.[69] Such a respect duty exists whenever the acting agent's in-

[68] See above sec. III, fn. 39.

[69] Notably, the term 'respect duty' is used in a very narrow sense as such duties that are based on the exercise of individual autonomy. On the notion of respect as a reason for legal duties more generally (and presumably less precise) cf. Kurt Seelmann, "Respekt als Rechts-

dividual autonomy manifested in the performance of a permitted action X is the decisive, prevailing reason for others to be under duties of support or non-interference. Hence, structurally analogous to our example 'A's right not to be killed' would be 'A's right to do X and be respected in doing so'. Already it is noteworthy that this concept of respect duties is a rather narrow one, i. e. not every duty of non-interference with a permitted action is necessarily a respect duty.[70] Furthermore, even liberties in this narrow sense can often additionally be protected by other specific claim-rights. These points shall be scrutinised presently in subsection (c). At this stage of the investigation it simply ought to be pointed out that, in order to qualify active normative positions as rights, one needs to establish some kind of connection from one's permission to reasons for other people's duties towards the right-holder. With the essential feature of active entitlements being the absence of duties and thus the existence of a normative exemption, the easiest (and in fact the only) way to do so is to valorise individual decision-making ability, which can ultimately lead to respect duties for other agents. However, with regard to the necessary degree of determinateness of liberties, what has been stated previously about claim-rights applies: Ultimate advantage is not necessary in order to meet the requirements of the scope. Thus, also a solitary, non-relational 'right to do X' is perfectly possible as well, as long as we keep in mind that correlative respect duties to this 'right' need to remain theoretically determinable. Hence, analogously to one's most abstract passive entitlements, e. g. the aforementioned 'rights' to life or bodily integrity, we can also think of a most abstract active entitlement as a 'right to freedom'.[71]

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pflicht," in *Rechtsphilosophie im 21. Jahrhundert*, ed. Winfried Brugger, Ulfrid Neumann, and Stephan Kirste (Frankfurt a. M.: Suhrkamp, 2008). Supposedly, the determination of respect duties, i. e. the separation of simple duties and respect duties, can in practice be quite problematic. On the face of it, a certain duty of non-interference could be a respect duty, yet it could also be based on another, independent reason. Essentially, as much is a substantive question – i. e. it depends on the values protected by the normative system in question and the specific mode of protection in this context – and thus not part of our investigation. Besides, the fact that a differentiation will not always be easy in practice does not damage or otherwise negatively affect the clarity of the theoretical distinction.

[70] Cf. Thomson, *Realm of Rights*, 53–54. The distinction, which Thomson has in mind, between 'privilege' and 'liberty' is not unlike ours between 'Hohfeldian liberties' and 'liberties in a narrower sense'. Yet, what Thomson, like others, fails to acknowledge is the fact that 'privileges' cannot be regarded as *entitlements* because they are not advantageous for their holders.

[71] Essentially, 'this right to freedom' as the accepted good of individual autonomy (see below) reflects the Kantian notion of freedom as the 'original [human] right': "*Freedom* (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity." (Kant, *Metaphysics*, 393). However, in effect the two conceptions differ significantly. Whilst Kant, just like Hobbes, appears to use the term 'right' as something existent in a pre-positive, pre-social state, from which duties are thus derived, as much is explicitly denied for our concept of rights: Rights exist only if and only because there is a social context and there are other agents that comply with the reason these rights represent, i. e. (respect for) individual autonomy. Essentially, Kant's idea of an 'original human right'

Let us remember at this point that we are only discussing entitlements so far and that the issue whether we actually *should* refer to either kind of entitlement as 'rights' is yet to be decided.

(b) Liberties as Bilateral Permissions

Earlier we argued that liberties should be understood as bilateral or strong permissions and not (also) as unilateral ones. Whilst at that point we mainly criticised the danger of terminological confusions entailed by a two-fold concept of liberties, it should now be clear why a 'unilateral liberty' could also impossibly be regarded as an active entitlement, let alone a right. This is due to the necessary link between freedom and advantageousness with active entitlements, which 'unilateral liberties' cannot account for, because they do not necessarily entail an area of autonomous decision, i. e. a permission, but possibly an obligation. A legitimate act, which is not at the same time permitted, could only ever be regarded as advantageous for the acting agent herself if it were a 'self-regarding duty', for instance a duty not to do harm to oneself.[72] Yet, in this case the agent in question would surely not perform an 'active right', but she would rather be enjoying a claim-right whilst simultaneously performing the correlative duty.

(c) The Relation of Liberties and Claim-Rights

Hohfeld's contention that there is no necessary connection between his concept of liberties and claim-rights is most agreeable and readily accepted. How about our concept of liberties as valued permissions, though? What is the relation of liberties in this narrow sense to claim-rights?[73] Evidently, they imply claim-rights to a certain degree. More precisely, they imply a specific claim-right, whose correlative duty is a respect duty. However, liberties do not imply all kinds of protective duties. *Hart*'s and *Bentham*'s analyses remain too vague

matches Hart's idea of freedom as the "one natural right" (H. L. A. Hart, "Are There Any Natural Rights?" *The Philosophical Review* 64 (April 1955): 175). For an excellent rendition of the Kantian concept of rights see: Marietta Auer, "Subjektive Rechte bei Pufendorf und Kant," *Archiv für die civilistische Praxis* 208 (2008): 611 ff.

[72] The notion of such 'duties to oneself' has been a matter of great controversy in legal and moral theory. For an original and very elaborate account of such duties (both as moral and possibly legal duties) see: Kant, *Metaphysics*, 394–397, 543–588. For an instructive article on the subject matter see Marcus Singer, "On Duties to Oneself," *Ethics* 69 (April 1959). For a more recent debate regarding the nature of such duties (in German language) cf. inter alia: Michael Köhler, "Die Rechtspflicht gegen sich selbst," *Jahrbuch für Recht und Ethik* 14 (2006); Bijan Fateh-Moghadam, "Grenzen des weichen Paternalismus," in *Grenzen des Paternalismus*, ed. Bijan Fateh-Moghadam, Stephan Sellmaier, and Wilhelm Vossenkuhl (Stuttgart: Kohlhammer, 2010), esp. 28–30.

[73] Henceforth the term 'liberty' will be used only in the stricter sense of a valued permission. If referred to in the Hohfeldian sense of a plain permission, it will be explicitly labelled as such.

in this respect. *Hart* claimed: "where a man is left free by the law to do or not to do some particular action, the exercise of this liberty will always be protected by the law to some extent, even if there is no strictly correlative obligation upon others not to interfere with it."[74] Yet, by assuming a protection '*to some extent*' in fact it remains entirely unclear what kind of protection can be expected from having a liberty and also from whom one is protected. Allegedly, *Hart* does have some kind of general protection of individual autonomy in mind, not unlike our account. Yet, what he fails to acknowledge is the strict connection of liberties as active entitlements to the value of individual autonomy and thus in effect *exclusively* to correlative respect duties. Other duties, like e. g. B's duty not to assault A, are not necessarily implied by a liberty, as they will be grounded in specific reasons other than the encompassing respect for A's exertion of freedom.

Nevertheless, the notion of respect *duties* implies that the advantageous aspect of active entitlements is decisively determined by somewhat accompanying claim-rights. However, there is a decisive restriction to this statement: Therewith liberties do not degenerate into a specific kind of claim-right. That is, a liberty is not equivalent to a specific claim-right that correlates with a respect duty as a specific duty, but the peculiarity of liberties (of active entitlements in general) lies in the fact that they are not determined through only one action evaluation, namely that of agent B, but rather through two reciprocal action evaluations. With a liberty B is under a duty towards A, just because A has a permission to perform another action X. This reciprocity of two action evaluations by two distinct agents is what sets active entitlements apart from passive ones. Due to this reciprocity, the idea of having a liberty cannot be adequately captured in the bare logic of duties and correlative claim-rights.

What is the primary purpose of liberties thus understood as valued permissions? Quite evidently, it is protection of the performance of permitted actions from interferences by third parties through the imposition of correlative respect duties. Thus, in practice, liberties exist especially in the relation of citizens to state institutions and public officials, which are generally responsible for observing compliance with and, where appropriate, for enforcing the law. This implies the guarantee and protection of granted areas of free permission in case autonomy is regarded as a principle, because the authoritative decision not to impose duties is then also a (conscious) decision in favour of individual freedom. In this respect, liberties will in most cases be rights of the citizen towards the state with the state being obliged to provide an adequate protection for the permitted action in question. Closely connected to this understanding of liberties is yet another central purpose of valued permissions or of individual freedom as a principle, which lies in the justification of normative demands. That

[74] Hart, *LR*, 179–180.

is, the principle of individual freedom itself describes an abstract 'right' of the citizen as the addressed agent towards the authority. Thereby it represents an argumentative counterweight to competing authoritative considerations in an alleged political discourse. In other words, once we accept individual autonomy as a general principle we also acknowledge an institutionalised requirement to *justify* restraints on this autonomy,[75] i. e. if freedom is a reason there must be better reasons in order to constrain this freedom by imposing duties – constraints out of mere caprice are thus made impossible or at least unjustifiable. In this respect, liberties represent rights of defence against the state in a classical sense.[76]

Let us clarify these general, theoretical remarks with the aid of our standard examples for liberties from before, starting with the derelict money note. In case individual liberty is generally regarded as a principle, then both A and B possess abstract liberties (not towards each other) to pick up the money, which are flanked by specific, independent claim-rights (towards each other), e. g. forbidding the other party to use violent force. A and B have liberties in a narrow sense with correlative respect duties not towards each other, but certainly towards the state or public institutions, which ought not deprive A and B of their respective 'rights' *without better reasons* and, more importantly, which have to secure the performance of the permitted act, in case there are ultimately no better reasons to restrict A's and B's freedom. A does not have a concrete liberty towards B, because B is under no duty to ultimately respect the performance of the action in question, namely picking up the money, as B himself is permitted to do the very same. Thus, the state of affairs in which A and B find themselves can be adequately described as a state of 'allowed competition'. Additionally, A's position – and B's position respectively – could be described as an 'incomplete liberty'. Such a kind of liberty pertains in case the exercise of the permitted act is generally normatively secured, but in case the holder of the liberty does not have an *exclusive* entitlement to perform the action in question, i. e. in case there are other agents that are permitted to perform the same action. On the other hand, a 'complete liberty' pertains in case *only* A is permitted to perform the action in question. For instance, A would probably enjoy a complete liberty if it was her own money note lying in the street. The idea of (in-) completeness of a liberty describes a more global feature of this liberty, thus exceeding the bare logic of bipolar relations. However, we can draw certain conclusions regarding these bipolar relations A – B from the fact that a liberty is either complete or incomplete: (1) A complete liberty entails specific liberties of A towards any other agent B. (2) An incomplete liberty entails the absence of a liberty of A towards

[75] Cf. David Lyons, "Utility and Rights," *Nomos* 24 (1982): 111: "If I have a right to do something this provides *an argumentative threshold* against objections to my doing it […]".

[76] Cf. below sec. III, 2., e), cc), (3).

any other agent B that enjoys the same (incomplete) liberty. Accordingly, a state of allowed competition entails the absence of liberties of A towards B.[77]

The difference between complete and incomplete liberties can be fittingly explained with the aid of our second example from before: the freedom of trade. With regard to the action 'offering a certain product on a certain, defined market' both A and B enjoy an incomplete liberty. For both it is a liberty towards the state which is held to secure their respective freedom to participate in the competition on the market. For A to have a liberty towards B as well, B would have to be under a correlative respect duty towards A. Presumably, B is under various duties towards A, for instance the duty not to assault A, to deceive her, to insult her or to damage her reputation otherwise. Certainly, all of these duties correlate with specific claim-rights held by A. Also one might say that they are in a wider sense grounded in 'respect' for A as a person. Yet, they do not represent 'respect duties' as they are meant to be understood in this context, because that would mean that B would have to respect A's action in the sense of letting her enjoy the opportunity to place her product on the market *exclusively*, which clearly is no duty of B's. Hence, A's 'incomplete liberty', despite being an actual liberty towards state institutions, is indeed – as *Hohfeld* correctly described it – only a plain permission towards competitors like B, a permission that is possibly, in practice usually, though not necessarily, accompanied by specific claim-rights. Accordingly, towards B this position is not advantageous for A, only towards those that are not permitted to compete with her, i. e. primarily the state as the guardian of the competition/the market. Thus generally, if A has a liberty to perform an action X there are two mutually exclusive possibilities for other agents to behave towards A, namely they are either permitted to compete with A for the respective goal entailed by the action, which implies the absence of a respect duty towards her, or they *are* under such a respect duty.

(d) Duties as a Disadvantage?

Surely, some will object to the thesis that a plain permission is not itself advantageous for its holder. Their argument will thereby probably draw on the idea that duties, in turn, are essentially disadvantageous. If this were the case, then, due to the exclusivity of duties and permissions, a lack of a duties would

[77] A different case is that in which a certain goal can only be achieved by two combined declarations of will, i. e. if various people have to act in unison in order to perform an action in the first place. An example for such an action is the right of both parents to mutually determine the name of their child. The difference with incomplete liberties is that neither of the parents separately is entitled (or even capable) of performing the action 'naming the child'. In fact, in this case (and similar cases respectively) we need to perceive of the group entity 'parents' as the significant decision maker that actually performs an action and that enjoys a liberty to do so. The fact that a prior agreement must be reached in the internal relationship/between the two parents remains untouched by this finding.

automatically entail a permission, at the same time a lack of disadvantage and hence an advantage. Put differently: A duty might be regarded as inherently disadvantageous for the addressee of the duty, because it is tantamount to an authoritative restriction on individual freedom. Accordingly, a permission being the absence of a duty would also mean the absence of a detriment for A, and as such be inherently advantageous. Finally, another way to sketch the argument is this: From the fact that A has a plain permission to perform X, i. e. a liberty in the classical Hohfeldian sense, we can infer that B cannot have a right to either demand the performance of X or a right to demand the omission of X, because that would require A to either be under an obligation or a prohibition with respect to X. Now, Hohfeldians usually suppose that the mere fact that it could be the case that B had a right towards A, and that this is in fact not the case, must be advantageous for A. Precisely, we can detect two distinct claims then: (1) Having a duty is inherently disadvantageous for an agent. (2) Due to being the correlative position to an advantageous position, i. e. a claim-right, a duty itself must be a disadvantageous position. Both are false due to neglect of the fact that the idea of a normative advantage is determined only by the appendance of a reason. In detail:

To begin with, let us remember that rights are 'relational properties'. They exist interpersonally in intersubjective systems. Put bluntly, if you were alone on this planet, you could not and would not have any rights, because there would simply be no point for you in having any. Roughly, to have a (claim-) right means to have a (practical) intersubjective reason on one's side for others to comply with. This reason ultimately forms duties for other agents addressed by the system in question. Importantly, from an intra-systemic perspective the reasons provided by the system generally indicate how the order of things should be, how the agents addressed should behave. Thus, for the system itself none of its implied reasons could ever be in a stricter sense negative, adverse or disadvantageous for *any* of the agents addressed by the system, as the system simply demands the reasons that it provides to be accepted as good. Accordingly, duties as such cannot be regarded as adverse or disadvantageous for their addressees, because they are in fact the practical affirmation of these reasons provided and protected by a normative system. Imagine B had a duty with regard to X, and A had a respective claim-right. If B complied with this duty, from an intra-systemic standpoint B would do the very *right* thing that one ought to do in this situation.[78] How can doing the right thing as such be

[78] Clearly, there is a similarity here to a more traditional Kantian understanding of duties with Kantian (moral) duties derived by means of the categorical imperative's being but an emanation of the good as such, cf. Kant, *Metaphysics*, 254–255; id, "Groundwork of the Metaphysics of Morals," in *Practical Philosophy*, ed. Mary J. Gregor (Cambridge: Cambridge University Press, 1999 [1785]), 55, 61, 73–89, esp. 88: "The objective necessity of an action from obligation is called *duty*".

disadvantageous for B then? Quite simply, within the normative system's own logic it cannot.[79]

Hence, the idea of an *individual normative advantage* can only be made intelligible if we assume a connection between one of these goods/reasons and the respective individual, which is not necessarily implied in the existence of a duty. Accordingly, to have and to comply with a duty cannot be disadvantageous for an agent in the same way that rights are advantageous for an individual, because the fact that there are is a reason appendant to A simply does not necessitate drawing any conclusions one way or another regarding possible normative advantages or disadvantages for B. In other words, the fact alone that duties mark the correlative position to an advantageous position in the form of a (claim-) right does not make the former a disadvantageous one, which proves claim (2) as false. What about claim (1), though? Intuitively it appears plausible that a duty is an inherent malady for any agent due to the implied restraint on his or her personal freedom. And indeed there are ways to perceive duties as a disadvantage or a malady, two in particular. One is to take a different perspective than the intra-systemic one, namely a subjective point of view, of the individual agent addressed, *or* a point of view outside of the system in question, i. e. by critically reviewing the content of the duty based on competing evaluative assumptions, based on the content of a distinct normative system. Yet, as we learned earlier, one ought to take an intra-systemic standpoint when determining what is and what is not advantageous in an intersubjective system. At any rate, even from a subjective perspective having a duty does not always have to be a wrong either. For instance, if you are under a duty not to torture other

[79] Possibly to many readers this characterisation of the intra-systemic role of duties will appear strange at first – not unlike an overture for an otherwise authoritative moral philosophy. Therefore, I wish to reassure you that it is not. Indeed, I regard as objectionable the fact that in political discourse in modern liberal societies we are very much used to thought patterns of freedom (manifest in the form of permissions, i. e. as a lack of substantive normative demands) as *the* universal good and duties as mere 'necessary evils'. My point is certainly not that personal freedom should not be promoted as a fundamental value. On the contrary, having been 'academically socialised' as a Kantian, often enough I cannot help but emphasize the need to foster autonomy and individual responsibility. However, in terms of theoretical meta-structures we should not too readily presuppose personal freedom as the default from which we – somewhat unwillingly – need to abstract a few necessary duties, at least not if we thereby also suppose a necessary *substantive priority* of individual freedom. In other words, all of a normative system's principles are generally to be complied with, as none of them can *a priori* be better than the other. In this sense, duties do not interfere with freedom; as practical reasons they make *practical freedom* possible in the first place, i. e. even the most liberal moral philosopher will have to acknowledge that a certain, however small, set of duties does not interfere with personal freedom, but in fact that it enables the practical exercise of freedom in a community. The idea that the principle of individual freedom may nevertheless have a somewhat pre-eminent role to play in the justification of rules is thereby not precluded, as this pre-eminence at best indicates a preliminary default function in the sense of a 'justification hurdle', explicitly without alleging an elevated normative weight in comparison with other principles. For a detailed development of this central argument see below sec. III, 2., e).

people, you probably would not object to this duty, but regard it as a sensible rule, which you accept willingly without further ado. You certainly would not perceive compliance with this rule as an inherent malady. Second, and more importantly, we *must* understand duties as an individual disadvantage in case autonomy/individual freedom is regarded as a principle in the system in question. In that case we account for individual advantage by measuring the degree of freedom.[80] Hence, an increase in the number of permitted actions is equivalent to a greater advantage just as a decrease is equivalent to disadvantage then. The decisive point is not that the duty *itself* is disadvantageous, but rather that a disadvantage occurs only if we further suppose that individual freedom is a good and thus generally an advantage. Accordingly, claim (1) is false insofar as it has to rely on this additional presupposition.

Moreover, this is precisely where *Hohfeld*'s conception of liberties fails. In order to clarify this contention, let us return to our third example for Hohfeldian liberties from above, the shrimp salad. Can we perceive the fact that A is granted a *Hohfeldian* liberty in the form of a plain permission to eat the salad as advantageous for A – either in relation to B or in general? Whilst *Hohfeld* makes the (at least implicit) claim that through B's issuance of a permission for A the overall normative position of A significantly improved,[81] the only correct answer to this question is a plain and simple 'no'. The issuance of a naked permission to eat the salad, even though theoretically possible, does itself not entail any kind of advantage for A. In fact, there are only two possibilities that it could do so: first, if B's possibilities to interfere with A's eating the salad were in some way more limited than before through the issuance of the permission or the waiving of A's duty, for instance if B were now under a duty not to reclaim the salad with brute force in case A were to get hold of it first. One might say in that case B would at least acknowledge A's liberty to *try* to eat the salad and this action would be protected. The second and only other way to regard A's newly granted permission as an advantageous position would be for it to be recognised as a liberty by a third party, so that, for instance, there would be no more negative consequences attached to the performance of the action for A. In the example it could, for instance, be the case that B would still be allowed to 'de-

[80] That does not mean that we only account for advantageousness in terms of freedom. But the imposition of a duty would certainly be *some* disadvantage for the individual agent in question – a disadvantage that could be outweighed by other reasons, e. g. the freedom of others or communal considerations, and possibly even by other individual advantages for the same agent, see therefore the remarks on the problem of (legal) paternalism in secs. III, 2., b), d), and e) below.

[81] Thomson, *Realm of Rights*, 52. There she describes the effects of a 'privilege', i. e. a Hohfeldian liberty, as follows: "if C does not interfere with D's eating of the salad […] so that D is able to, and does, eat the salad, *then C cannot complain that D wronged him*. […] That is certainly not nothing." Consequently, she claims: "We make too little of the moral significance of a privilege if, in the light of the weakness of privileges, we say that a privilege is not a right".

fend' his salad by any means but that A would no longer have to pay remedies to B for eating B's salad if she were actually to have succeeded doing so. The respective liberty of A would thus once more exist towards institutions that are empowered to enforce legal rules rather than immediately towards B. In a way, B's issuance of a permission would thus lead to a state of both A's and B's being 'outlawed' in an unregulated fight for that salad. In any reasonable legal system one or both of the two possible consequences would follow the issuance of a permission. Yet, importantly, neither possible effect – additional duties of non-interference for B or discontinuation of possible remedial damages – is a direct or necessary consequence of the fact that A is granted a plain permission.[82] In this respect *Hohfeld* was entirely right: his liberties are in theory independent of other people's duties. More precisely, there is no way to infer any immediate, necessary conclusion regarding possible reciprocal duties from the fact that a person A has a naked permission to do something – not without further information about the normative system in question and the reasons provided by it. The case in which neither of the two possible consequences mentioned above obtains would be evidence of a somewhat insensible, though not impossible normative system. In fact, the waiving of A's duty would be nothing but a purely declaratory act then – to the extent that A is 'free' to perform the action of eating the salad – but without any kind of normative protection. In effect there would be no change to the rules applicable to the case because A would in no way be better protected through the issuance of the permission. B's granting such a permission would be comparable to the authoritative issuance of a rule, which tells A that she is no longer forbidden from but now permitted to kill B, whilst at the same time upholding B's right to self-defence as well as all the regular sanctions for A in case she committed the crime. Effectively, the permission would not change anything relevant about A's overall normative position.

Ultimately, this is what one ought to criticise about *Hohfeld*'s concept of liberties: Even though his idea of liberties as plain permissions is neither inconsistent nor generally inviable for describing a certain normative phenomenon, it is ultimately useless for the purpose of determining possible 'rights' because it does not give a clear account of how a plain permission is supposed to be any kind of normative improvement. In other words, *Hohfeld*'s undeniable analytical acumen in working out independent features of liberties and claim-rights was ultimately at the expense of the general normative significance of his concept of liberties. As plain naked permissions they necessarily remain in a normative no-man's-land. As a theoretical construct taken by itself and without any link to the value of autonomy and/or the normative demands on B, the concept is not able even slightly to set itself apart from the anomy and meaninglessness

[82] Also critical towards Hohfeld in this respect: Matthias Mahlmann, *Rechtsphilosophie und Rechtstheorie* (Baden-Baden: Nomos, 2015), 282.

of the Hobbesian original position, in which formally every conceivable behaviour is the object of a permission, which only means though that there are no rules at all – and therewith strictly speaking no normative system.[83]

(e) No-Rights: A Sudden Change in Perspective

This 'insubstantiality' of liberties can also be demonstrated by taking a closer look at their correlative 'no-rights': Earlier we conceded for claim-rights that they are not simply the natural reflex of every duty simpliciter, but that the practical reason behind a Hohfeldian duty needs to be specifically linked with the entity A in order for A to have a claim-right and B's duty being a correlative to this position. Keeping this definitional link between A's and B's position in mind, we now find that *Hohfeld*'s liberties as naked permissions have practically no meaning at all for the other person B regarding the possible normative demands addressed to him. In fact, *Hohfeld* tries to somehow establish a connection between A's naked permission and B's position – or rather to veil the missing connection – by shifting perspectives in a quite surprising way. Usually we analyse the actions in the bipolar relation A – B with regard to the question of to what extent A as the potential right-holder has an advantage from certain aspects of the rules applicable to the case. Yet, with 'no-rights' we suddenly do not any longer ask ourselves what B's supposedly correlative position means for A as our centre of interest, i. e. with regard to the issue of A potentially being a right-holder, but instead abruptly we ask ourselves what B's position means *for B* concerning the question of whether B possibly has a claim-right himself or not – with the plain result that he certainly does not have one.[84] Evidently, this logical deduction is entirely correct (see above); nevertheless, one has to critically question *Hohfeld*'s reasons for this change in perspective from A as the potential right-holder to B. In my view it must have been to (unknowingly) conceal the result reached when properly thinking through his reduced concept of liberties, which is namely that their existence does not have any practical implications for B apart from the fact that B does not have a claim-right with regard to A doing X. However, this fact tells B nothing at all about how he should behave.[85] Or as *Gorman* correctly analysed: "[…] the sentence 'X has the priv-

[83] Hobbes, *Leviathan*, 86–92. Cf. also: Sumner, *MF*, 23; Alon Harel, "Theories of Rights," in *The Blackwell Guide to Philosophy of Law and Legal Theory*, ed. Martin Golding and William Edmundson (Malden, MA: Blackwell, 2005), 192; Rex Martin, *A System of Rights* (Oxford: Clarendon, 1993), 32–33.

[84] Cf. Gorman, *Rights and Reason*, 94 ff.

[85] That also implies that practically everyone and every*thing* could be the holder of a no-right. If A has the permission to do X, then strictly speaking a tree 10 kilometres down the road has a no-right, because it suffices to ground a no-right in the fact that A has no duties towards this tree. Thus, the concept of no-rights – analogous to that of liberties in the Hohfeldian sense – becomes indistinct and ultimately inviable for practical normative reasoning.

ilege of entering on the land' *makes no reference to* Y *at all*, and can therefore formally imply no sentence in which Y plays any significant part"[86].

(f) Conclusion

To conclude: Liberties in the Hohfeldian sense as plain permissions can be protected by claim-rights, but it is only these claim-rights which are then advantageous for A. As such a plain permission can never be advantageous for A. If one wants to understand A's permission as an entitlement discriminable from plain claim-rights, i. e. as a right *to do* something actively, it is only possible by referencing the underlying reason – individual autonomy. This reason becomes manifest by A's deciding to perform the permitted action. To be clear: Liberties in this sense certainly are a much narrower concept than *Hohfeld*'s liberties. That is, a great deal of normative protection for an agent A will have to be regarded as 'only' claim-rights. Additionally, none of the foregoing remarks imply the claim that *Hohfeld* misinterpreted the overall normative situation in the classical examples for liberties. Moreover, his liberties do indeed serve a valuable role in properly describing and rendering certain normative phenomena, as e. g. the state of 'allowed competition'. Only a Hohfeldian liberty certainly does not fulfil the basic conditions for being a right. Thus, for our purposes we should disregard naked permissions and think of liberties as active rights.

(3) Powers

Hohfeld's idea of powers as abilities to create normative effects raises several troubling questions as well. Especially, exactly *how* are we to describe the specifically *normative* nature of powers (and of second-order positions more generally) if not by reference to our fundamental deontic modalities? And in what way exactly is the mere fact that a normative effect occurs supposed to be advantageous for the acting agent, if at the same time the action in question is obligatory or even forbidden? Additionally, while one may have the somewhat factual ability to break rules and thus conjure certain normative consequences, would it not be more fitting to think of powers as genuinely *normative* abilities, i. e. normatively mediated abilities or such abilities one is *empowered* with? And if so, could we possibly think of an obligation or a prohibition that could provide for such a normative ability?

We remember: *Hohfeld* based his concept of powers on the normative effects actions can have irrespective of the normative demand associated with this action. Thus, the concept falls short of our scope of rights in two aspects and needs to be readjusted accordingly. First, I will argue that we can reasonably

[86] Gorman, *Rights and Reason*, 94. Gorman uses the tokens X and Y, where we use A and B instead.

speak of a 'power' only in such cases where A has a permission to precipitate the intended changes in one's own or others' positions. Only then we can understand a power as a genuinely normative ability, i. e. as a normative definatory power.[87] And only thus can we as a second step valorise A's normative ability in order for it to become a proper entitlement, namely by regarding the respective permission and therewith A's autonomy in this respect as *per se* valuable. In other words, if we want to discriminate powers from mere liberties and to do so while asserting the advantageous stance of such powers, we need to understand a power as a special kind of liberty, namely one in a superordinate system, by whose exertion a reason in a subordinate system is controlled.

(a) Powers as Protected Permissions

To start off, let us quickly recapitulate our concept of powers as introduced earlier. There it was said that a power was the ability to somehow exert influence on, that is, to change other Hohfeldian positions. We shall now return to the standard examples for powers from above – the chain of command and the bona fide purchase – and therewith to the questions: Which normative demands can possibly be accorded to the exercise of a power? Precisely, can a power only be exercised if the action in question is permitted (P) or possibly also if it is obligatory (O) or forbidden (F), as proclaimed by *Hohfeld* and others alike? Presumably, the positions described as 'powers' in the two examples do not accord with the advantageousness-axiom, i. e. it is impossible to detect any kind of intended advantage for the acting agents in question. There is no reason whatsoever to assume that the mere ability to bring about certain normative effects is advantageous for the person pertaining this ability – not unless either the effects brought about are themselves in some way advantageous for A or the action is permitted and this fact is as such regarded as advantageous, which, as we just saw, would make the power a (special kind of) liberty. In the examples the effects yielded by A's actions are the emergence of a duty for the subordi-

[87] Cf. Carlos Alchourrón and Eugenio Bulygin, *Normative Systems* (Wien/New York: Springer, 1971), 151. Cf. also Torben Spaak, "Explicating the Concept of Legal Competence," in *Concepts in Law*, ed. Jaap Hage, Dietmar von der Pfordten (Dordrecht: Springer, 2009), https://ssrn.com/abstract=1014402, 1 (page references refer to the online version): "The concept of legal competence […] is a normative concept, in the sense that a person has competence by virtue of a norm, and that the exercise of competence changes a person's normative position". Spaak rather fervently criticises the idea of a competence being (or at least presupposing) a permission, calling the idea "simply a mistake" and "difficult even to understand" (Spaak, "Legal Competence," 7). Yet, his reference to bona fide purchases, which is the only argument he presents in favour of his own position, is at best ungainly, as we shall see presently in sec. (3), (a). Cf. also sec. III, fn. 91. Moreover, Spaak himself describes a competence as the "possibility of changing legal positions", whereby possibility is explicitly meant in a normative sense, see Spaak, "Legal Competence," 4. What else is a *normative* possibility, though, than the structural equivalent of a normative exemption – that is, a permission?

nate soldier and the fact that the bona fide buyer gains property. Neither effect is advantageous for A from an intra-systemic standpoint. Thus, only the latter possibility for the advantageousness of powers pertains. Consequently, I hold that a power, correctly understood, is exercised by performing a permitted action which entails a change to a certain predefined normative position in a subordinate normative system. Additionally, in order for this permitted action to be an entitlement it needs to enjoy normative protection, i. e. it needs to be a valued permission, i. e. a liberty. Accordingly, all powers are liberties, even though not all liberties are powers.

In detail: In the first example A's action triggers B's duty. Thus, in a way A indeed has "volitional control"[88] over B's having or not having the duty. On the other hand, this control is not provided by the normative system judging the action 'ordering B to do something'. On the contrary, the system in question denies A any kind of normative control or definatory power over B's duty; otherwise it would not have put A herself under an obligation to give the order. In other words, from an authoritative, that is, an intra-systemic standpoint A is all but *free* to create or not to create B's duty. The system thus does not grant the possibility to decide, i. e. a personally bound normative ability to define or erase certain duties, but it merely attaches some kind of normative effects to the compliance with or the violation of a duty imposed on A. If this bringing about of normative effects would be enough for something to be called a power, then strictly speaking A would also exercise a power by killing B, for example. Clearly, the action would be a violation of her duty not to kill B. Yet, by doing so A would exercise her ability to create a duty, in this case the duty of bystanders to assist B, of the police to arrest her, of the state attorney to file a case, etc. Hence, a definition of powers that clings to the mere normative effects which an action does or does not have would dilute the concept of powers, let alone the idea of entitlements more generally.[89] Much the same applies also to our second example from above, the bona fide purchase. By performing the forbidden action of selling Q to B, A does create a new, advantageous normative position for B.[90] This ability to cause certain normative consequences is not strictly speaking provided by the normative system in question, though. It is merely accepted as a consequence of the factual action 'selling Q to B', which itself represents the violation of a duty and is thus in conflict with the system in question.[91] The fact that B ultimately gains the property of Q would and could only

[88] Hohfeld, "Some fundamental conceptions," 44.

[89] Cf. Raz, *Practical Reason*, 104–106. Here Raz generally distinguishes 'power-conferring norms' from those norms which are controlled by the power itself. Essentially, this describes the relation of the rules in a superordinate system (superordinate in terms of justification) and those in a subordinate one.

[90] Or rather a multitude of such advantageous positions, which together constitute the more complex idea of property/ownership.

[91] In this respect, Spaak clearly errs by describing the argument behind the proposed link

be advantageous for A if the reason or normative effect for this specific consequence of A's action would have something to do with A, that is, were intended to create a normative advantage for A. However, this is clearly not the case. The reasons for allowing the change in property are B's good faith and possibly, more generally, the smoothness of commercial transactions. At any rate, the rule in question is not intended to be an advantage for A in any way at all. Thus, from the intra-systemic standpoint A once again does not exercise a genuinely normative ability to change a legal relation, but his somewhat factual, i. e. only in effect normative, ability to do so simultaneously means the violation of a duty and thus something inherently negative. Hence, as a preliminary result we can state that powers should not be understood as actions which solely entail certain effects on lower-order normative positions, but due to the necessity of being advantageous for their holders, these actions cannot be obligatory or forbidden. They need to be permitted, as only permissions convey genuine normative control for their holders and only permissions can be valorised to become active entitlements (see above).

Let us consider a possible objection to this concept of powers, which simultaneously serves as an argument (or at least an illustration) for the foregoing assumptions regarding the correct perspective for determining advantageousness. We supposed that we need to take an authoritative or intra-systemic point of view in order to determine whether something is advantageous for an entity. Advantageousness is thus exclusively understood in the sense of 'intended advantage'.[92] Applied to our two examples, the objection might read as follows: Even though the normative system in question demands or forbids A from performing the actions in question, i. e. even though the system itself does not sign over any intended advantage to A, A herself might regard her ability to change the normative relations in question as advantageous. Moreover, she might have a (subjective) interest in breaking a rule in order to cause a certain normative consequence. For instance, in the first example she might actually want to give the order to B and feel empowered to do so. In the second example it might be A's foremost intention to damage the former owner D by giving away the item Q and thus causing a change in property. Let us concentrate on this second example: Is it advantageous for A that she gets her will (possibly because she just despises D and wants to annoy him intentionally) by depriving D of his property due to A's transaction with B? From A's solitary point of view one might assume so. Evidently, A's violation of her duty will have negative consequences for her – like having to pay remedial damages to D – but she might

between competence and permission as follows: "One might perhaps argue that in such a case the legal system somehow permits the agent to bring about a change of legal positions while also prohibiting from exercising his competence" (Spaak, "Legal Competence," 7). In fact, there is nothing permissive about A's ability.

[92] Hart, *LR*, 184–185, 188; Sumner, *MF*, 41. Cf. also Raz, "Nature of Rights," 195 ff.

believe them to be outweighed by the contentment she feels knowing how much she annoyed D. However, A's exclusive subjective perspective cannot be the deciding factor in determining what qualifies as an intersubjective entitlement, as entitlements ultimately exist in bipolar relations. In order for entitlements to actually apply to both parties A and B, such intersubjective relations can only be governed by intersubjective rules from intersubjective systems. And given an intra-systemic perspective on the case, A does not have an advantage from the rule allowing B to gain the property of Q because the reason for allowing the legal effect of D's losing his property is not giving possibly ill-tempered borrowers their fair share of justice but rather respect for the good faith of buyers (see above). If we linked the question of advantageousness with subjective preferences, this would yield bizarre results in practice. For example, think of a legal system that still applies drastic sanctions like whipping. Suppose A, a member of the community in question, is a sadomasochist who personally gets pleasure from feelings of pain. Suppose further that A would purposefully commit a crime in order to get whipped afterwards. Thus, a proponent of the narrow concept of powers such as *Hohfeld*'s would have to claim that by committing the crime A exercised a power, because only due to his own action he creates the executioner's obligation to whip him. Presumably, no one in his or her right mind would claim that A has a right or an entitlement to commit the crime, though. This is so because from the perspective of the law, there is indeed nothing at all advantageous about the action for A apart from the fact that his deviant sense of pleasure personally leads him to welcome the sanction in question instead of fearing it, though which the law does not and cannot take into account. Furthermore, the point that intended advantage in an intersubjective sense is often unequal, if not even adverse to subjectively perceived advantage, can be illustrated by another, somewhat converse example: liberties and the 'burden of choice'. Often enough, to be permitted to freely decide what to do and what not to do is regarded as advantageous as we usually reject all forms of external, patronising restrictions on ourselves. Yet, from common normative practice we know that this is not necessarily always the case. Often the *necessity* (rather than the freedom) to make one's own decisions, which is accompanied by having permissions or liberties, is perceived by the individual herself as a 'burden' rather than an advantage.[93] However, the exercise of autonomy by

[93] For empirical evidence (possibly with interesting implications also for political philosophy) of this phenomenon, which we are all familiar with from our daily lives see: Claude Messner and Michaela Wänke, "Unconscious information processing reduces information overload and increases product satisfaction," *Journal of Consumer Psychology* 21 (January 2011). Very roughly, in the experiment different test groups had to choose between different chocolates, some of them had 6, others 24 to choose from. One of the results was that those consciously choosing from 24 rather than 6 – those with a surplus of freedom of decision – were significantly unhappier with their decision than those with a more limited set of options to choose from.

way of a liberty is *necessarily* regarded as advantageous for the individual from the perspective of the intersubjective system in question.

(b) Powers in the Vertical Extension of Normative Systems

Presumably, the concept of powers – in order to distinguish it from liberties – and therewith the Hohfeldian differentiation of first- and second-order can be adequately explained with reference to the idea of a vertical extension of normative systems.[94] As indicated, the decisive and meaningful difference between powers and liberties (thus holding up the discriminability-thesis) is the fact that with plain liberties a definatory power is exercised without reference to subordinate systems that also address content at other agents, whilst with powers exactly this is the case. Hence, the difference between the two is best explained by reference to the idea of a super- and subordination of normative systems in terms of justification.[95] Precisely, if we were to define powers as the mere normative ability to generally bring about changes in legal relations – and without reference to super- and subordination of rules – an otherwise important difference between liberties and powers would be blurred and possibly overlooked, namely the difference between changes in legal relations that are simply brought about by performing a permitted action or a liberty, but which were already laid out in the normative routine of the system, i. e. changes whose occurrence amounts to a mere reflexive response to other occurrences, and the exercise of a *genuine* normative definatory power on the other hand. Put simply, the difference is that between either being able to perform different kinds of moves in a game of chess, thereby changing the other player's and one's own possibilities for further draws – as opposed to the ability to change the very rules of the game.

In detail: Suppose the only features of powers were 'bringing about a change in legal relations by means of a permitted action'. Then in order to be able to hold the discriminability-thesis we would have to work out an additional criterion or additional criteria to help us distinguish powers from mere liberties. This point shall be elucidated by the following example: A crosses the street at a pedestrian crossing. Supposedly, A has a liberty to do so, not a power. B, approaching the crossing in his car, has a duty to stop his car in order to let A pass. Had A not crossed the street B would himself have been at liberty to just go straight ahead. Thus, by crossing the street (or by making the respective practical decision) A in a way originally created B's duty to stop his car. Additionally, and in contrast to the actions in the examples in the foregoing section, A's action was the object of a liberty, which eliminates a lack of advantageousness as an argument for not referring to the action in question as the performance of a

[94] See above sec. II, 5., b).
[95] See above sec. II, 5., b), aa).

'power'. But does our inability to use the advantageousness criterion mean that we should, in turn, consider this action as the exercise of a power? According to *Hohfeld*'s concept of powers one might indeed come to this conclusion. Yet, the competence exercised in this example and the competence exercised in the prior example of A's giving consent for B to perform surgery on A or in a slightly modified version of the pedestrian-example in which A allows B to actually run her over with his car (provided the normative system in question would permit A to do so) are of an entirely different sort. It is this difference that marks the dividing line between liberties and powers. The difference is that with liberties one's definatory power is exercised only with regard to reasons that are not directly relevant for other agents. In fact, the reasons for the emergent duties in such cases are not controlled, but merely triggered. That is, in the example with the pedestrian the general duty not to hurt or kill other people (by running them over with your car) was pre-existent in a way and the actual duty of B only became manifest by A's stepping on the street. Yet, by doing so A did not actually control the reason behind B's duty, but only the reasons for or against crossing the street, which are as such completely irrelevant for B.

Another example in order to illustrate this thought: Suppose A has a legal liberty to drink a fine scotch whisky. By deciding to do so or not to do so, A judges certain reasons pro or contra drinking whisky – for instance, the sheer pleasure of doing so as opposed to (minor) health-related worries. In any case, the reasons 'controlled' are not part of another subordinate normative system, which prescribes duties to other persons. In other words, even if we understood the law as a vast multitude of normative systems in super- and subordination, the law is entirely indifferent with regard to the pro- and contra-reasons in this matter. That means there is a bottom to a legal system, i. e. certain *default systems*. My decision to drink whisky is a personal one and it does not affect other legal relations, for example, the whisky-merchant's liberty to sell the drink. Similarly, in our example with the pedestrian crossing, A is in a normative position to define her own reasons for crossing or not crossing the street. Indeed, by crossing the street she causes or activates B's duty to stop his car, but she does not control the reason behind B's duty, which is A's life and bodily integrity. Much the contrary applies to the example of A giving consent to surgery. Again, primarily A needs to find reasons for herself pro or contra surgery, i. e. for or against granting a respective permission. Yet, by doing so she also exercises a genuine power over a practical reason, which this time is directly relevant for B, namely A's bodily integrity which is a primary (legal) reason for B to be under a respective duty. Thus, a central difference between liberties and powers is that liberties can and do exist in default systems, whilst powers by definition cannot. That is, if A had liberty to eat sausage rolls for lunch, she could herself define reasons pro or contra doing so (as well as pro or contra eating meat in general). The point here is that she would not have a power, as her decision to eat or not to eat sausage

rolls would not entail any normative demands on other people.[96] Naturally, the role of powers is thereby not limited to control over default content, i. e. over pure liberties, duties and claim-rights, but the usually complex, multiply layered legal law of a community surely allows for powers to exist with regard to other subordinate powers, which can in turn refer to other subordinate powers, and so forth.[97]

Furthermore, just like with plain liberties, we can distinguish between complete and incomplete powers. For instance, A's power to control the reason 'bodily integrity' is a complete power as it is valid towards any other agents addressed by the system. Strictly no one is allowed to assault or to otherwise hurt A, unless she explicitly gives her consent to doing so. Yet, A's power to waive or demand compensation for an injury suffered is limited to the person B who inflicted the injury, surely not to anyone. Thus, A has a power towards B in this example, which in the overall picture is 'only' an incomplete power.

(c) Liabilities and the Structural Divergence of No-Rights

If we do understand powers as specific kinds of liberties, then accordingly liabilities must be specific respect duties. As much seems even more appropriate for powers than for liberties: Anyone who has to comply with a certain reason surely also has to comply with the control exercised over this reason. Thus, if A has a power to allow S to perform surgery on her, then S has a correlative liability, because he has a duty to ultimately respect A's decision in either way. Interestingly, there appears to be a structural divergence then between no-rights and liabilities as their alleged second-order analogue. As much will prove to be another central solecism in *Hohfeld*'s concept of liberties. At the same time, it is additional evidence for the alleged 'insubstantiality' of his concept of no-rights.

We remember: According to the parallelism-thesis the structural relations of first-order liberties and no-rights and second-order powers and liabilities ought to be analogous.[98] Yet, a closer look reveals that the respective structures of no-rights and liabilities seem to be all but that. B's no-right, as described earlier, was introduced as the mere lack of a duty towards B on the side of A, which, as we worked out in detail, does not entail that B himself is under a duty to do anything himself. He could just as well have a permission to perform an interfering action. B's liability on the other hand appears not only to positively acknowledge the existence of a permission on the side of A but also to implicitly acknowledge some kind of duty for B to respect or to obey the exercise of A's

[96] Analogously, duties and claim-rights can also exist in default systems, whilst immunities cannot. The lack of definatory power on the default level, which is generally accompanied by duties, concerns a lower level of normative content which is no longer relevant for other agents.

[97] Sumner, *MF*, 31.

[98] See above sec. II, 1., a), bb), (4).

respective power. That is, the concept of liability implies the idea of a *bindingness* of A's power towards B, which the concept of no-rights explicitly denies for its correlative liberties. In light of the parallelism-thesis this discrepancy in *Hohfeld*'s original design must appear more than odd. If A's Hohfeldian liberty is by definition not binding at all in relation to B, then where does the bindingness of A's power towards B come from? In my view, *Hohfeld* implicitly acknowledged some form of 'respect duty' with his concept of powers, which he did not dare couple with his liberties, yet which he should have done if he truly wanted to qualify them as possible rights and increase their practical relevance. Even for *Hohfeld* powers are powers only because someone is liable to A's decision. Analogously, liberties ought to be liberties just because someone is under a duty to respect A's decision.

(4) Immunities

Given these insights about powers and liabilities we are now able to infer a revised concept of immunities (and their correlative disabilities) as well. If having a power means holding a genuine normative control over certain reasons in a subordinate normative system, then B's disability as a power's 'opposite' has to be the lack of such a position of control. If B lacks a permission, then in turn B must be under a superordinate duty with regard to the reason in question – a duty not to alter this reason, i. e. to positively accept it. The correlative position to such a lack of power with B thus is an immunity for A.

However, this 'immunity' as the correlative position to a disability can take two rather different forms. Generally, it describes the fact that the reason for B's disability is somehow appendant to A. That can either be the case if A is the holder of an (already advantageous) first-order entitlement, i. e. a liberty or a plain claim-right, or if A is the holder of a power over the exact reason with regard to which B has a disability. In the first case the immunity functions as a kind of 'fortified first-order position' as it secures the fact that an already advantageous position may not be changed by B. In the second case A's power towards B can in fact only exist if B has a respective disability. That is, a power implies an immunity as the absence of control over a certain reason with B is necessary in order for B to be liable to A's own control. Thus, the holder of an immunity does not always have to hold an advantageous first-order position as well. This point can be illustrated with the aid of the following example: Suppose E, a single parent, has to decide whether a risky surgery is supposed to be performed by surgeon S on his newborn son N. Preliminarily, S has a duty not to harm N and N has a respective claim-right towards S. Due to a lack of control over the reason behind this duty with S, S also has a disability and N has a correlative immunity towards him, as the lack of control strengthens N's claim-right not to be harmed. Furthermore, E has a power towards S with respect to

S' duty not to harm N and S has a correlative liability towards E. If this is so, then with this liability S also has a disability towards E and E has an immunity towards S as S' lack of control over N's bodily integrity not only protects N's bodily integrity, but simultaneously renders E's power towards S possible in the first place. In general, if A has a power towards B, B necessarily lacks an own power regarding the same normative matter in question. On the other hand, the fact that B lacks a power, i. e. that B has a disability and A has an immunity, does not necessarily imply that A actually possesses a power in return. In fact, it is not overly hard to think of constellations in which no party in a bipolar relation possesses a power, a bipolar relation in which there exists a reason immune to any exercise of individual competence.[99]

(5) 'Rights in the Strictest Sense'

In order to bring a little order to the insights won so far, the various relations between the different first-order and second-order relations shall be summarised and illustrated. To begin with, given an understanding of powers and immunities as outlined above, the basic structure of first-order and second-order relations would indeed be analogous. Whilst Hohfeldian duties and disabilities essentially represent obligations or prohibitions, liberties and powers as active entitlements represent permissions. Thus, we can not only validate the discriminability-thesis, but also the parallelism-thesis (see above).

Disabilities are specific duties just as powers are specific liberties. Liabilities imply disabilities, whilst liberties imply claim-rights (with correlative respect duties) just as powers imply immunities (with correlative liabilities). Hence, initially we seem to find regular unilateral relations of implication between entitlements in the same order:

[99] Accordingly, based on the foregoing remarks one might even reach the conclusion that in order for something to qualify as a full-fledged right it must always be protected by an immunity, cf. Matthew Kramer, "Some Doubts about Alternatives to the Interest Theory of Rights," *Ethics* 123 (January 2013): 247. Here Kramer describes a claim-right unaccompanied by an immunity as a 'hollow right'. In turn this would necessitate the fact that a position is accompanied by a superordinate immunity as a precondition for a position to be a *securely* advantageous position. Indeed, in order for rights to truly function as a defence against state power, as individuals' claims for freedom against public authority, they ought to be protected by superordinate immunities towards the authoritative state. Thus, it appears as if also every power would have to be ultimately backed by an immunity in order to be securely advantageous for its holder. Yet, we should not infer from this that every regress of justification ultimately ends with an immunity. As much would misinterpret the idea of 'capping' the infinite regress of justification, as the dialectical relation between competence and content does not allow such an inference (see above). In other words, the regress of justification needs to end with either an ultimate reason (immunity) or an ultimate decision (power). Importantly, through capping the regress of justification, a power itself can serve as an ultimate justification without any further reference to another *superordinate* reason/immunity.

Liberty → Claim-Right	Respect Duty → Duty
Power → Immunity	Liability → Disability

It is noteworthy that due to the peculiar nature of active entitlements, the logical relations between B's positions and A's positions differ in a significant manner. Whilst B always holds a specific kind of duty, A's passive positions are claim-rights (plain claim-rights or immunities) whilst A's active positions are always liberties (plain liberties or powers), which – as we learned earlier – should not be regarded only as specific claim-rights. They merely presuppose the existence of a claim-right as part of the overall active entitlement. Thus, as little as liberties are claim-rights, powers are immunities. Nevertheless, the existence of a liberty in favour of A implies the existence of a claim-right held by A just as the existence of a power implies the existence of an immunity. Thus – bearing in mind this structural difference – we do not necessarily have to revise our notation. Additionally, we can identify unilateral relations of implication between the parallel positions on first-order and second-order:

Immunity → Claim-right[100]	Disability → Duty
Power → Liberty	Liability → Respect Duty

If we combine these insights, we end up with the following three-folded implicatory relations:

Power → Liberty → Claim-right	Liability → Respect Duty → Duty
Power → Immunity → Claim-right	Liability → Disability → Duty

Thus, the result of our critical appraisal of *Hohfeld*'s scheme is that basically every entitlement or every potential right in some way presupposes a claim-right held by A. In other words, the existence of a claim-right, i. e. a practical reason appendant to an entity A as a basis for someone else's duty, is the minimal content for anything to be called a right. Therewith claim-rights do indeed appear to be "rights in the strictest sense".[101] In fact, as much is merely a logical consequence of the advantageousness-axiom in combination with the correlativity-axiom. For any position to be advantageous in relation to others, these other persons need to be held under respective reasons/duties. To extrapolate the importance of interpersonal, bipolar relations in order to identify rights can be seen as *the* major achievement of *Hohfeld*, even though the way he applied the correlativity axiom is not beyond reproach as we saw earlier. However, he made

[100] Once more: Any immunity of A is also a claim-right of A. Especially, this goes for both forms of immunities. Either the reason behind B's disability is to make A's power possible and therewith appendant to A, or the reason is to secure one of A's claim-rights or liberties and therewith also appendant to A.

[101] Glanville Williams, "The Concept of Legal Liberty," *Columbia Law Review* 56 (December 1956): 1145: "every right in the strict sense relates to conduct of another". Cf. also Kramer, *RWT*, 14; Sumner, *MF*, 25.

an admiringly clear point that the very existence of something like an individual's right depends on the fact that there is a social or an intersubjective normative context in which this right can actually exist. That way *Hohfeld* paved the way for an understanding of rights as relational properties in intersubjective normative contexts.

Importantly, the fact that claim-rights might indeed be 'rights in the strictest sense' does not make them rights in the only possible sense. Therefore, *Kramer*'s claim to treat the concepts of right and Hohfeldian claim-right as "interchangeable designations"[102], which appears to be in accordance with the respective passages from *Hohfeld*'s original text, is most objectionable. For instance, it would be perfectly reasonable to regard the existence of a claim-right as merely the necessary condition for something to be an actual right, but count only such positions as actual rights that include an active, second-order entitlement, i. e. a power.[103]

Besides, despite what some might think, the result that basically all rights imply the existence of a Hohfeldian claim-right does not oversimplify normative reasoning, because it does not entail the conclusion that we could reduce the language of rights to that of duties, of obligation and prohibition. On the contrary, as we saw earlier the idea of liberties and powers as active entitlements (or possibly active rights) cannot be explained simply by a language of duties. The idea of a genuinely normative competence surpasses an otherwise too simple logic of duties. This is a decisive difference between the account presented here as compared with, for example, that of *Andrew Halpin*. *Halpin* claims that all Hohfeldian positions could theoretically be reduced to only claim-rights and duties.[104] As much is plain false. Even though evidently the stronger exclusivity-thesis does not hold, because it has to give way to the advantageousness-axiom in combination with the correlativity-axiom, the discriminability-thesis is vital for a correct understanding of entitlements. All four entitlements have clear and distinct features, i. e. in every case we can unambiguously determine whether A merely has a plain claim-right, a liberty, an immunity or possibly a

[102] Kramer, "Some Doubts," 247.

[103] More than simply being an advantageous position for A (liberty/claim-right) and more than being the fact that this advantageous default cannot be altered by B (immunity), powers confer to A the ability to define for herself what is supposed to be advantageous for her. In other words, having a power means to be able to decide between not changing a position advantageous by default or changing this default and thus setting one's own standard with regard to the question of what is advantageous for oneself. In this respect, the ability accompanied by powers is fundamentally different from all other Hohfeldian entitlements, which might already count in favour of a choice conception of rights, see presently sec. III, 2.

[104] Andrew Halpin, "Hohfelds' Conceptions: From Eight to Two," *The Cambridge Law Journal* 44 (November 1985): 456. Cf. also id, "Fundamental Legal Conceptions Reconsidered," *Canadian Journal of Law and Jurisprudence* 16 (January 2003): 42. Here Halpin makes a questionable attempt to argue for the 'non-fundamentality' of certain Hohfeldian positions by referring to an entirely defective account of deontic operators.

power. The fact that all of the latter three imply the existence of a claim-right in one way or another does not mean that for A to have an immunity, for example, is the same as having a plain claim-right. Thus, following *Halpin*'s position on this point would indeed oversimplify matters. Following ours does not.

c) Conclusion

Towards the end of this section on *Hohfeld*'s scheme of fundamental legal positions, it is arguably appropriate to review our investigation thus far, identifying what we have actually demonstrated in this section and how this will help us proceed in the following. Earlier we identified the scope of rights as containing the elements 'normative', 'advantageous', and 'appendant'. As the groundwork for defining an actual concept of rights, we aimed to identify all manifestations of these presuppositions, i. e. all such elements of a normative system or between different normative systems that meet the requirements of the scope. In this respect, *Hohfeld*'s scheme of basic entitlements appeared to be a most useful tool to start off with, as his aim presumably was similar to ours. The decisive additional presupposition which *Hohfeld* added to his analysis, which we adopted in parts and which can easily be regarded as the great success of and development due to his work, is its limitation to bipolar relations, manifest in his correlativity-axiom. On the other hand, adducing the advantageousness-axiom as another necessary presupposition in order to determine different kinds of rights, we had to substantially revise *Hohfeld*'s scheme. As a result, at least based on Hohfeldian logic and consciously retaining his terminology, we ended up with four discriminable elements or proper entitlements able to meet the requirements of the scope of rights: claim-rights, liberties, immunities, and powers. We identified liberties and powers as active entitlements and claim-rights and immunities as passive ones. Furthermore, we found that both active and passive entitlements function as manifestations of the scope of rights in all different forms that reasons can take. Precisely, they can come as abstract reasons, general practical reasons and conclusive practical ones. This latter point thereby stands in sharp contrast to *Hohfeld*'s model, which limits its analysis to practical reasons.

It appears to be of vital importance already at this point to be clear about the limited nature of how inferences drawn from these findings can aid our task of finding an adequate *concept* of rights. Specifically, the (strictly deontological) insight that claim-rights are in a way the most basic type of entitlement could seem like a preliminary decision in the dispute between Interest Theory and Choice Theory regarding such a concept of rights. As indicated earlier, many Interest theorists see rights in one way or another as reasons for other people's duties. Hence, one might jump to the conclusion that such a concept of rights is strongly supported by the notion of claim-rights being the most basic form of

entitlement or even infer that claim-rights actually represent the best concept of rights in general. However, such claims would imply that we had already gone one step further than we actually have so far, because, as we saw earlier, to define a concept one needs to make a judgement and commit oneself to certain conceptual reasons – something which we clearly have not done up until now by merely sharpening the scope of the term 'right'. Direct inferences from statements about the scope of a term to its concept are strictly impossible. In order to determine a concept of rights in the subsequent step we will have to work out which of the four entitlements, either alone or in combination, *should* actually be integrated into a concept of rights and therefore be considered a right. In this respect Interest Theory roughly claims 'all of them' due to the fact and to the very extent that all of them refer to reasons, that all of them at least imply claim-rights. However, this is, at the very least, not a necessary conclusion. Preliminarily, one could, as Choice Theory does, just as well argue that only powers or only liberties and powers, as the individual and protected exertion of freedom, should qualify as rights. This is what the dispute between Interest and Choice Theory of rights ultimately amounts to, if we harness their theoretical potential as conceptual theories. It is the (conceptual) reasons both sides offer for their respective accounts which we shall have a closer look at now.

2. Choice Theory versus Interest Theory[105]

What is a right? Or rather: What should we refer to as a 'right'? Protected decisions? Or preferably certain (practical) reasons? In this section we shall finally get to the bottom of these questions. To begin with, it is worth clarifying that both Interest Theory and Choice Theory represent certain schools or lines of theory rather than precisely articulated and discriminable theories.[106] Different versions of both Interest and Choice Theory may vary considerably in the details. In subsections a) and b) we will therefore try to work out at least some

[105] In recent years there have been a few attempts to break up the antinomy of Interest and Choice Theory by establishing a third way between or beyond these two factions. Notable examples of such attempts include: Schnüriger, *Statustheorie moralischer Rechte*; Siegfried van Duffel, "The Nature of Rights Debate Rests on a Mistake," *Pacific Philosophical Quarterly* 93 (2012); Leif Wenar, "The Nature of Rights," *Philosophy & Public Affairs* 33 (2005); id, "The Nature of Claim-Rights," *Ethics* 123 (January 2013); Gopal Sreenivasan, "A Hybrid Theory of Claim-Rights," *Oxford Journal of Legal Studies* 25 (2005); David Rodin, "The Reciprocity Theory of Rights," *Law and Philosophy* 33 (2014). Directly responding to the challenges offered by Wenar and Sreenivasan, Matthew Kramer and Hillel Steiner impressively demonstrated why and to what extent these attempts are inevitably futile, why IT and CT are ultimately irreconcilable/incompatible as conceptual theories in their joint essay "Theories of Rights: Is There a Third Way?" *Oxford Journal of Legal Studies* 27 (2007). Essentially, one needs to decide for one or the other, cf. below sec. III, 2. e), dd), esp. fn. 215.

[106] Edmundson, *Rights*, 122.

fundamental tenets held by each line of theory, which most, if not all, of the respective proponents would agree upon. Additionally, we will sketch the most prevalent points of criticism held against each line of theory. In subsections c) and d) we will then try to match these findings with our four manifestations of the scope of rights, i. e. clarify which of the entitlements are normally regarded as rights under each respective line of theory. Hence, in these sections we will refine our understanding of both Interest and Choice Theory by reformulating each one in the best possible way on the theoretical basis laid out so far, which will include responding to typical and possible criticism from the point of view of each line of theory. Consequently, in subsection e), we will then try to classify both theory families by asking ourselves about their actual and possible theoretical aims. Thus, we will investigate in turn how both Interest Theory and Choice Theory would function if we understood them as proper normative theories, as purely descriptive theories (i. e. limited to an assessment of the scope of rights), and finally as conceptual inquiries s. str., which is where we shall finally get to the bottom of our underlying question 'what is a right?'.

a) Choice or Will Theory – Introduction

Traditionally, choice or will theories of rights were the product of substantive, liberal philosophies, such as those of *Hobbes* and also *Kant*.[107] Influenced by *Kant*, it was German scholar *Savigny* who first attempted developing an analytical concept of rights. Famously he defined a right as "the power due to the individual: an area in which the individual's volition reigns, and does so with our consent. We call this power the right of this person, tantamount with authority"[108]. Subsequently, the concept of rights became a heavily controversial field of study both in moral and legal philosophy and it remained so till this day. Interest in the analysis of rights (and in the autonomy-protecting dimension of rights) grew particularly strong once more towards the middle of the 20th century. In this respect there are two philosophers whose respective theories are im-

[107] For a vivid introduction to the historical development of CT see Thomas Gutmann, *Iustitia Contrahentium. Zu den gerechtigkeitstheoretischen Grundlagen des deutschen Schuldvertragsrechts*, unpublished ms., 22 ff.

[108] Individual translation from the German original, in which it says "*die der einzelnen Person zustehende Macht: ein Gebiet, worin ihr Wille herrscht, und mit unsrer Einstimmung herrscht. Diese Macht nennen wir ein Recht dieser Person, gleichbedeutend mit Befugniß.*" (Friedrich Carl von Savigny, *System des heutigen römischen Rechts*, *Band 1* (Berlin: Veit & Comp., 1840), 7). The recourse to a spacial/areal metaphor has ever since been most typical for choice theorists. See in this respect also Bernhard Windscheid, *Lehrbuch des Pandektenrechts*, 8th ed. with comparative remarks on German Civil Law by Theodor Kipp (Frankfurt a. M.: Rütten & Loening, 1900 [1865]), 131; Andreas von Thur, *Der Allgemeine Teil des Deutschen Bürgerlichen Rechts, Band 1 –Allgemeine Lehren und Personenrecht* (Leipzig: Duncker & Humblot, 1910), 53–64, esp. 57; similar: Wellman's terminology of 'dominion', cf. only Carl Wellman, *Real Rights*, 7–8, 107 ff.

possible to overlook: *H. L. A. Hart* and *Hans Kelsen*. By far the most prominent version of an analytical will or choice theory of rights in Anglophone legal theory up to date is *Hart*'s. In his seminal essay 'Bentham on Legal Rights' he developed a concept of rights that has ever since strongly influenced the debate about rights. In a nutshell, he argued that rights are (bilateral) liberties, i. e. all legally protected individual areas of free discretion.[109] *Kelsen* on the other hand, as the most prominent proponent of a will theory in German language, wanted to restrict the language of rights, or rather in his words of 'authorisations', to powers only.[110] There might be good reasons to exclude plain liberties from the concept of rights, as *Kelsen* did.[111] Yet, this question can and will not concern us in de-

[109] Hart, *LR*, 196.

[110] In German: '*Berechtigungen*', see e. g. Kelsen, *Reine Rechtslehre* [1934], 60; id, *Allgemeine Staatslehre* (Bad Homburg v. d. H.: Verlag Dr. Max Gehlen, 1966 [1925]), 60. Later Kelsen also describes this position as one's '*Rechtsmacht*', i. e. literally the 'legal power' to decide some legal matter, see id, *Reine Rechtslehre* [1960], 139–141. Most noteworthy, Kelsen's assessment of rights is rather particular in quite a few ways. Generally, he denies subjective rights an independent status (cf. above sec. III, fn. 62), i. e. he ultimately reduces the concept of rights entirely to that of (objective/intersubjective) law, and therewith to duties. According to Kelsen, only legal positions granted to an individual, which entail some kind of control over other people's duties, deserve to be treated as distinguishable from mere reflexes to duties, yet not as 'rights' but only as 'authorisations'. Kelsen's aim with this reduction of rights was to protect the law as the positive manifestation of an intersubjective normative practice from subjectivist and naturalistic justifications, which he found in the traditional dualism of subjective right and objective law in legal theory, see Kelsen, *Allgemeine Staatslehre*, 55–60. As such, this aim is praiseworthy and his reduction of rights to duties seems in a way only consequent. Yet, he arguably goes too far in his critique of rights. More than just debilitating the idea of a subjectivist justification of intersubjective rules, by denying rights *any* meaningful structural part in legal systems, he robs his own theory of the potential to account for the argumentative force of 'rights' in normative discourse – in fact, of the potential to account for such a discourse in the first place. This point is made admirably clear by Hammer in his outstanding article: Stefan Hammer, "Braucht die Rechtstheorie einen Begriff vom subjektiven Recht?" in *Hans Kelsen. Staaatsrechtslehrer und Rechtstheoretiker des 20. Jahrhunderts*, ed. Stanley Paulson and Michael Stolleis (Tübingen: Mohr Siebeck, 2005), esp. 178. Despite these shortcomings of Kelsen's theory, and despite his general rejection of the notion of 'rights' (for an elaborate criticism of traditional accounts of both IT and CT see id, *Hauptprobleme*, 567–593), it is nevertheless justified, simply by virtue of his characterisation of '*Berechtigungen*', to count Kelsen amongst advocates of a modest CT of the like proposed here. One should bear in mind, though, that Kelsen's account of rights is rather questionable due to it's being based on a decisionist justification model, see Hammer, "Begriff vom subjektiven Recht," 190. That is, Kelsen's '*Berechtigungen*' may be distinguishable from mere reflexes of duties, yet they necessarily maintain a derivative status, which ultimately appears all but necessary for a metatheoretical, normatively neutral concept of rights.

[111] In fact, elsewhere Hart defined a right – or more precisely and in his words elucidated the expression 'a legal right' – as follows: "(1) A statement of the form 'X has a right' is true if the following conditions are satisfied: (a) There is in existence a legal system. (b) Under a rule or rules of the system some other person Y is, in the events which have happened, obliged to do or abstain from some action. (c) This obligation is made by law dependent on the choice either of X or some other person authorised to act on his behalf so that either Y is bound to do or abstain from some action only if X (or some authorised person) so chooses or alternatively only until X (or such person) chooses otherwise. (2) A statement of the form 'X has a right'

tail here. More importantly, despite differences in detail in *Hart*'s and *Kelsen*'s theories, by investigating theirs as well as other notable accounts such as those of *Savigny*, *Steiner*, *Sumner*, or *Carl Wellman*,[112] one is able to determine a kind of smallest common denominator for Choice Theory: Generally, all choice or will theories refer to the agents' ability to decide and act autonomously, sometimes only in the sense of thus being able to enforce certain duties[113] or of having a certain individual latitude, a "dominion"[114] as *Wellman* puts it or enjoying "autonomy within a domain"[115] as is *Sumner*'s choice of words. The central idea is pervasive, namely that rights are a means of protecting individual freedom, the exercise of individual autonomy. Thus, at the core of CT rights stands the idea of freedom of decision, with these decisions somehow normatively protected from interference.

There are various (traditional) points of criticism that CT faces. At this point we shall only regard the most prevalent ones. An extensive discussion of these and other critical points will ensue in section c). First of all, CT is often criticised for its inherent inability to account for so-called 'unwaivable rights' such as the right not to be sold into slavery or possibly the right to life.[116] Many people have at least a strong intuition that one's right not to be enslaved is something which he or she cannot simply renounce. Accordingly, such 'rights' are understood as a line of normative protection out of the reach of an individual's own discretion. And if having a right would only mean being able to choose

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is used to draw a conclusion of law in a particular case which falls under such rules." (Hart, "Definition and Theory," 35). Apparently he thereby also limited the concept of rights to instances of control over someone else's legal duties and thus came very close to Kelsen's concept of 'authorisations'.

112 Von Savigny, *System des heutigen römischen Rechts*; Carl Wellman, *A Theory of Rights* (Totowa, NJ: Rowman & Allanheld, 1985); id, *Real Rights*; id, *An Approach to Rights*; Sumner, *MF*; cf. id, "Rights, Interests and Free Speech," in *Rights and Reason*, ed. Marilyn Friedman et al. (Dordrecht: Kluwer, 2000); Hillel Steiner, "Working Rights," in *A Debate over Rights*, ed. Matthew Kramer, Nigel Simmonds, and Hillel Steiner (Oxford: Clarendon, 1998); id, *An Essay on Rights*; id, "Are There *Still* Any Natural Rights?" in *Rights: Concepts and Contexts*, ed. Brian Bix and Horacia Spector (Farnharn/Burlington: Ashgate, 2012). By times so-called 'demand-theories' are presented as a third category, see Leif Wenar, "Rights," in *Stanford Encyclopaedia of Philosophy*, ed. Edward N. Zalta (Stanford University, 1997–), https://plato.stanford.edu/archives/fall2015/entries/rights/. Cf. inter alia: John Skorupski, *The Domain of Reasons* (Oxford: Oxford University Press, 2010); Stephen Darwall, *The Second-Person Standpoint* (Cambridge, MA: Harvard University Press, 2006). Due to the fact that they mainly refer to the invididual's ability to actively 'demand' the performance or non-performance of certain actions by others, arguably they are better classified as versions of CT under false flag.

113 See above sec. III, fn. 109; possibly only in a very strong sense as being able to exert control over a duty on three different stages of enforcement, see Kramer, "Some Doubts," 248–249.

114 Carl Wellman, *Real Rights*, 8.

115 Sumner, *MF*, 98.

116 MacCormick, "Rights in Legislation," 197.

between different options, then indeed any notion of unwaivability would be strictly incompatible with the notion of rights.

Another standard point of criticism is CT's alleged inability to account for 'non-enforceable rights', e. g. one's 'right' to initiate or terminate criminal proceedings.[117] An example: B assaults A. Clearly, B violates a duty towards A not to do so, thus he also violates A's respective claim-right. Yet, the enforcement of this criminal law duty or the sanctioning of B's violation does not lie within A's discretion, but rather with the state attorney or the public prosecutor. Now, if CT implies the claim that a right only exists in case a person A is in a position to command over a respective duty of another person B, and A lacks the permission to enforce B's duty in this case, would that imply that A does not have a right not to be assaulted according to CT? Interest theorists sometimes take this point as an argument against the undue narrowness of CT. The idea is: Why should we reject the idea of rights on account of a lack of control over the performance or enforcement of someone else's duty, when it is already as such so evidently advantageous for A?

Finally, the most wide-spread and most serious objection against CT is the fact that CT does not and in fact cannot include rights of the incompetent into its concept, i. e. rights of small children, of handicapped or demented persons, (possibly) of animals, etc. At least for the former (human) groups, we doubtless have a strong intuition that these entities should have rights. In fact, the intuition is two-fold: Not only do we normally have the strong normative intuition that, for example, a newborn's well-being is an intrinsic good, to be protected irrespective of circumstance and individual discretion, but this thought is accompanied by the linguistic intuition that this intrinsic reason should be regarded as the newborn's very own right. The fact that CT deprives these and other comparable entities of having rights seems to majorly discredit its cogency as a theory.[118]

b) Interest or Benefit Theory – Introduction

Historically, IT emerged in explicit renunciation of and as an alternative to CT.[119] Thus, in German legal theory it was first *von Jhering* who defined a right

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[117] Edmundson, *Rights*, 125.

[118] For a vivid exposition of this specific point of criticism see esp. Neil MacCormick, "Children's Rights: A Test Case for Theories of Rights," *Archiv für Rechts- und Sozialphilosophie//Archives for Philosophy of Law and Social Philosophy* 62 (1976).

[119] Nowadays it can well be regarded as the prevalent concept of rights. For instance, Jeremy Waldron notes: "There used to be a controversy in the analysis of rights about whether the concept itself presupposed an exclusive concern with liberty. But the claim that it did (…) has now largely been abandoned" (Jeremy Waldron, "Rights," in *A companion to contemporary political philosophy*, Vol. 2, 2nd ed., ed. Robert Goodin, Philip Pettit, and Thomas Pogge (Oxford: Blackwell, 2007), 746).

as the individual's "utility, benefit, gain, which is supposed to be warranted by the law".[120] In conscious and clear distinction to *Savigny*'s account he added: "Not the volition or the power mark the essence of the right, but the utility".[121] Arguably, this turn from volition to utility itself marks the essence of the dispute between CT and IT. Nowadays, similar to CT, there are various versions of IT, both Anglophone and Germanophone – too many to cover all of them in detail at this point.[122] Yet, also with interest theories it is possible to find a smallest common denominator, some core tenets that are generally shared. All versions of IT have in common that they – directly or implicitly – refer to (practical) reasons appendant to a certain entity, to the holder of the right.[123] As already indicated earlier, *Joseph Raz*, in his most distinguished account of an interest theory of rights, places the concept of 'reasons' at the core of his rights-concept by defining a right as "an aspect of X's well-being (his interest) [which] is a sufficient reason for holding some other person to be under a duty"[124]. Due to its reference to reasons more generally and not simply to autonomy, IT is correctly regarded as "more capacious"[125] than CT in terms of the applicability of its concept of rights. In fact, CT's weaknesses appear to be the strengths of IT: Neither does IT have a problem implementing unwaivable rights nor, more importantly, implementing the notion of rights of the incompetent.

These (apparent) advantages can be seen in all kinds of interest theories. For instance, even though regarded as *Raz*' main rival for the most convincing interest theory,[126] the aforementioned core tenet – the reference to reasons – is also shared by *Matthew Kramer*'s account of IT rights. In contrast to *Raz* he offers a somewhat reduced version of IT, for the most part naming only necessary crite-

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[120] Once more the author's personal translation from the German original "*Nutzen, Vorteil, Gewinn, der durch das Recht gewährleistet werden soll*" (Rudolph von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung, Teil 3 Abt. 1*, 4th rev. ed. (Darmstadt: Wiss. Buchgemeinschaft, 1888 [1866]), 339–340). The idea of a conceptual link between rights and a certain normative advantage for a person/an entity had also been existent in Anglophone legal theory around that time, cf. only William Hearn, *The Theory of Legal Duties and Rights: An Introduction to Analytical Jurisprudence* (Melbourne: John Ferres, Govt. Printer, 1883), 141.

[121] Von Jhering, *Geist des römischen Rechts*, 350. German original: "*Nicht der Wille oder die Macht bildet die Substanz des Rechts, sondern der Nutzen*". Cf. also this instructive article about von Jherings theory of rights (in German): Gerhard Wagner, "Rudolph von Jherings Theorie des subjektiven Rechts und der berechtigenden Reflexwirkungen," *Archiv für civilistische Praxis* 193 (1993).

[122] At least it appears noteworthy that the first Anglophone interest-concept of rights was developed by Jeremy Bentham (see Bentham, *Works III*, 181).

[123] For other notable, contemporary examples of an interest conception of rights see only Neil MacCormick, "Rights in Legislation," esp. 192; id, "Rights, Claims and Remedies," *Law and Philosophy* 1 (August 1982); Lyons, "Rights, Claimants, and Beneficiaries," esp. 176.

[124] Raz, *Morality of Freedom*, 166. Emphasis added.

[125] Wenar, "Rights".

[126] Ibid.

ria for rights, yet *a priori* excluding an (at least possible) sufficient one: "Necessary though insufficient for the holding of a legal right by X is that the duty correlative to the right, when actual, normatively protects some aspect of X's situation that on balance typically redounds to the benefit of a being like X."[127] He continues explaining: "Neither necessary nor sufficient for the holding of some specified legal right by X is that X is competent and authorised to demand or waive the enforcement of the duty that is correlative to the right."[128] Whilst for *Raz* the 'well-being' of the right-holder is decisive, *Kramer* regards the '(typical) benefit' of a being as central to the idea of its having rights. Thus, despite differences in the details, both align with the theoretical legacy of IT. Traditionally, for interest theories the purpose of rights was, in conscious contrast to choice theories, not seen in (merely) promoting autonomy, but rather in the more general good that comes with rights, the advantage that goes along with having a right. Already *von Jhering*, for instance, claimed that the "practical purpose" of rights were "the utility, the advantage, the gain that ought to be provided by the right"[129]. Thus, in sharp contrast with CT, in which the individual, normative competence entailed by permissions is regarded as central, IT essentially focusses on the content-dimension of normativity, i. e. on the reasons provided by a normative system. A right thereby is supposed to exist in the case where an agent (or some other possible right-holder) has an advantage (or benefit) from a certain rule, which is nothing but a paraphrase for the notion of a reason being appendant to the respective entity.

What appears problematic is the question of to what extent these reasons are an entity's 'interests'. Whereas with CT we could quite easily determine the central element of a 'decision' as a protected permission, the notion of 'interest' is less accessible. Does it refer to the individual being and its subjective preferences or to its interests *properly understood* within an intersubjective normative system? If it is supposed to be the latter, it certainly cannot – as the term seems to imply – also refer to *subjective* thoughts, wishes, preferences, feelings, etc. as these two notions regularly conflict (see above). Ultimately the entity's 'interests' as laid out in interest theories of rights must be understood as its well-understood or best interpreted interests from an intersubjective standpoint, i. e. as appendant reasons within an intersubjective system.[130] That does not imply

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127 Kramer, "Some Doubts," 246.

128 Ibid.

129 Von Jhering, *Geist des römischen Rechts*, 339–340. Cf. also Gutmann, *Iustitia Contrahentium*, 30.

130 Essentially, that is what Kramer appears to have in mind by referring to aspects which are 'typically' in the interests of certain beings, see above sec. III, fn. 127. Similarly, Penner notes: "[…] there must be some sort of critical judgement of the interests that ground rights […]. Our critical interests do not depend on our particular subjective wishes. One has many rights, such as the right to education, whether one wishes it or not." (James Penner, "The Analysis of Rights," *Ratio Juris* 10 (September 1997): 305). Cf. also Raz, "Nature of Rights,"

that it is completely irrelevant what the entity itself thinks or wishes or feels, but in order for these 'subjective interests' to become duties of other persons they need to be regarded as reasons by them, by the community, i. e. intersubjectively.[131] Hence, the notion of advantageousness for the holders of rights is inseparably linked with the notion of communality, of other persons' possibly behaving towards the right-holder in a way that is regarded as advantageous for her. Accordingly, we do not even have to decide whether interests in this intersubjective sense *are* rights or rights are only supposed to protect subjective interests.[132] In any case, rights are supposed to be reasons for duties, and thus they need to be understood as intersubjective reasons.

Beyond these definitional issues regarding the term 'interest', just like with CT there are various standard points of criticism which IT is regularly faced with. Just like above we will only discuss the most prevalent ones at this stage. First of all, a central problem of IT, even though one of its own making, is its theoretical indeterminateness. It is what *Kramer* fittingly describes as IT's inherent problem of "delimitation"[133]. By identifying rights with appendant reasons we still do not know (a) exactly what kinds of entities qualify as possible right-holders[134] and (b) under which circumstances the interest – that is, the appendant reason in question – is the actual reason for a duty or whether we are dealing with a duty simpliciter. The point is that there are quite a few additional judgements to make in order to actually determine whether a right actually exists. As we will see, the same partly applies to choice theories, yet IT's increased indeterminacy is reason enough to raise concerns about unnecessary vagueness in comparison with CT.

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195 ff. Hence, with respect to the justification of norms the concept of interest somehow tries to bridge the gap between subjective wishes and intersubjective norms. Yet, what it actually does is blur the lines by implying one can virtually be the other, when in fact there is only one or the other. A subjective state of mind cannot be an intersubjective reason, unless it is regarded as one by the respective intersubjective authority. If one does not distinguish carefully between subjective interest and well-understood, critical interests, the term is bound to lead to confusions.

131 Not to be confused with the subject's *act of claiming* of a right (see above), which in this form is not provided for or does not exist in the intersubjective normative system in question. However, due to the act of claiming that a right ought to exist, the concept of rights can serve as an instrument to criticise the content of a certain intersubjective system by employing a differing value judgement from another normative system, i. e. for instance a moral critique of the law (see above).

132 Cf. Lyons, "Rights, Claimants, and Beneficiaries," 173, at fn. 1.

133 Matthew Kramer, "Refining the Interest Theory of Rights," *American Journal of Jurisprudence* 55 (2010), http://scholarship.law.nd.edu/ajj/vol55/iss1/2/, 34.

134 One might say 'all such entities that have or can have interests'. Yet, having defined an interest as an intersubjective reason appendant to the right-holder, the case of interest-holders appears all but clear, as reasons could be ascribed to virtually any being. For a deepened discussion of this point see below section d).

Apart from that IT faces similar problems as CT with respect to (apparent) deviations from actual language use. Precisely, such cases are usually regarded as problematic, in which the occurrence of an interest (seemingly) deviates from the occurrence of a right in ordinary language. First, the cases of so-called 'third-party beneficiaries' appear to be problematic for IT.[135] If A and B enter into an agreement that B ought to give a certain good to C, it is unclear who is supposed to have a 'right' in this case – A or C? Whilst C, not being a party to the contract but merely a direct beneficiary of it, would certainly profit in some way from the performance of B's contractual duty (in that C certainly has an interest in receiving the good from B), we usually regard only A as having a right towards B as she was the one entering into the contract with B in the first place *and* she being the one able to demand or waive the performance of the contractual obligation.[136] How can IT explain the discrepancy between right and advantage or interest in such cases?

Secondly, the reverse case appears just as problematic for IT, namely the one in which from linguistic intuition we usually expect someone to have a right, yet this person or entity does not seem to have any *personal* advantage or interest in the allocation of this right. As much can be the case with fiduciaries or legal representatives, but e. g. also in this example employed by *Raz*: We assume journalist J has a right to protect his source S in court, which would also be to say that public prosecutor P is under a duty not to force J to reveal the identity of S.[137] Quite plainly, the reason behind the rule in question (that is, the 'interest' protected) is S's interest in anonymity and/or the public's interest in a functional system of free press. Regardless, J does not seem to have an individual interest in this case, at least not one that would justify P's being under a respective duty. Nevertheless, linguistic intuition tells us that it is (at least also) J who has a right in such cases.

Finally, another point of criticism frequently levelled at IT is its alleged inability to account for an adequate critique of (legal) paternalism.[138] *Gutmann*, for instance, claims that any theory of rights concerned only with an entity's

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[135] Lyons, "Rights, Claimants, and Beneficiaries," 180 ff.

[136] Another (analogous) example is offered in Wenar, "Rights," namely the case of someone's partner winning the lottery. Obviously, you have an interest in that as you would indirectly benefit from your partner's getting paid out, yet the law ascribes a right to receive the money exclusively to the one with the valid ticket.

[137] This example is borrowed from Joseph Raz, *Morality of Freedom*, 179 and 247–248. Cf. also id, "Legal Rights," *Oxford Journal of Legal Studies* 4 (Spring 1984): 7.

[138] Thomas Gutmann, "Paternalismus und Konsequentialismus," in *Paternalismus und Konsequentialismus*, ed. Michael Kühler, Alexa Nossek (Münster: Mentis, 2014); Tony Honoré, *Making Law Blind* (Oxford: Clarendon, 1987), 255. Cf. also: Penner, "Analysis of Rights," 320–321; Sumner, *MF*, 97; Norbert Paulo, "The Bite of Rights in Paternalism," in *New Perspectives on Paternalism and Health Care*, ed. Thomas Schramme (Cham: Springer International Publishing, 2015).

well-understood interests necessarily has paternalistic implications.[139] Indeed, if we understand interests in the sense of well-understood interests, i. e. as intersubjective reasons, which is necessarily the case (see above), then IT implies the possibility of rights opposed to a subjective interest, an individual will – a possibility which CT explicitly negates. Thus, it is true that IT rights imply the possibility of (substantive) paternalism. Whether or to what extent that is actually a problem is another matter to which we will return later on.

c) Choice Theory – Theoretical Clarifications

Which of the revised Hohfeldian entitlements that we earlier identified as manifestations of the scope are regarded as rights by CT? The answer is both powers and plain liberties.[140] In other words, according to CT rights are generally best understood as active entitlements or valued permissions. Put differently, for a choice theorist rights are protected areas of individual competence.[141] According to CT, one has a right to do X both because and to the very extent that he or she is free to decide to perform or not to perform X – in addition to the fact that the normative system in question protects this decision by ensuring the possibility of respect duties for other agents, at least for the state itself. Hence, even under CT not every plain permission – that is, every act of individual competence – is supposed to be a right, but only such permissions which are safeguarded to a certain degree through the valuation of individual autonomy. Presumably, quite a few choice theorists would disagree. We are very much used to plain permissions described as rights, especially as permissions antecedent to any organised state. In this way one could and should also interpret *Hobbes*' language of a pre-positive 'right to everything'.[142] Importantly, it is a major and necessary concession which every version of CT has to make towards IT that the permissions in question, with which autonomy is exercised, must at the same time be the reason for possibly holding other agents under respective duties, i. e. that every active right implies a (passive) claim-right (see above). As described earlier, leaving the intersubjective normative context for rights, as *Hobbes* does in his state of nature, would necessarily deprive them of what makes them advantageous for their holders. Thus, importantly, despite its clear definitional focus on the competence-aspect of rights, CT ultimately can-

[139] Gutmann, "Paternalismus und Konsequentialismus," 59.

[140] As we saw earlier, in the relevant literature as much goes for powers in all cases and for liberties in most. In my view, both should be encompassed by a CT concept of rights, as the core of such rights lies in the protection of individual autonomy, which is not only warranted by powers, but especially also by liberties.

[141] Cf. Massimo La Torre, "Rechte und rechtstheoretische Ansätze," *Rechtstheorie* 41 (2010), 86 (in German): "*Ein Recht zu haben weist eher daruf hin, innerhalb eines Handlungsspielraums autonom entscheiden, d. h. sich in Deliberationen einlassen zu dürfen*".

[142] Hobbes, *Leviathan*, 91–92.

not avoid an accompanying reference to the content-dimension and thus to correlative, advantageous duties in order to make its concept of rights plausible. As much inevitably needs to be conceded by any choice theorist. In this respect, it is not surprising that it is sometimes argued that IT describes a more fundamental aspect of rights and that it in a way encompasses all of CT's tenets.[143] In a way that appears correct. Whether this is a valid or even decisive argument in favour of IT as a *conceptual* theory will be our concern in the ensuing sec. e).

On this basis let us proceed by reconsidering the most common points of criticism against CT. Some of them will be shown to be entirely futile, whilst others do pose serious problems which proponents of CT cannot evade but rather need to endure. First, there was CT's inability to account for 'unwaivable rights'. Clearly, this would only be a problem for CT if one were to presuppose that there actually are or rather should be 'unwaivable rights'. Yet, on the contrary, it is one of *the* central claims of any choice theory that such 'rights' do not and should not exist. So, even if it is the case that people have a strong linguistic intuition about the 'unwaivability' of certain rights, which in my view can probably already be doubted, then this criticism of CT amounts at best to a deviation of the proposed terminology from common terminology. This can of course be regarded as a disadvantage (just as the cases of a divergence between interests and alleged rights might be one of IT). It is notable, though, that it certainly cannot be regarded as an argument against the theoretical cogency of CT, i. e. with respect to its description of certain normative structures. In other words, the normative position in which an agent A is said to have an advantage by virtue of a certain reason, but in which she herself is not able to exert normative control over this reason, can in revised Hohfeldian terms be regarded as a 'sole immunity', i. e. the existence of an immunity accompanied by the non-existence of a power. In technical terms, as much is the normative position of having an 'unwaivable right'. Suppose, for instance, the right to life is regarded as unwaivable, as it is – at least under most circumstances – in most contemporary legal systems. Then first of all A has a claim-right against others that they not kill her. Additionally, she has an immunity that no one alters this claim-right. Furthermore, for the right to be unwaivable she must lack the power to alter the claim-right herself, i. e. to possibly allow others to end her life. Thus, the structure of 'unwaivable rights' can be adequately explained by reference to our familiar entitlements. However, within CT such a position is simply not regarded as a 'right' in the first place, i. e. intentionally excluded from the concept of rights as a matter of a conceptual decision, because it can fully and adequately be described in the language of duties. B has a duty not to kill A, and both B and

[143] Kramer, *RWT*, 61; Rainbolt, *Concept of Rights*, 115; Sumner, *MF*, 96. Cf. also Edmundson, *Rights*, 127. Edmundson regards CT as a special kind of IT if both were understood as justificatory theories.

A have disabilities with regard to this duty. Thus, the aforementioned linguistic argument against CT, which criticises a possible deviation from common language usage, holds and needs to be taken seriously. Yet, any further theoretical argument concerning CT's inability to account for 'unwaivable rights' would have to be based on the presupposition that the labelling of the described positions as 'rights' is indispensable for normative reasoning, which clearly it is not. In fact, in normative debates the very construction of 'unwaivable rights' or 'sole immunities' is rather a cause for vigorous debates about the legitimacy of (legal) paternalism.[144]

What about the second point regarding 'non-enforceable duties'? In this respect already the underlying way of thinking is misleading. In contrast to the common critique, which often judges the foregoing example with the assault and the ensuing proceedings as a single set of facts, we need to clearly distinguish two entirely different issues here: (1) Does A have a right with regard to B's preliminary action, i. e. the assault? (2) Does A have a right with regard to the opening/termination of criminal proceedings against B? With regard to question (1) the answer is yes, to the extent that A initially had a claim-right not to be assaulted and presumably also a power to decide whether B's default duty not to assault A should persist or should be rescinded. That is, according to CT, A has a right against B not to be assaulted insofar as A *could have given* consent to the action in question. Almost *en passant* this debilitates another common reproach of CT, namely that it allegedly cannot account for 'passive rights' due to its focus on what the right-holder herself is able to decide or to do.[145] Precisely, the concern is this: If rights really were only protected permissions as CT claims, why indeed should we still speak of, for example, a 'right not to be assaulted' under a CT concept? As much clearly misses the point of CT if correctly understood. Its aim is not to entirely get rid of the notion of other people's duties, but rather to link the notion of rights with that of a normative control over these duties (so much at least for powers, see above). CT simply aims to exclude *plain* claim-rights and *sole* immunities from its concept of rights, i. e. of such solitary claim-rights for which the right-holder does not also possess a power.[146] Hence, excluded are both claim-rights without accompanying im-

[144] Good introductions to the problem of paternalism in general are the following: Gerald Dworkin, "Paternalism," in *Stanford Encyclopaedia of Philosophy*, ed. Edward N. Zalta (Stanford University, 1997–), https://plato.stanford.edu/archives/win2016/entries/paternalism/; Joel Feinberg, "Legal Paternalism," *Canadian Journal of Philosophy* 1 (September 1971). For a more elaborate account on the role of paternalism in legal reasoning (in German) see Thomas Gutmann, "Paternalismus – eine Tradition deutschen Rechtsdenkens?" *ZRG GA (Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung)* 122 (2005).

[145] See inter alia: Edmundson, *Rights*, 126; Rainbolt, *Concept of Rights*, 105, with further references.

[146] Hence, Hart's idea that immunities could not be adequately integrated by a Choice Theory of rights (Hart, *LR*, 198–200) was not entirely accurate, but in light of these insights

munities, which *Kramer* and *Steiner* call 'nominal rights'[147], as well as claim-rights accompanied by 'sole immunities' (see above). Thus, CT rights should not be understood only as liberties and powers, but the respective powers need to be seen in direct relation to lower-order reasons controlled by them. In fact, as *Sumner* pointed out, correctly understood, a power as a means of control over one's own claim-rights *comprises* this first-order position.[148] In other words, the objection regarding 'passive rights' is only valid for such cases in which agent A does not also have a power with regard to the claim-right in question. That narrows the problematic cases down to 'unwaivable rights' (see above). CT, correctly understood, is able to account very well for passive rights like A's right not to be assaulted – if understood as A's right not to be assaulted *without her prior (or possibly also posterior) consent*.[149]

Returning to our example, we can state that CT can account for A's right towards B with respect to question (1). How about question (2) though regarding an alleged right to initiate or terminate criminal proceedings? Evidently, A does not have a power to do either of these things; thus, according to CT, A does not have a right. Does it matter, though? Should or indeed do we actually think that A has a right in such cases? The nature and purpose of criminal proceedings in general suggests something different. The 'beneficiary' of criminal proceedings is not ever supposed to be the victim, in this case A, but the goal is, very roughly speaking, maintaining and affirming public order.[150] This reason is certainly not a reason appendant to A, thus at least it does not directly suggest that A should be responsible for controlling it. Naturally, the fact alone that a certain reason is not appendant to a specific entity, i. e. that it is not a claim-right, does not mean that one cannot have a 'right' with respect to it. In the example case the public prosecutor holding a power over whether to initiate proceedings could at least be thought to hold a 'right' according to CT. That is, the reason which one has at one's command does not have to be one's own claim-right.[151] Only the power itself needs to enjoy normative protection as a special kind of liberty. To conclude: We find that the problem of so-called 'non-enforceable rights' is not actually a problem at all for CT. According to CT, reasons which are not 'enforceable' in the sense of being 'controllable' by an agent A, are simply not to be

understandable. By contrast, Simmonds errs when he describes this concession of Hart as "misguided" (Nigel Simmonds, "The Analytical Foundations of Justice," *The Cambridge Law Journal* 54 (July 1995): 219).

147 Kramer and Steiner, "Is There a Third Way," 297. According to the authors the contrary is a 'genuine right', i. e. a claim-right accompanied by an immunity.

148 Sumner, *MF*, 37.

149 Carl Wellman, *Theory of Rights*, 75.

150 The very opposite usually goes for civil proceedings, in which case the parties involved argue about their individual demands towards each other. Here rights to initiate or to terminate proceedings should indeed be expected.

151 Consider also the case of parents in relation to their child, as to be explained presently.

regarded as rights, because they do not endow A with a respective competence. Again, at best one could raise the accusation that CT thus deviates from conventional language usage, which, however, in this case seems much more far-fetched than in the case of 'unwaivable rights'.

We shall investigate one more point in this context, though, that has not been mentioned earlier but has only just been touched upon, namely by affirming the possibility of a public prosecutor's having 'rights' under CT. Naturally, state officials quite often have the possibility of deciding certain normative matters either way. The question is: Can state officials, acting in their assigned role, actually have rights?[152] It seems as if we would obtain quite implausible results if we allowed all protected or valued permissions to be counted as 'rights'. An example: A lives in a country with an authoritarian regime. When emperor E decides to destroy a park in the middle of A's city, she decides to demonstrate in a peaceful manner against oppression and for freedom of press and expression. Suppose policeman P is given the permission by E to violently beat down A in order to stop her from protesting.[153] Now, even though P has a permission and that permission is presumably also protected against interference by the law, from our ordinary understanding of rights it would seem almost bizarre to say that P has a right to bludgeon A. Indeed, any plausible choice theory needs to reject the idea of officials' rights, that is, to confine rights to individual citizens as a normative instrument *against* authoritative ruling. Such a theoretical restriction is necessary not only with respect to the historical genesis of the concept of rights, as we shall find later on. In defence of CT as we described it earlier, one might claim that this restriction is already laid out in the central purpose of CT rights, which is to foster and protect '*individual*' freedom or autonomy. Even though P as a person is also an individual, in his role as an official (a policeman) what he actually does is to enact authoritative will – that is, to enforce authoritatively predefined duties, which are as such contrary to individual freedom. Thus, if one acts in such a function, even though formally on account of a permission, this act represents not an exercise of individual autonomy, but rather the opposite. Importantly, these remarks – especially the implied idea that policemen cannot have rights – are in no way supposed to degrade the work of policemen or other state officials. They are merely supposed to sharpen our concept of rights. If P breaks in the door of notorious thug T after hearing screams from inside and after asking for permission to enter, we can be thankful that he did. However, we should – for the sake of rights – not think of him as having a 'right' to do so, but rather of T having a duty not to hit other people and to open the door on request, and of P enforcing this duty in his function as an extended arm of the state.

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[152] Peter Jones, *Rights* (New York: Palgrave, 1994), 31.

[153] Suppose P does not have a duty to do so, because A's behaviour is regarded as a mere nuisance, not a real threat.

Finally, what about CT's inability to account for 'rights of the incompetent'? To be clear, this one is a problem that cannot simply be explained away by proponents of a choice theory, at least not entirely. Once more, the problem lies with a – this time very strong – deviation of the proposed terminology from actual usage of the term. Though yet again, it is not a problem of structural or meta-theoretical defects of the proposed concept of rights. Neither does a CT concept of rights deprive any group of entities of any (possible) advantages, nor indeed does it offer an inadequate explanation of normative practice. Take as an example a newborn's alleged 'right no to be injured'. According to CT, the baby itself does not possess such a right, which is plainly counter-intuitive. However, within its theoretical framework (not with regard to terminology) CT can very well account for the baby's endowment with a *plain claim-right* towards others, i. e. the fact that the baby's well-being is the reason for holding others under a duty not to injure it. Moreover, CT does by no means exclude the possibility that we regard this reason as an intrinsic reason, i. e. as a reason immune to anyone's discretion. As much would, for instance, surely in all cases apply to a baby's claim-right not to be tortured.[154] Supposedly, there is no case imaginable in which such an act could possibly be allowed. No one could possibly control the reason in question or have it at his or her command. Thus, according to CT no one could have a right with respect to this action of torturing. Also the baby would not have a 'right', but is merely protected by respective duties and disabilities, which on a substantive level would by no means make the baby normatively any less protected.[155] Contrary to this persistent claim-right not to be tortured, the baby's alleged 'right not to be injured' is usually controllable to a certain degree by its parents or legal guardians, e. g. by giving consent into a risky yet indicated surgery or a vaccination. In short, others normally have a duty not to hurt or injure a small child C. The reason for this duty can be regarded as one appendant to C. All these ideas can be accorded for by CT. Finally, even under accounts like IT, which do ascribe rights to small children, it is someone other than the actual 'right-holder' in question, namely the parents or legal guardians, who actually have and exert control over the relevant reasons in the case. Whom to label as having a 'right' is then simply a terminological matter. The fact that CT strongly deviates from ordinary language in this respect undoubtedly is an equally strong argument against

[154] Cf. Thomson, *Realm of Rights*, 17 ff.

[155] See inter alia: Joel Feinberg, "The Rights of Animals and Unborn Generations," in *Rights, Justice, and the Bounds of Liberty* (Princeton, NJ: Princeton University Press, 1980), 180; Phillip Montague, "Two Concepts of Rights," *Philosophy & Public Affairs* 9 (Summer 1980): 384; Carl Wellman, "The Growth of Children's Rights," *Archiv für Rechts- und Sozialphilosophie//Archives for Philosophy of Law and Social Philosophy* 70 (1984): 452. Cf. also Christopher Wellman, "Feinberg's Two Concepts of Rights," *Legal Theory* 11 (2015): 219: "[…] it is awkward to assert that human infants cannot be right-holders, but not every awkward conclusion is absurd".

it. That does not exclude the possibility, though, that there are other (possibly even better) reasons for positively endorsing a CT concept. We will meticulously analyse these reasons in subsection e). For now, we may at least state that a normatively neutral CT concept of rights does not entail worse practical results than its rival IT.

d) Interest Theory – Theoretical Clarifications

Which of the four entitlements, identified earlier as manifestations of the scope of the term right, qualify as IT rights? We find that IT can take two different stances towards this issue. Either interest theorists need to maintain that essentially rights are *only* claim-rights or that rights are all normative positions which are or at least imply a claim-right. As indicated earlier, the first position is apparently taken by *Kramer*: "[…] Interest Theorists join Hohfeld in regarding 'right' and 'claim' as interchangeable designations […]."[156] To be fair, in saying so *Kramer* presupposed an understanding of the four entitlements in the traditional, Hohfeldian sense, which in a way justifies his conclusion. Accordingly, it is hardly *Kramer*'s conclusion which is questioned, but rather his and *Hohfeld*'s reduced account of entitlements. At any rate, according to a narrower version of IT, strictly speaking the four entitlements as described earlier would not *tout court* have to be regarded as rights but rather at best *to the extent* that they *also* are or imply claim-rights. Importantly, such a narrow IT would not necessarily deny that there might be other additional features which join in with claim-rights, it simply would be agnostic regarding these additional presuppositions. However, to limit the language of rights to *plain claim-rights* would not strictly speaking be impossible, yet it would be a conceptual limitation entirely unnecessary, whose only noteworthy effect would be an oversimplification of normative practice. It is entirely possible to claim that rights *essentially* are claim-rights, but still distinguish between different forms of claim-rights. In terms of theoretical clarity, it is therefore preferable to interpret IT in such a way, namely that it refers to claim-rights as the most basic kind of right, but in due consideration of other advantageous normative positions, i. e. discriminating plain claim-rights from different classes of other, more specific potential rights such as liberties, immunities, and powers. Thus, properly understood IT comprises all of the four entitlements – not simply to the extent that they are or

[156] See above sec. III, fn. 102. One could interpret Raz in the same way, when he writes: "A person who says to another 'I have a right to do it' is not saying that […] it is not wrong to do it. He is claiming that the other has a duty not to interfere." (Joseph Raz, *Ethics in the Public Domain*, rev. ed. (Oxford: Clarendon, repr. 2001 [1994]), 275). He certainly appears to show the ambition to exclude active entitlements from the concept of rights. Presumably, this claim is based on a misconception of the peculiar, reciprocal nature of active entitlements, which, as we learned, are not reducible to claim-rights.

imply claim-rights but *because* they do.[157] Put differently, IT's rights definition does not entail a restriction to plain claim-rights alone, but properly understood the existence of a claim-right needs to be regarded as the necessary basic element for anything to be called a right under IT. That way the definition easily allows for different kinds of rights to exist as long as they possibly imply certain correlative duties and thus an advantage for right-holder A. Hence, IT's concept of rights is indeed the most encompassing as it comprises all kinds of passive and active entitlements.

Let us now reconsider what *Kramer* described as the problem of delimitation.[158] Especially that implies the necessity for IT to limit the scope of possible right-holders. As much stands in sharp contrast to CT to which any such necessity for an *a priori* limitation does not apply. We remember: Both CT and IT – as any theory concerning a concept of rights – need to somehow offer an account of the notions of advantageousness and appendance. CT, due to its linking rights to acts of individual competence, does not specifically have to explain the notion of appendance, but rather needs to enrich the notion of autonomy, which is manifested as a permission that is an act of individual competence, with the notion of advantageousness (see above). IT, on the other hand, *a priori* links the notion of rights to that of advantageousness. Thus, it decidedly leaves open the question of under which conditions a (practical) reason is appendant to a certain entity. Obviously, it is all but impossible to consequently draw a respective line or to define respective criteria. Yet, it is noteworthy that such (clear) criteria for the necessary subsequent demarcations are expressly not provided by any (analytical) IT of rights. The interest theorist will reply: There is such a criterion, namely only such beings can have rights which have or can have *interests* in the sense of some pre-normative aspiration inherent in the being in question. Accordingly, not all entities are possible right-holders. For instance, if one has a duty not to demolish a famous natural monument, it would be both linguistically and theoretically dubious, bizarre even, to claim that the monument had a right not to be demolished, even if you were to see it as invested with intrinsic value. Nevertheless, the interest-criterion must remain vague at its edges as there are quite a few unclear cases. For instance, the case for animal rights is a

[157] Cf. George Rainbolt, "Rights as Normative Constraints on Others," *Philosophy and Phenomenological Research* 53 (March 1993): 99. Rainbolt wishes to limit the concept of rights as "normative constraints" on others to claim-rights and immunities. The underlying reasoning is that from the traditional Hohfeldian positions only duties or disabilities restrict the options of conduct for B, which entails that only claim-rights and immunities could be advantageous for A. Rainbolt's argument is sharp, yet he overlooks the notion of active entitlements and the impossibility of describing such entitlements only in a language of duties/claim-rights (see above). Furthermore, despite his intention to remain neutral in the interest/choice-debate (ibid, 99), his focus on the advantageous aspect of duties without restriction to active rights ultimately makes Rainbolt's theory an interest theory.

[158] Kramer, "Refining the Interest Theory," 34.

heated contemporary debate.[159] But even beyond that, what about the rights of nature, of certain plants, trees or even of national parks?[160] We know, for instance, that quite a few trees react to outside threats in a way that would not exactly indicate a consciousness, but maybe something similar to a sense of pain and certainly some kind of inherent will to live, to survive. Thus, where is the line to be drawn then exactly? If it is not the ability to make decisions that determines right-holders, is it a matter of species, of the ability to communicate, to feel pain, or simply of being a living creature? All these questions remain undetermined under an analytical IT for further evaluation. Admittedly, as much is not a severe problem for IT insofar as it would make the theory any less consistent in a stricter sense. Thus, justly, by *Kramer* the above-mentioned points are not regarded as a weakness in a stricter sense due to the fact that IT simply implies that there are further moral judgements necessarily to be made in order to determine who or what exactly should enjoy the advantage accompanied by having a right.[161] However, with respect to the examples given above and in direct comparison with CT, IT at least appears less accessible and less feasible from the start to the applicant of a normative system – an argument against IT that we shall return to later on.

Furthermore, the problem of delimitation finds expression in another point: Even within a certain class of beings, e. g. of competent adult human beings, the question of whether someone is the holder of a right can often not be answered clearly by reference to a certain rule, but requires an additional normative decision/demarcation. That is, from the actual normative content of a rule we cannot *per se* and in every case infer who has an advantage or is supposed to have an advantage from it, i. e. who the respective right-holder is supposed to be. However, this would only have to be regarded as a problem for IT if it wanted to make any justificatory determinations or specific preliminary judgements, which – even expressly in the case of *Kramer*'s version of IT – it does not and does not have to, either. In fact, if this point were to be regarded as a weakness of IT, CT would share it, because also with CT we cannot infer the existence of a right from the mere content of a rule. In order to determine the existence of a right under IT we need to ask ourselves 'is there a duty for a person B?' and subsequently 'is the reason behind it appendant to right-holder A?' as well as 'is this reason the decisive, outweighing reason?' For CT much the same applies. The mere existence of a permission is not enough to determine the existence of

[159] Cf. only Tom Regan, *The Case for Animal Rights*, 2nd ed. (Berkeley: University of California Press, 2004).

[160] Quite fascinatingly, in the summer of 2016 the state of New Zealand did indeed endow a national park with 'legal personhood', cf. Bryant Rousseau, "In New Zealand, Lands and Rivers Can Be People (Legally Speaking)", *New York Times on the Web*, July 13, 2016, http://www.nytimes.com/2016/07/14/world/what-in-the-world/in-new-zealand-lands-and-rivers-can-be-people-legally-speaking.html.

[161] Kramer, "Refining the Interest Theory," 34–39.

a right. Additionally, we need to ask 'is there a corresponding duty to this permission for B (or possibly a state of competition)?' and more precisely 'is this duty based on the fact that individual liberty as an abstract reason outweighs other abstract reasons in this case?' Hence, the line of thought is much the same for both lines of theory. Both are in need of practical concretisation of their respective concepts.

In that sense, the two more specific arguments against IT mentioned earlier – the cases of so-called 'third-party beneficiaries'[162] as well as the reverse cases, in which we usually assume an entity's having a right, whilst it does not seem to have (sufficient) own interests to do so – are in fact mainly manifestations of this more general issue of practical delimitation, i. e. these 'problems' arise only due to the fact that further normative demarcations are necessary, which makes it more than doubtful whether these points can actually question the cogency of IT as a conceptual theory. Let us start with the so-called 'third-party beneficiaries': In my view, for an interest theory properly understood such cases do not pose a problem at all, because any modest theory concerning a concept of rights does not even pretend to offer a tool in order to determine who actually *has* a right in each practical case, but it explicitly affirms the necessity to make further normative judgements in order to do so (see above). In other words, IT – just as well as CT, for that matter – describes what rights are and what they should be; it does not describe the conditions under which a specific right actually occurs. That is, on the basis of a concept of rights we may never infer whether there is a right in a certain case and who has it merely from knowing the facts of the case. Otherwise we would be dealing with strictly substantive, justificatory approaches. What one can accomplish with the aid of a concept of rights is to correctly denominate a right in the case where one knows all the relevant underlying value judgements. Back in our example case for 'third-party beneficiaries', the reason for the promisor to make a payment towards the third party could simply be interpreted in different ways – and actual legal systems in fact do differ in their rules regarding such cases.[163] One could either interpret it as only a contractual duty towards the promisee, in which case the reason would be appendant only to A, i. e. A would be the holder of the respective claim-right. Just as well one might interpret the case in a way that B has the duty to make the payment directly towards the intended 'beneficiary' D, who would then hold the respective claim-right. The point is: Both interpretations are possible within the framework of IT and could be adequately described by it. The question of which of the two interpretations is preferable is a substantive one and is simply

[162] David Lyons, *Rights, Welfare, and Mill's Moral Theory* (New York: Oxford University Press, 1994), 36–46.

[163] Cf. Dennis Solomon, "Die Aufhebbarkeit der Drittberechtigung beim Vertrag zugunsten Dritter in rechtsvergleichender Perspektive," in *Festschrift für Harm Peter Westermann zum 70. Geburtstag* (Köln: Schmidt, 2008).

neither raised nor answered by IT. Thus, we can hardly regard it as a fault in the theoretical structure that it remains agnostic in this respect.[164]

Much the same applies for the reverse cases – for persons allegedly having rights, but no proper interests/reasons appendant to them. Reconsider the example with journalist J from above: Suppose prosecutor P does have a duty not to force J to reveal his sources, whilst J has a permission to do so towards P. Suppose further the reason for P's duty is a reason appendant to S or simply a general, non-appendant reason in order to maintain a functional society. That means we can infer that not J, but (at best) S holds a respective claim-right against prosecutor P. As much does not *per se* exclude the possibility, though, that J also holds a liberty. The question of whether J has such an additional liberty – that is, whether P has an additional respect duty – depends on whether J's 'interest' to freely decide about the revelation of his sources is a sufficient, prevailing reason for a correlative duty. That is, would J's autonomy taken by itself outweigh the public interest of finding the truth before the court? In the case where it would, J would have a right against P, namely a liberty. It is all but impossible to imagine P thus having duties towards both S *and* J or both S and J having a right towards P. Thus, each of the appendant reasons by itself would have to be regarded as a sufficient reason for the respective duty. Given this (positive) alternative there would be no problem for IT at all as J would have a right and IT would be able to adequately explain why. In the reverse case, if J's autonomy were not regarded as a sufficient reason to outweigh the public interest, IT would indeed, similar to CT with the rights of the incompetent (see above), suffer from a linguistic inadequacy in the sense of a gulf between the proposed and common terminology. Yet, also similar to CT, as much does not necessarily harm the consistency and cogency of IT as a conceptual theory of rights. In fact, the assumption that J has a right despite a lack of any actual personal advantage to him does seem a bit strange. Hence, IT might well be correct in demanding an adjustment of common language use for such cases.[165]

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[164] Regarding a certifiable divergence between *subjective* interest and right in such cases: This argument clearly presupposes a subjective concept of interests (D has a subjective interest to get the payment; I have a subjective interest in my spouse's winning the lottery; etc.), which, as laid out earlier, is clearly defective; see above sec. III, 1., b), aa).

[165] Things are even more clearly in favour of IT in the before unmentioned case of legal guardians. If a guardian G makes practical decisions on behalf of the entrusted person, e. g. entering into certain contracts, then again one might have worries about the divergence of the alleged right of the guardian to do so and the corresponding lack of one's own interest. Yet, in these cases we even have reason to believe that it is G's freedom of decision that is mainly protected, which would give her a right that also IT can account for. In other words, the reason to respect the exercise of freedom of decision by G is not directly the interest of the entrusted person; however, to define what these best interests are precisely is assigned to G herself. Thus, it is the respective normative competence and G's freedom to decide which is protected in such cases.

Finally, what about the paternalistic implications of IT? In this respect we conceded earlier that IT does indeed imply the *possibility* of legal paternalism. Thus, importantly, we are dealing with possible, but certainly not necessary implications. The paternalism-objection is based on the fact that IT, in sharp contrast to CT, allows for rights that are best described as 'sole immunities', i. e. a (normative) state of affairs in which an agent's claim-right is protected by an immunity but precisely *not* by a power. Indeed, by allowing for rights to be 'sole immunities' of competent agents, IT also allows for the kind of (hard) paternalism entailed by such a construction. On the other hand, IT is flexible enough to not let these be necessary implications, i. e. IT is compatible with paternalistic patterns of argument, but endorsing IT does not entail any endorsements regarding substantive claims in favour of paternalism. In fact, employing an IT concept one could even allow for 'sole immunities' to exist and at the same time not defer to paternalistic arguments insofar as the scope of such normative positions is restricted to non-competent right-holders like small children, animals, etc. In other words, the fact that IT allows for sole-immunity-rights does not entail that one has to endorse a foundational, substantive theory which promotes (hard) paternalism. By contrast, IT as presented here would be just as compatible with a decidedly anti-paternalistic substantive theory.

e) Methodological Classification and Evaluation of Interest and Choice Theory

Before making a final stand in the rights-debate, we shall first try to compare the results won so far regarding CT and IT rights with the possible methodological focusses a theory of rights can obtain. That is, we will ask ourselves: What if CT and IT were not (only) theories in search of an adequate concept of rights, which both expressly propose to be? What if instead we considered to what extent do they (also) function as purely descriptive or as justificatory theories? Put differently, and with respect to the distinct epistemological interests outlined before[166]: To what extent do IT and CT provide us with viable answers to only question (1.1), at least also with answers to question (2), and finally which theory offers the preferable answer with respect to our central, conceptual question (1), i. e. (1.1) *plus* (1.2)?

aa) As Purely Descriptive Theories

CT, limiting the language of rights to liberties and powers, certainly could not be regarded as a successful attempt for a purely descriptive theory of rights, i. e. delineating the scope of rights. It does not give an adequate answer to the ques-

[166] See above sec. I, 1., a), bb).

tion 'what, out of all things, could possibly be called a right?' Instead CT needs to be regarded as a purely *conceptual* approach – a rather demanding one even. IT on the other hand – with respect to the results it produces – offers a very precise answer to our methodological question (1.1) by including all four entitlements without any further conceptual demands. In other words, IT above all very clearly delineates the *necessary* conditions for rights and could thus also (if not preferably) be interpreted as an attempt to render the scope of rights, not a proper concept.[167] Thus, if we understood IT as a purely descriptive account, it would be in accordance with the original aims of the Hohfeldian endeavour, certainly much more so than CT possibly could. Accordingly, and as indicated earlier, it is not an uncommon claim that IT comprises CT in such a way that it offers the more fundamental account of rights or, put differently, that CT necessarily needs to rely on the central tenets of IT.[168] We now find that as much is true in case we understand IT as a purely descriptive account. As such its tenets are evidently necessary conditions for any plausible theory concerning a concept of rights and thus also for any plausible CT concept. Yet, what IT would actually offer then is not a concept of rights, but only a rendering of the scope of the term. Importantly, this does not imply that IT does not or could not *also* work as a conceptual approach. In order to assume so, though, one would have to demonstrate that there are good reasons why the concept should be just as wide as the scope and that there are no better reasons against such a contention. We shall see whether and to what extent there are either way in the following section cc).

bb) As Substantive, Justificatory Theories

To what extent do both CT and IT imply any preliminary judgements, i. e. to what extent and why do they possibly possess a substantive, justificatory stance? Doubtlessly, both lines of theory are rooted in a strongly substantive, normatively pre-shaped tradition. Whilst CT stands in the tradition of classic liberalism and deontological ethics such as those offered by *Kant*, *Savigny*, etc., IT has traditionally been developed and defended by members of the opposed consequentialist camp such as *Bentham*, *v. Jhering*, et al. From this fact it is sometimes inferred that a debate about different concepts of rights is essentially normative in nature, that it is always also a dispute between different substantive moral conceptions.[169] This thesis shall be challenged, at least in this rigid form. My adverse thesis, as it has been indicated already, is that it is at least pos-

[167] We remember: this seems to be what Kramer claimed all along by marking the features for his 'concept' of rights "necessary though insufficient […]", see above sec. III, fn. 127.

[168] See above sec. III, fn. 143.

[169] Gutmann, "Paternalismus und Konsequentialismus," 58–59; id, *Iustitia Contrahentium*, 34–35.

sible and therefore ultimately preferable to formulate a modest, restrictive concept of rights, one which entirely abstains from any practical normative implications – and that both CT and IT can be understood in such a modest way. That is, I suppose that by employing modest versions of IT or CT no necessary normative *judgements* have to be backed, even though certain minimal and indirect normative implications are inevitable.[170] Yet, there are no hidden or disguised normative disputes carried out between the concepts of IT and CT if understood in the proposed way.[171] Still, even the most restrictive version of CT will have to positively acknowledge the valuation of individual autonomy, i. e. the fact that individual autonomy is regarded as a principle. Hence, at least pure duty ethics are *a priori* excluded by endorsing CT. Yet, the same must apply for any interest theory, which in practice allows the existence of 'autonomy rights' as one type of rights amongst others, which presumably no interest theorist would deny.[172] For instance, *Rainbolt* contends: "Sometimes [rights] are justified on autonomy grounds while in other cases they are justified on the basis of individual welfare"[173]. However, and importantly, this normative presupposition of CT does not entail any specific normative claims in the sense of concrete substantive judgements. In other words, with a CT concept, if we knew a rule, we could determine whether there is a right, but knowing only the concept of rights we could never determine the rule.

Saying it is possible for such modest concepts to be formulated, it is implied that other kinds of concepts are possible as well, such as a CT concept of rights which not only describes protected decisions as rights but at the same time implies a 'presumption in favour of freedom' on the justificatory level, which emphasises a general substantive *priority* of individual freedom over other social goals or concerns of the community – in other words, a priority of the right over the good.[174] The term 'right' *can* be understood in such a normatively charged – or one might say 'political' – way. Yet, such a concept would not be an adequate result of a conceptual inquiry with the aim of facilitating a normative discourse. To be clear: My point is not that such justificatory claims need to

[170] The term 'modest' is expressly not used in the sense Frank Jackson uses it to distinguish between modest and immodest conceptual analyses. See therefore the corresponding article by Kenneth Himma, "Immodesty in Dworkin's 'Third' Theory: Modest Conceptual Analysis, Immodest Conceptual Analysis, and the Lines Dividing Conceptual and Other Kinds of Theory of Law," in *The Legacy of Ronald Dworkin*, ed. Wil Waluchow and Stefan Sciaraffa (Oxford/New York: Oxford University Press, 2016), http://ssrn.com/abstract=2465170.

[171] Gutmann, "Paternalismus und Konsequentialismus," 59; Gerald Postema, "In Defence of 'French Nonsense'. Fundamental Rights in Constitutional Jurisprudence," in *Enlightenment, Rights and Revolution*, ed. Neil MacCormick, and Zenon Bankowski (Aberdeen: Aberdeen University Press, 1989), 128–129.

[172] See esp. Raz, *Morality of Freedom*, 188 ff. Cf. also above sec. III, fn. 143.

[173] Rainbolt, *Concept of Rights*, 115.

[174] See inter alia John Rawls, "The Priority of Right and Ideas of the Good," *Philosophy & Public Affairs* 17 (1988).

be rejected for having the function of justification, but they do need to be decidedly rejected as the content of any concept of rights, as the relation of freedom and social goods is exactly what we are supposed to argue about *with the aid of* concepts like that of 'rights'. Thus, the term 'rights' certainly cannot already imply a general priority of individual freedom over other goods as this would obstruct the debate from the very start. If the concept of rights already entailed a priority of the right over the good, all those which do not share the view that such a priority exists are not even able to use the term, i. e. the two factions on the level of substantive moral philosophy described above[175] would not even be able to speak the same language. Exactly this, a common language, is what conceptual inquiries ought to make possible, though. It could, of course, be the case that it was generally impossible to formulate a value-free concept of a normatively charged term like 'rights'. Yet, there is no perceptible explanation of why this should be the case in the first place, namely an answer to the question of why there is supposed to be no clear line to be drawn between the conceptual level – question (1.1) and (1.2) – and the justificatory one – question (2).[176] My aim is to demonstrate that such a line can be drawn by employing the distinction between abstract reasons/principles and practical reasons/judgements, i. e. the idea of relating abstract reasons as introduced earlier.

Let us therefore shift our attention for a moment from the nature and purposes of concepts to what it is that makes approaches substantive or 'justificatory'. The ultimate aim of any practical normative philosophy is to supply agents with (practical) reasons, to supply agents with answers to the question 'what ought I to do?' In other words, justificatory or substantive normative reasoning means the evaluation of certain actions or types of actions. Evaluating actions and producing practical reasons means prioritising principles, which is to say, defining relations between them.[177] That is, in every perceivable case justificatory reasoning means pre-forming judgements, i. e. defining relations of priority or precedence both concrete and general. Thus, conceptualisation as understood here could successfully contrast with justificatory approaches if it could demonstrate avoiding any such judgements or any implications regarding relations of precedence between the involved principles.

Hence, what I propose is a distinction between two different kinds of concepts of rights, depending on the concrete substantive implications they have: a neutral one and a normatively charged one.[178] Importantly, the difference be-

[175] That is, deontologists versus consequentialists. Or rather, a justificatory emphasis on individual freedom versus a respective emphasis on intersubjective goods. Cf. above sec. II, fn. 224.

[176] See above sec. I, 1., a), bb).

[177] See above sec. II, 4., b), bb).

[178] One might also consider 'modest' and 'immodest' with regard to substantive implications. Importantly, though, the distinction introduced here is not at all equivalent, not even similar to that introduced by Jackson – and thereon following Himma – between modest and

tween the two cannot be found by investigating rights as practical reasons (see above). In this respect both CT rights and IT rights do imply a certain prevalence of rights. If we say a practical CT right exists, it is implied that individual autonomy outweighs other considerations *in this specific case*. If we say a practical IT right exists we just as well imply a priority of the respective abstract appendant reason. The difference lies elsewhere, namely on the level of principles: A neutral or modest concept of rights has no further normative implications because it does not imply an *a priori* prevalence of one good over another already on this abstract level. In contrast, a normatively charged or immodest concept does imply such an abstract priority. Traditionally, amongst choice theorists the assumption of a general, justificatory priority of individual autonomy has been and is all but uncommon (see above). Yet, we do not have to understand a choice conception in that way. As an abstract 'right to freedom' we could just as well take individual autonomy as one reason amongst many others. The same applies for IT: At least some versions of IT seem to imply a general priority of such abstract reasons that are supposed to be rights; rights are thus usually regarded as somehow weightier reasons than others, as some kind of normative "threshold weights"[179]. However, also here we could refer to the abstract appendant value as only one reason amongst others without implying any increased weight or higher priority only due to the fact that this reason is referred to as a 'right'.

Now, what makes the neutral understanding of a concept of rights preferable to the 'normatively charged' one? Essentially, it is the indifferent applicability in normative debate. Additionally, there are other strong intra-theoretical reasons not to rely on a normatively charged concept for each line of theory.[180] For CT the claim for an abstract priority of autonomy over social concerns on a conceptual level would lead to defects of liberal and especially libertarian theories that were (at least in parts) correctly pointed out and aptly criticised by theorists like *Sandel*, *Taylor*, et al.[181] Without wanting to endorse a 'communitarian' po-

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immodest concepts, see already above sec. III, fn. 170. Himma presents the concept pair as differing with regard to the epistemological interests. As said before, I only aim at a differentiation with regard to substantive implications. Thus, even though generally worthy of further consideration, we cannot and need not dwell further on Jackson's account as his project was one fundamentally different from ours.

[179] Dworkin, *TRS*, 92. See also Gutmann, *Iustitia Contrahentium*, 40, with further references. Cf. also: Thomson's 'High-Threshold-Thesis' (Thomson, *Realm of Rights*, 166–167); Koller, *Theorie des Rechts*, 252.

[180] Note that the following arguments are principally also general arguments against the (pre-) theoretical accuracy of such concepts, cf. below sec. cc), (3). As they entirely fail with respect to the criterion of normative inclusivity – see below sec. cc), (2) – it seems reasonable already at first glance to focus on the neutral/modest variants of both lines of theory in determining a concept of rights.

[181] See inter alia: Michael Sandel, *Liberalism and the Limits of Justice*, 2nd ed. (Cambridge: Cambridge University Press, 1998), 1–10, 135–141, 175–178; Charles Taylor, "Atom-

sition and all of its possibly problematic implications here, it appears clear from what we have learned so far that virtually every intersubjective duty that is not grounded in the mere respect for another's autonomy means an outweighing of autonomy by some other intersubjective principle. Thus, if we would presuppose an abstract priority of autonomy over other goods already on the conceptual level, we would in a way disguise the fact that we actually need to decide in which cases autonomy and in which cases some other social good should prevail. In other words, a general priority of autonomy, a 'suspicion in favour of freedom' (see above) might be a reasonable claim on the justificatory level, yet employing a CT concept with such an *a priori* implication bears the imminent danger of promoting an excessive individualisation, a too extensive disentanglement of the individual from its social context, and consequently neglect for the necessary conciliation between concerns of the individual and concerns of the community on the substantive level.

On the other hand, a normatively charged interest theory would suffer from a similar and equally severe problem. By implying an abstract priority of such abstract reasons that are labelled as 'rights' over other reasons, such a concept would encourage a development that can already be witnessed in normative practice and has been regularly detected by legal theorists: the inflation of rights, as indicated by the increasing prevalence of rights talk.[182] If even to have an abstract right meant having a somewhat weightier, better reason on one's side, it is only understandable that people will try to label their concerns, their own or those which they advocate, as 'rights'. Thus, the strictly substantive matter of which interests/values should prevail in a certain context is veiled and relocated to the conceptual level. In other words, it is no longer a question of who has the better arguments or reasons on their side, but it more and more becomes a matter of who has a right and who does not. Such a disguising of substantive questions as conceptual ones is certainly counterproductive and not tolerable for a sophisticated normative debate.

To conclude: If we understand IT and CT in the proposed neutral or modest way, we are able to draw a distinct line between conceptual and justificatory approaches – the former being of the kind that they do not entail any statements of normative priority on the level of principles. In this sense, the dispute between IT and CT *can* be understood as a purely conceptual one without any practical implications. As much is preferable, because the normatively charged

ism," in *Philosophical Papers Vol. 2*. (Cambridge: Cambridge University Press, 1985), 188–189. Cf. also Mary-Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991), 109 ff. For an introduction to libertarian ideas and the respective understanding of freedom (in German) see Peter Rohs, "Libertarianische Freiheit," in *Auf Freigang*, ed. Sibille Mischer, Michael Quante, and Christian Suhm (Münster: Lit, 2003).

[182] Loren Lomasky, *Persons, Rights, and the Moral Community* (New York: Oxford University Press, 1987), 3 ff., 224; Rowan Cruft, "Beyond Interest Theory and Will Theory?" *Law and Philosophy* 23 (2004): 347, with further references.

concepts would not only obstruct the substantive debate, but would also entail serious theoretical problems either way. The consequent substantive questions regarding what actually makes rules just are not affected by the dispute on the conceptual level. On the justificatory level (at least in Western philosophy) there remains a clash between two fundamental positions: one side standing in the liberal tradition of *Kant*, *Rawls,* et al., taking the individual and its autonomy as its theoretical starting point, grasping law as the reciprocal compatibility of individual spheres of freedom, and demanding a general priority of the right over the good, its rival standing in the consequentialist tradition of *Bentham* and *Mill* trying to base rules on the well-understood (objective/intersubjective) interests of individuals, imposing a priority of the good over the right. Presumably, both would have to be regarded as misconceived insofar as they were to claim a general logical priority in terms of theory of either freedom over intersubjective goods or goods over freedom. Theoretically, there can be no such general priority, certainly not in the sense of pre-theoretical explicability of one phenomenon by means of the other, as freedom of decision (the right) and substantive reasons for actions (the good) are interdependent on a meta-ethical level. That is, in the relation between individual and society it is an undoubtable practical necessity to constantly prioritise between individual freedom (in the form of permissions) on the one hand and predefined reasons (in the form of obligations and prohibitions) on the other. In normative practice this priority is established in the form of practical reasons that are in constant need of refinement. Hence, the difference between the opposing kinds of substantive moral theory does not lie in *per se* incompatible, yet fundamental theoretical structures. In fact, they do lay a different justificatory emphasis on common general structural ideas. The liberal tradition emphasises the notion of autonomy or the individual's potential to exert normative competence, whilst consequentialism emphasises the notion of reasons or the idea of authoritatively imposed content.[183] The focus

[183] In fact, with respect to the individual being, consequentialism as a theory family usually emphasises the notion of beneficence in the sense of an intended well-being. As a short side note, it shall be insinuated why and to what extent such a reasoning is objectionable. Bluntly, if we suppose a notion of 'intended well-being' it is a just question to raise whose intentions exactly should play a role here. In this respect, consequentialist theories tend to ignore the individual's side and the just demands for consideration of his or her subjective preferences in the process of justifying rules. Supposedly, these theories do so by presupposing the legitimacy of an active, rule-issuing authority merely by virtue of its derivation, not by virtue of the reasons the authority provides in normative discourse. Ultimately, that leaves the individual as passive with regard to the definition of his or her own well-being – a subject to the will of the authority. In fact, such an understanding is already implied in the Latin stem for the English term 'beneficence', as the Latin '*bene facere*' literally means 'doing good'. Hence, the term suggests a relation of someone doing good and others receiving it. The meta-theoretical problem of a struggle for the proper definition of what is 'good' in the first place, for the proper perspective in doing so, is thus better captured by the more neutral expression 'advantageousness'. For the terminological issue cf. above sec. I, fn. 27. For a more precise rendering of the meta-theoretical problem just mentioned see esp. below sec. III, 2., e), cc), (3), (c).

and emphasis of these theories may differ, but there is surely no *pre-justificatory* priority of autonomy over reasons or *vice versa*. Ultimately, all substantive theories have to work with the same basic meta-theoretical tools. They all need to strike a balance between the individual citizen and social concerns, between individual freedom of decision and prescribed reasons.[184] As substantive theories, both schools are doing the same, namely issuing permissions and duties in a way that is regarded as overall just in the internal logic of the practice. In this respect different substantive approaches can, do, and will dissent regarding the problem of to what extent individual freedom is necessary for a good, peaceful, prosperous social coexistence; however, they should not deviate with regard to the underlying meta-theoretical structures. In short, to determine a modest concept of rights is naturally only the first step. On the justificatory level we then need to decide precisely just how important rights are to us.[185]

cc) As Conceptual Theories

What exactly is it then that makes any concept of rights a *good* one? What determines the quality of such concepts? And how do the different criteria for the concept's overall quality relate to the two concepts of rights which we just outlined? Properly applied, the very purpose of conceptual inquiries in normative philosophy is to reverse the reasoning from theory to corresponding concept. Thus, the aim is first to establish and generally agree upon a common terminology in order to then be able to discuss an adequate substantive, foundational theory. Accordingly, a concept needs to meet certain requirements. The extent to which a concept fulfils these requirements coincidently offers reasons/arguments for the decision in favour of one concept and against another with respect to programmatic question (1.2). Essentially, these at times reverse aims or purposes or 'conceptual reasons' are (1) linguistic adequacy, (2) normative inclusivity, and (3) meta-theoretical accuracy.[186] In detail:

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[184] Thereby, it does not matter whether this justificatory process is described as a weighing, an appreciation of values (German: *Abwägung*) or as a demarcation of spheres or domains of freedom (German: *Abgrenzung*). The latter is the preferred language of those who see individual freedom as the default and intersubjective reasons as restricting autonomy. The former is the language of those regarding intersubjective values as primary and consequently individual autonomy as one value amongst others.

[185] The notion of a normatively neutral concept as presented here thus follows in the footsteps of Hart, who considered the aim of his 'descriptive jurisprudence' a *demystification* of law, see Hart, "Demystification of Law". Analogously, normatively neutral concepts of rights aim at a demystification of rights. Normative problems need to be solved and decisions need to be made independent of mere conceptual questions. It should never be of importance alone whether we describe something as a right, but essentially the respective normative weight of the reasons involved should matter. Thus, especially a neutral CT in the tradition of Hart stands for a conscious discharging of a normatively charged concept with the primary aim of a rationalisation of the language of law and thereby (hopefully) a rationalisation of law itself.

[186] This categorisation and the ensuing investigation – especially the distinction between

(1) Linguistic or Practical Adequacy

The first possible benefit of a concept of rights is its compatibility with the actual usage of the term. In other words, being as close as possible to the scope of the term needs to be considered as a quality feature of the concept. This might appear strange in light of the fact that we explicitly divided questions (1.1) and (1.2) in the first place. Yet, if we understand linguistic adequacy as not *the*, but only one quality feature of concepts, we detect no inconsistency whatsoever. Hence, in terms of being an argument for one possible concept and against others, a concept's accordance with the term's scope is simply an entirely acceptable pragmatic one. The question in this context is: To what extent do speakers of the language have to adjust their usage of the term? The (valid) claim for linguistic or practical adequacy thus amounts to the following: The smaller the necessary adjustments, the better.[187] Evidently, IT is preferable to CT in this respect. Even though both lines of theory know cases in which the practical usage of the term right might have to be aligned with the theory (see above), IT can accord for many more practical manifestations of the term than CT, especially for central, intuitive ones like rights of the incompetent, of small children, elderly or handicapped people, certain animal rights, etc. Hence, practical adequacy is a strong argument in favour of IT.

(2) Normative Inclusivity or Normative Neutrality

The second criterion is again concerned with the idea of a concept being applicable for as many people as possible – yet this time not in the sense of a practical habit which ideally should not at all or only at best minimally be changed, but in the sense of being compatible with as many substantive moral theories, as many conceivable justificatory approaches as possible. Thus, in order to be suited for or to be deployable in a general normative discourse, the concept should imply minimal evaluative presuppositions, i. e. should require as few abstract values and concrete evaluative decisions as possible. With the restriction 'as few … as possible' it is implied that inclusivity need not and must not go at the expense of the explanatory adequacy of the term, i. e. the restrictiveness with regard to implied reasons should only go so far as the implied normative claims remain contested. All entirely uncontested normative claims could and should indeed be part of the concept. As indicated earlier, the appreciation of the in-

(1) and (3) and their relation with respect to the dispute between CT and IT – in many ways draws on the outstanding analysis of Leonard Sumner (Sumner, *MF*, 95 ff.). Note that I am surely not trying to offer a conclusive account regarding the nature of concepts; the following implications should be read as merely a selection of thoughts and remarks on the nature and purpose of concepts, especially of theoretical normative concepts like 'rights' – thoughts which should be seen as an invitation for further debate.

187 Cf. Sumner, *MF*, 49–50.

dividual's freedom to decide one's own fate as a general principle (at least one amongst others) can be regarded as truly pervasive – even among proponents of IT. Thus, the inclusion of this abstract principle into one's concept of rights presumably does not harm the concept's normative inclusivity.[188]

Ultimately, neither IT nor CT can be regarded as more inclusive than the other. Correctly interpreted neither of the two implies any concrete normative judgements or any general priority of principles (see above). Both IT and CT are equally agnostic with regard to specific value judgement and thus both (in theory) equally applicable as meta-theoretical concepts in normative discourse. Hence, 'normative neutrality' is no argument for either side. In order to illustrate this normative neutrality of both IT and CT, let us return once more to the example of paternalism from above. There we claimed that a modest IT would be compatible with both paternalistic and strictly anti-paternalistic substantive theories. Importantly, much the same applies for a modest CT of rights. It does not per se exclude substantive paternalistic theories. In fact, hard paternalism is compatible with a CT concept of rights as well, only the reasons for paternalistic measures could never be regarded as 'rights' under CT, but would have to be presented as respective duties of the person acted towards paternalistically. Thus, on the one hand we find the criticism levelled at IT debilitated: IT is not necessarily more paternalistic than CT. On the other hand, the example case does point to a subjacent difficulty with IT. Its concept of rights proves to be theoretically vague and indistinct. Whilst it is not problematic that it is wide enough to allow for paternalistic patterns of arguments, it is surely problematic that its concept of rights to a certain degree loses its contours by allowing for cases in which there is a conflict between different (sets of) rights for the very same entity/person. For instance, consider this standard example for problematic, paternalistic reasoning: A wants to end her own life. The question is: Should she be allowed to relieve others of their duty not to end her life or not? This issue describes a conflict between an alleged power of A's in contrast to an alleged sole immunity. From the point of view of the competent authority this conflict can also be described as a one between different principles (autonomy versus welfare/beneficence). Thus, there is nothing strictly wrong with IT in terms of meta-theoretical structures. But we do need to ask ourselves whether it is sensible to describe this conflict as 'conflict of rights' of the same individual or rather as a conflict between a subjective right (to freely exert control over one's own life) and an intersubjectively imposed duty (to preserve one's own life) as CT would suggest. We will return to this question in much more depth in the following sections. Already I may insinuate that it is more than doubtful

[188] Only pure duty-based ethics are precluded from the start by accepting a CT concept – a fact which historically is all but surprising, as in times of purely duty-based ethics the notion of individual 'rights' was entirely unfamiliar to those engaged in normative reasoning. Cf. only Edmundson, *Rights*, 4 ff. See also below sec. cc), (3), (c).

whether there are any valid theoretical or meta-theoretical reasons in favour of IT in this respect.

(3) Meta-theoretical Accuracy

Finally, there is one final, rather important goal that an ideal concept of rights ought to achieve. Not only should such a concept accord to practical usage and enable us to indiscriminately engage in substantive discourse. Ideally, it should also pre-shape the consequent normative debate and the resultant substantive theories in a sensible manner.[189] A good concept should be to some degree helpful in the design of a proper substantive, normative theory of justice. Therefore, one aim of a concept needs to be to describe and trace important meta-theoretical structures as accurately as possible. In other words, by making a conceptual claim we draw a line between properties we decide to call rights and those which consequently are not. For this demarcation we need reasons. The reasons for choosing one concept over the other are not exhausted by claims for linguistic adequacy and normative inclusivity, but if our ultimate aim is to establish an adequate substantive theory, i. e. a proper theory of justice, we merely make a general debate about such a theory *possible* by ensuring the concept's normative inclusivity. Yet, we can do more than that. We can support and facilitate the substantive debate by directing it into the right channels from the start with the terminological demarcation proposed.

This now leads us to ask which of the rival concepts does a better job at tracing necessary meta-theoretical structures? Let us begin by roughly sketching the arguments to be scrutinised henceforth: First, CT does a rather compelling job in this respect by drawing the line between rights and non-rights analogously to the line between permissions and duties, between individual competence and prescribed, intersubjective normative content. If we would understand only powers and liberties as rights, then we could demarcate a quite clear dichotomy between rights on the one hand and duties on the other. Regarding a certain action any person/agent would then either have a right (liberty or power) or a duty. Thereby this dichotomy exists under the sole condition that individual autonomy is regarded as a principle within the normative system in question, because only in that case every permission would necessarily be a right (see above).[190] The agent in question might not have this right towards every other agent but would at least towards the norm issuer/the state (see above). Hence, CT "enables us to draw boundaries within a rule system in an illuminating

[189] Cf. Sumner, *MF*, 52: "[…] one conception might be functionally more adequate than another if it is better adapted to serving some important conceptual or theoretical purpose".

[190] The connection is said to be only 'quite clear' because on the side of permissions we left out 'unprotected permissions' in bipolar relations, which we consciously chose not to refer to as 'rights'.

way"[191]. Moreover, by implying a content-wise distinction between the value of individual autonomy and other intersubjective values, it enables us to accurately describe a necessary, pre-substantive stress ratio regarding the justification of normative content, namely between the community as a whole represented by its authority and the individual, both of which are generally able to make their own decisions. CT rights thus function as an argumentative counterweight to and a justification hurdle for authoritative considerations in this stress ratio. IT on the other hand fails on a broad scale to provide meaningful meta-theoretical insights. The only thing that it does provide is a differentiation between rights as appendant reasons and other kinds of reasons. In comparison, this does not seem anywhere near as important as the distinctions that CT traces.[192] In detail as follows:

Sumner writes: "Rights on the choice conception […] enable us to distinguish between two grounds for imposing constraints on others: the protection of individual autonomy and the protection of individual welfare"[193]. For a start, I believe he is entirely correct. Yet, there is more to CT rights than just that. The particular strength of the choice conception includes not only, as *Sumner* suggests, its ability to distinguish between two kinds of normative protection by means of imposing different kinds of duties/constraints on others, i. e. in fact its ability to distinguish between different kinds of content, but also the ability to clearly distinguish within one system between authoritatively imposed content on the one hand and areas of individual competence on the other.[194] Additionally, by distinguishing between the two aforementioned kinds of content (autonomy and welfare), CT terminologically reframes a central, pre-justificatory stress ratio, namely between community and individual with the community's

[191] Sumner, *MF*, 53. Yet, for reasons to be laid out presently, Sumner errs in consequently asserting that "the interest conception could plausibly claim that it too draws lines in a theoretically fruitful way" (ibid). Cf. also Leonard Sumner, "Rights," in *Blackwell Guide to Ethical Theory*, ed. Hugh LaFollette (Malden, MA: Blackwell, 2000), 295.

[192] Sumner, *MF*, 96–97.

[193] Ibid, 98.

[194] The reason why both claims are consistent lies in the dialectics of content and competence; see already above sec. III, fn. 99. In every case an (active) right will be a protected area of individual decision making, which does not necessarily entail that it only exists because a certain personal authority assigned it to the right-holder. Thus, we would understand the sovereign's decision as an ultimate justification. One could do so, yet it is equally possible to regard the 'original human right' of freedom/autonomy (see above sec. III, fn. 71) as an original, intrinsic reason, which – at least in a certain area – would as such be immune to the sovereign's decisions. In other words, the most problematic issue regarding the proper justification of rights is not and cannot be settled in this context. Whether one regards their status as an original one (autonomy as an intrinsic value) or as a derived one (rights assigned by the authority, wherever deemed appropriate) is not of importance for determining a concept of rights as such. Cf. Gutmann, "Paternalismus und Konsequentialismus," 58–59. In any case rights will serve as the individual's means to argue for and to claim more freedom and responsibility and less authoritative restraints on conduct.

authority addressing rules at agents, who are themselves capable of making their own decisions. In a way, this is a conflict of competing *potential competences*. Employing a CT concept, the notion of rights then helps us to explain and stress the individual's position in this conflict. Rights are thus something the individual is endowed with, something which he or she can claim, against or in contrast to the exertion of authoritative power. Importantly, despite the implied terminological distinction between different kinds of content, it is a decisive benefit of CT that it draws the conceptual dividing line between rights and non-rights essentially along the line between acts of individual competence and duties as predefined normative demands. IT, on the other hand, draws this line much further out,[195] based on the intuitive insight that rights are something which people are better off with than without. Notably, the fact that IT draws the conceptual line further does not necessarily mean that IT *per se* cannot explain the difference highlighted by CT. Within IT we could simply think of rights as the generic term and then further differentiate *types of rights*. For instance, it is all but uncommon to differentiate between autonomy-rights (liberties and powers) and welfare-rights (claims and immunities). Thus, it might seem that by employing an IT concept we can make sense not only of the distinction between specific appendant reasons (relational duties) in contrast to other practical reasons (non-relational duties), but it seems IT can *also* draw a line between the exercise of freedom and other more basic forms of rights.[196] Notably, the former is a distinction which CT's concept of rights does not imply, let alone even try to explain or reframe. Provided there is indeed a meaningful difference between appendant and non-appendant reasons (which is at least not impossible), ultimately that would make IT not only an equally convincing, but even a preferable theory in terms of meta-theoretical accuracy. However, there are a number of powerful arguments which speak against IT and thus in favour of CT in this respect, which shall be scrutinised in the following.

(a) Lack of Feasibility through Indeterminateness

To begin with, let me try to sharpen a thought introduced earlier: IT's alleged lack of feasibility as a concept. As indicated, CT conceptually distinguishes between protected permissions on the one hand and obligations/prohibitions on the other. Hence, it draws a conceptual line between rights and non-rights analogous to that between acts of individual competence and prescribed normative content in normative systems that generally value individual autonomy. IT draws this line in the realm of content alone, i. e. between different kinds of reasons. In other words, it presupposes different types of reasons without *a priori* specifying these reasons. Accordingly, the difference between the two is

[195] Sumner, *MF*, 100.
[196] Ibid, 98.

that CT's concept can be applied without much further ado, because in its case the underlying reason in question is unambiguous: As we saw, it can only be individual autonomy. IT on the other hand, with its implied claim that rights are simply reasons amongst others, lacks feasibility precisely by lacking prior criteria to distinguish those reasons which are supposed to be rights from others. The only criterion it does provide, namely the 'appendance' of such reasons deemed rights, appears rather meaningless in terms of meta-theoretical structures. Why, in fact, should it be of any importance? Practically, with regard to the content of the duty in question, it does not make any difference whether we are dealing with a directional or a non-directional duty. As much would and could only make a difference if rights were *a priori* weightier reasons, a possibility we explicitly denied by discrediting normatively charged concepts beforehand (see above). Apart from that, the (moral or legal) reasons behind not hurting another person and behind not destroying a monument or not cutting down a very old tree might be regarded as reasons different in kind. Yet, is it sensible, let alone necessary, to *a priori* distinguish between the two terminologically? In other words, is the proposed distinction important enough to justify the label rights or do we thereby rather disguise more important meta-theoretical structures? And which structures exactly would they be?

(b) The Structural Problem of Interest Theory with Regard to Paternalism

In order to approach these questions, we shall, for the third time already, pick up the problem of paternalism. Earlier we clarified that neither a normatively neutral IT nor an equally neutral CT entail any positive or negative implications with respect to the substantive problem of paternalism. A justification as well as a critique of paternalistic measures can be established only by way of substantive normative reasoning. However, the possibility of criticising IT in this context goes well beyond the accusation that IT has *substantive* paternalistic implications, which correctly understood it does not; yet, one may point out that by employing an IT concept, in contrast to its rival CT concept, due to the nature of IT rights one will be *less able*[197] to leverage a critique of paternalism. That is, IT does not acknowledge and does not provide for the fact that paternalism *is* a problem, which is in need of a resolution on the justificatory level. In order to make this point plausible we need to show two things, namely that (aa) paternalism represents a necessary, meta-theoretical problem to be solved one way or another by any substantive theory and that (bb) IT is structurally less able to account for this problem.[198] In detail as follows: (aa) Any normative community consists of a certain number of capable agents. The intersubjective rules within this community are usually provided by some personal authority, for instance a

[197] Duly note: less able, not strictly *unable*.
[198] Cf. Gutmann, "Paternalismus und Konsequentialismus".

sovereign single ruler (a king, a dictator, etc.), a democratically elected parliament, a religious leader, a divine entity, etc. This authority decides certain normative issues, and thus it provides reasons/predefined normative demands for the agents within the community. However, in order to be able to decide in favour of these reasons in the first place, in order to follow the imposed normative demands, each agent needs to be capable of making decisions him- or herself. Thus, due to their own decision-making ability every agent must by definition be able to disagree with a predefined judgement, claiming that he or she could have judged just as well or even better by him- or herself. Hence, in any conceivable normative community there is a necessary, meta-theoretical stress ratio between the rivalling abilities of the authority and of the individual to judge a certain action. As indicated earlier, there is a stress ratio between two kinds of potential competences. Reconsider the paternalism-example from above: Suppose A is not permitted to command over her own life, thus she is not permitted to give her consent to any form of euthanasia. Furthermore, A is generally regarded as an autonomous agent, capable of making her own decisions and thus possibly being responsible for their outcomes. We can understand a rule that forbids others to comply with A's explicit death wish in only two ways: Either A is no longer regarded as capable under certain circumstances. However, then we are not dealing with 'paternalism' as a problem in the first place, as paternalism presupposes an interference with a person's autonomy.[199] Or we suppose that A was generally capable of making a decision in this case, only that her decision would have been a somehow flawed one. Then we discover the conflict described before: The relevant authority, the lawmaker makes a judgement about a normative issue with respect to A's own well-being, whereas A could have also made such a judgement. Now, it is possible, of course, that there are better and worse reasons to do certain things; this is a matter for evaluation. But once we agree that the person A in question is still able to decide for herself, there is a clash between competing capabilities to decide, to judge. There is a conflict between different reasons and one needs to decide which should enjoy priority: the intersubjective or the subjective definition of the good in this case. (bb) Now, why and to what extent is IT less capable of describing this structural conflict of competing competences regarding the same normative issue? The reason is IT's unilateral focus on the dimension of content. By referring only to the reasons for duties, the rights-concept of IT overemphasises the advantageous aspect of rights. Thereby it is able to include a wide variety of different rights, which in turn leads to its inability to distinguish through or by means of its concept between elements that are or are supposed to be advantageous for the right-holder due to an imposed judgement and such elements that are advantageous due to the (protected) permission to judge by oneself. Once again, this does not imply

[199] G. Dworkin, "Paternalism".

that IT produces worse practical results nor that one could not otherwise criticise paternalism or paternalistic reasoning despite employing an IT concept. Only one could certainly not employ the concept itself as a means to criticise paternalism, which in turn one is able to do with CT rights. In other words, IT is less viable in terms of describing the problem of paternalism because for IT, to have a right simply means to enjoy an advantageous position, regardless of whether this advantage is autonomous, paternalistic or anything else. For CT to have a right means to obtain a means against authoritative implementations.[200] Thus, CT rights are anti-paternalistic by nature – only in the sense, though, that it is impossible to have a 'right' with an underlying paternalistic reasoning given CT, whilst it is not so under IT. In turn, we could have paternalism in a normative system that works with CT rights, only the relevant authoritative measures would then prescribe respective duties for the agent acted paternalistically towards.

(c) The Emergence of Rights or Right-Based versus Pure Duty Ethics

Ultimately, the inability of IT to account for the central stress ratio between individual and authoritative competence goes well beyond the rather specific problem of paternalism, where we are by definition only concerned with normative issues regarding the individual well-being of one specific person, i. e. put bluntly, cases in which the state claims to know better what is good for this person. Moreover, the stress ratio between authoritative and individual claims for competence can in fact be regarded as pervasive within any intersubjective normative system.

Once more: It is one of *the* central theoretical benefits of CT that by employing its concept of rights (in contrast to other concepts like duties, virtues, etc.) one is able to account for the above-mentioned stress ratio. As indicated earlier, CT rights thus serve as a means for individuals in the struggle for freedom and against authoritative power. Let us dwell on this thought by investigating the history, the genesis of rights.[201] Where did rights come from? Why were there no rights before and, consequently, what were they needed for in the first place? As much shall become clear by a thorough comparison of purely duty-based ethics with those ones that more or less rely on a notion of rights, which practically all contemporary and reasonably developed normative com-

[200] Cf. above the remarks on the role and function of liberties in general, sec. III, 1., b), bb), (2), (c).

[201] Well-written introductions to the history of the concept of rights include the following: Thomas Gutmann, "Normenbegründung als Lernprozess? Zur Tradition der Grund- und Menschenrechte," in *Von der religiösen zur säkularen Begründung staatlicher Normen*, ed. Thomas Gutmann, Ludwig Siep, Bernhard Jakl, and Michael Städtler (Tübingen: Mohr Siebeck, 2012); Helmut Coing, "Zur Geschichte des Begriffs "subjektives Recht"," in *Das subjective Recht und der Rechtsschutz der Persönlichkeit*, ed. Helmut Coing, Frederick Lawson, and Kurt Grönfors (Frankfurt a. M.: Metzner, 1959); Finnis, *Natural Law*, 206 ff.

munities do. Hence, the central question that any rights advocate needs to ask himself is: What do we need rights for in comparison and contrast with duties? More precisely: What is the decisive aspect about rights that cannot and could not be adequately represented in a language that is exclusively based on duties, directional and/or non-directional? What was the decisive development in normative reasoning through the emergence of rights, for which a pure language of duties did not suffice? Notably, the following remarks will first focus on pure duty ethics and should not be read as a critique of IT. We will work out why and to what extent IT does not account for the specific function of rights thereafter.

When speaking of 'pure duty ethics' we need to distinguish two things carefully: (1) The meta-theoretical claim that it is possible to conclusively define the nature of normative relations solely in terms of the content of the duty or duties implied and (2) a substantive normative account that only uses the logic and the language of duties in order to justify rules such as traditional religious ethics[202]. Presumably, both the meta-theoretical claim and the substantive normative theory are objectionable. In short, whilst thesis (1) is plain false, a theory like one described under (2) is at least inadequate because it does not account for the specific function of rights which lies in the process of justification of rules as an argumentative counterweight to authoritative power.[203] In detail: Thesis (1) is false, because a pure language of duties could only draw on the fact that agents are capable of making decisions in order to explain the side of the obligated party and possibly of those parties that have a direct advantage by virtue of those duties. The fact that the reason for the correlative duties of liberties and powers is the permission of the right-holder itself, i. e. the reciprocity of two action evaluations with active entitlements, cannot be adequately captured in a bare logic of duties (see above). Furthermore, a substantive ethical theory that forgoes the notion of rights is inadequate, because it misses out on the important justificatory impetus that this notion usually entails. Here we need to be careful: I (still) do not claim that the concept of rights implies any concrete, substantive judgements. The concept itself is normatively neutral. Yet, in making use of the concept its practical function is often a specific justificatory one. Namely, rights are *claimed* in order to defend the principle of individual autonomy against authoritative considerations. In order to elucidate these thoughts, let us attend to traditional pure duty ethics, e. g. any traditional religious ethics: In the respective normative systems there are a number of positive and negative duties plus a number of plain permissions. Hence, what traditional duty ethics strictly do not contain is autonomy as a good worthy of protection. The emergence of the

[202] Due to immense changes in normative language and the justification of moral rules, Stepanians makes the bold, yet surely interesting and not unjustified assumption that Moses would nowadays probably return with ten human rights from Mount Sinai instead of ten commandments, see Stepanians, introduction, viii.

[203] See, once more, above sec. III, 1., b), bb), (2), (c).

idea of an individual self-worth and the idea that this individual agent should be free to decide certain matters for herself, more than leaving certain areas of conduct indifferently to her discretion, was born during the period of late scholasticism.[204] The idea is: One ought to have a permission, i. e. be free of imposed duties, whenever this value of individual autonomy outweighs all other relevant considerations. Exactly then does one also have a right. In the wake of introducing the idea of individual freedom as a good worthy of protection, the idea and the concept of 'rights' was born, because by itself the normative language hitherto, i. e. the language of duties, knew only one kind of normative definatory power within a certain normative system, namely that of the respective authority which issued intersubjective rules. It did not allow for the above mentioned distinction between different, competing, potential competences. Consequently, for pure duty ethics permissions were merely a by-product of the authority's lack of will to prescribe certain duties. Hence, the appreciation of individual freedom as a principle, as a good worthy of protection resulted in a *structural counterweight* to authoritative power, which was indeed ground-breaking for normative reasoning. Through the general intersubjective valuation of autonomy the individual was no longer unilaterally dependent on the issuance of permissions from a superordinate authority, but was capacitated to *claim* them by virtue of its own free will,[205] namely by demanding that one's own ability to judge and decide outweighed or at least should outweigh other, intersubjective considerations. In other words, purely duty-based ethics could only either demand obedience in the form of duties or abstain from such demands. Thus, their language was not fit to account for the value of autonomy in contrast to and in conflict with authoritative norm issuance.

Let me reframe this crucial point with reference to the fundamentals of deontic logic as sketched earlier. We remember: In sec. II, 3., c) above we clarified the exclusive juxtaposition of duties and permissions within one normative system and the neutrality of permissions as structural elements of such systems. Generally, whether there is a duty or a permission depends on the respective authority. What does that tell us about the nature of permissions? Precisely, does it mean that any authoritative decision against regulating a certain conduct is also a decision *in favour of* individual freedom? Not necessarily. Certainly, in every case the non-regulation of a conduct by the authority simultaneously means the emergence of a permission. Yet, under certain conditions one could understand permissions simply as authoritative indifferences, i. e. as a label for morally or legally neutral actions, which the authority is literally indifferent towards. Similar

[204] Gutmann, *Iustitia Contrahentium*, 22, with further references.

[205] Cf. Feinberg, "Nature and Value of Rights," 250. Here Feinberg emphasises the notion of *claiming* a right as an *activity* and aims at distinguishing it from the mere possession of a 'claim'. For an excellent, critical appraisal of Feinberg's account of rights see Christopher Wellman, "Two Concepts," 214–215, 223–225.

to the distinction between permissions simpliciter and protected permissions or rights, the question of whether we understand permissions as 'authoritative decisions in favour of freedom' or simply as 'authoritative indifferences' depends on whether the system in question regards individual freedom as an independent principle/value. Hence, it depends on one's foundational, substantive theory. In detail: Let us begin by imagining two normative systems, one system N_1, which does not value individual freedom, and another system N_2, which does. Accordingly, we can and ought to distinguish very carefully between implied preconceptions regarding the demands on the role of the respective authority.[206] In system N_1 permissions are nothing but authoritative indifferences. Here the authority only becomes active if and to the extent that it issues normative content/duties. Everything else would be a mere waiver to take (authoritative) action, which in turn would not require specific reasons.[207] Consequently, within the logic of this system N_1, limits to the authority's power are set only at its own discretion. More precisely, there is no need in N_1 to justify rules except for making the claim that the authority itself is just. And that is the decisive difference with system N_2. Here we need to understand permissions as authoritative decisions in favour of freedom. Accordingly, we find a basic evaluation of every conceivable conduct in N_2 – either there is a predefined reason for an action, or there is a valued permission. An objection to this reasoning lies at hand: The idea that there should be an authoritative decision for any conceivable conduct seems to make impossible demands on a given authority. Much the same applies to an idea introduced earlier, namely that any option of conduct is always either legitimate (L) or illegitimate (IL) within a system. Both points at least seem to imply that an authority actually needs to make an evaluative *judgement* about any perceivable way its addressed agents might behave. Importantly, the foregoing remarks do not imply that. Not each and every possible action needs to be consciously assessed or judged, not even in N_2. Undoubtedly, a normative system that would have to provide a conclusive judgement about any possible action would put untenable requirements on both the authoritative norm issuer as well as the addressees. Some areas of human conduct can (and should for that matter) be left unregulated. And surely, any cogent normative meta-theory

[206] In doing so, we suppose, for now, that the authority is wielded by some person/agent. See already above sec. II, fn. 6.

[207] Even though the objection lies at hand, this understanding of personal authority is not (necessarily) inconsistent with the thesis from above that persons/agents cannot avoid acting/forming decisions if we suppose the general, latent capacity to do so. Supposedly, we do not have to assume this capacity in case the agent acts in the role of a normative authority, but it might be argued that in this specific, authoritative role it is possible to take action only particularly. Besides, even if the objection were justified, at best it could debilitate the claim that authorities can indeed not act, which would then only support our claim that pure duty ethics as in the case of system N_1 from the example rely on implausible presuppositions in their foundational theories.

ought to offer an adequate explanation for this indifference on the part of the respective authority, for 'normatively neutral' behaviour. Correctly understood, we are able to do so within N_2 and still maintain the idea of a general decision in favour of freedom. The peculiarity of N_2 lies elsewhere than in its excessive regulation demands on the authority. Precisely, in N_2 freedom merely exists as a kind of basic value,[208] and therewith as a *justification hurdle* for the authority.[209] In other words, once we do regard individual freedom as a principle, one cannot justify rules simply based on a claim of authority, but only on the claim that the reasons provided by this authority outweigh freedom, i. e. that these reasons are *better* reasons, which only in that case are able to justify constraints on freedom.[210] Hence, by virtue of an even, balanced justification process we simply suppose authoritative decisions in favour of freedom in those cases in which the authority is in fact not interested in regulating human conduct or in which there are no reasons to restrain individual freedom. An example: Imagine N brushing her teeth at home. Further suppose that N has a legal permission to do so and that the law in question values N's autonomy. Now, obviously it would be absurd to claim that the legislator made a concrete, let alone conscious, judgement to permit tooth brushing. In terms of deontic logic, it is permitted due to the legislator's not having prohibited or obliged people to brush their teeth. Beyond that, though, N has a right to do as she does not simply due to a lack of will to regulate tooth brushing, but rather due to the fact that there are no good reasons imaginable to do so, i. e. no reasons to outweigh N's autonomy. Thus, N's permission is not the result of a conscious decision in favour of freedom, we may nevertheless *suppose* such a decision as the result of a hypothetical deliberation process. To conclude: Both N_1 and N_2 are at least theoretically possible as normative systems. Yet, similar to the argument against the cogency of substantive pure duty-ethics from above, the underlying substantive theory of N_2 appears to be much more plausible than that of N_1, as it alone is able to make sense of the stress ratio of authoritative power and the individual's decision-making ability by installing the aforementioned justification hurdle. At any rate, only within N_2 we can make sense of 'rights' as clearly distinguishable from 'duties'.

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[208] Note once more: not as some prevalent, or per se weightier reason. Cf. above sec. III, fn. 79.

[209] Forst refers to much the same idea by asserting a basic 'right to justification' in normative discourse, cf. Rainer Forst, *Das Recht auf Rechtfertigung* (Frankfurt a. M.: Suhrkamp, 2007). For an analogous argument employed as a critique of the respective shortcomings of Kelsen's concept of rights see Hammer, "Begriff vom subjektiven Recht," 188–190. Cf. above sec. III, fn. 110.

[210] Importantly, the described presupposition of the value of individual freedom is independent of the (substantive) issue, whether this value is recognised by the personal authority as a kind of rational, self-imposed restraint, or whether it is thought to deserve an *a priori* elevated role in normative reasoning as an intrinsic reason. In both cases rights would serve the function of an argumentative counterweight, a 'justification hurdle' for the respective authority.

Hence, it is no surprise that, historically, the notion of 'rights' was born in order to fill the linguistic hole torn open by the valuation of individual autonomy and therewith the creation of the argumentative counterweight just described. Accordingly, the emergence of (a language of) rights in addition and in contrast to (one of) mere duties can be regarded as the birth or at least the uprising of a normative individualism forming the basis of liberalism.[211] In terms of the process of the justification of rules within a community the individual was given a powerful tool, a weapon almost, to be used in order to defend one's own concerns.[212] Hence, in this best tradition of rights they stand to protect the dignity and self-worth of the capable agent in communal life, of the individual whose interests are no longer supposed to be the mere function of some collective interest, ultimately submitted to the will of some intersubjective norm issuer/authority.[213] Rights, in this sense, exist and emerged in order to set limits to authoritative power.

Transferring these insights to our competing conceptual approaches, we may state: Liberties and powers deserve the proper label as 'rights' because it needs to be clarified that the position of the individual in the struggle for the correct rules to submit to is recognised and consequently strengthened. The exercise of individual competence is not simply something that occurs when there is a lack of other considerations made by the relevant authority or when there is a lack of duties; rather, the individual demand to exercise competence is given its own, proper normative weight. As *Sumner* fittingly put it, the language of rights was necessary in addition to that of duties, because "autonomy […] is sufficiently important to be safeguarded by a distinctive normative concept"[214]. In turn, do claim-rights and immunities also deserve this proper label? An interest theorist might claim: yes, because it needs to be clarified that the advantageous aspect of a duty is not a mere reflex of this duty, but that duties may be based on reasons inherent in, or appendant to certain things or persons. But what does this intended distinction between appendant and non-appendant reasons – or between directional and non-directional duties respectively – actually argue out in terms of necessary, meta-theoretical structures? That is, is any problem or stress ratio which substantive normative theories have to deal with captured by this conceptual dividing line? Ultimately, the answer is no. Once more: A normative theorist would seriously have to consider the difference between appendant

[211] Richard Flathman, *The practice of rights* (Cambridge: Cambridge University Press, 1977), 33–34; Coing, "Geschichte des Begriff," 47. Cf. also Duncan Ivison, *Rights* (Stocksfield: Acumen, 2008), 5.

[212] In other words, rights are a means of an 'individualistic critique' of the law, cf. Hart, *LR*, 200–201.

[213] Gutmann, "Paternalismus und Konsequentialismus," 59–60. For a similar argument with respect to a submission under the aim of maximising general utility cf. David Lyons, "Utility as a Possible Ground of Rights," *Noûs* 14 (March 1980): 20–22.

[214] Sumner, *MF*, 98.

and non-appendant values only in case the former were regarded as weightier, prior reasons. Then the theorist would have to decide which reasons belong to which categories. This case is excluded already, though, because such a normatively charged IT concept faces the serious danger of an inflation of rights (see above). If, however, the distinction between appendant and non-appendant is not by weight but simply by type, a substantive normative theory *can* implement it, but it certainly does not have to, because practically, i. e. with regard to the outcome of a case, it would not make any difference. In short, the distinction between rights and non-rights that IT offers could only be rendered useful for normative reasoning if rights had an elevated status in the realm of normativity. As this cannot be the case with a normatively neutral concept of rights, which we should aim at for reasons provided earlier, IT ultimately fails with respect to meta-theoretical accuracy.

(d) Conclusion

What exactly counts in favour of including all different kinds of entitlements into a concept of rights as IT does? In terms of its utility for an ensuing normative debate, not much. To be clear: With respective terminological adjustments and specifications it is not impossible to describe the necessary conflict of potential competences in a normative system by employing an interest theory of rights. However, the crucial stress ratio between individual and community regarding competing decision-making abilities, which was the reason for a concept of rights to emerge in the first place, is certainly not predetermined or traced by IT, which by contrast CT achieves with admirable clarity. Thus, CT is clearly preferable in this respect.

dd) Conceptual Evaluation or the Making of a Decision

As a preliminary conclusion about the dispute between IT and CT we can say that neither of the two offers *the* best concept in the sense of the necessarily correct result to question (1). Due to the fact that any concept of rights exists in a stress ratio between different, competing, regularly adverse purposes, we should not be surprised that both IT and CT show both strengths and weaknesses. As *Christopher Wellman* aptly puts it: "Of course, there are advantages and disadvantages to concentrating on each of the lines of demarcation with its corresponding theory of rights […], so neither will nor interest theorists can accuse the other of making either a logical or conceptual mistake. And if this is right, then we are not in a position to suggest that [one] must opt for one theory over another."[215] Neither concept is able to meet all of the requirements to a full ex-

[215] Christopher Wellman, "Two Concepts," 225.

tent. Yet, the fact that "there is no right or wrong answer"[216] to the question regarding a concept of rights should not come as a surprise. After all, as repeatedly pointed out so far, committing to a certain concept of rights is an evaluative matter[217], i. e. we cannot determine a concept of rights in terms of right and wrong, but only with respect to better or worse reasons and arguments, which in turn makes it something which one could never prove to be correct in the sense of true or false. The establishment of such a concept is simply a matter of decision, of (necessary) commitment to one side due to arguments, which can be exchanged and discussed and eventually need to be prioritised.[218] With regard to a concept of rights, this necessary commitment largely amounts to a commitment to either theoretical accuracy or practical/linguistic adequacy.[219]

Thus, it comes only in the form of a reasoned opinion, that surely can be disputed, when I conclude that one ought to judge theoretical accuracy over mere linguistic or practical adequacy and hence decide for CT and against IT.[220] Ultimately, the reason for this endorsement of CT is that otherwise legal theory would, virtually without objection, consent to an almost sadly ambitionless existence, namely to the extent that its only proclaimed aim would be to obtain just as much consistency as possible out of an otherwise ambiguous language use in order for speakers to adjust as little as possible.[221] Without a doubt, CT is much more demanding in this respect. It demands to eliminate central cases of application of the term 'rights' from actual language use in order to improve the theoretical accuracy of political debate, which surely is a lot to ask. The not entirely unreasonable worry, whether in practice it is even imaginable that practical usage of a term like 'rights' would or could ever actually adjust to the predicaments of an academic theory (however cogent that theory may be), is inseparably connected to CT's demands on linguistic practice. Accordingly, many interest theorists will find these demands "too violent"[222]. Yet, I contend that at least the *claim* that as much should happen, that linguistic practice ought to

[216] Ibid, 224.

[217] See above methodological question (1.2) as laid out in sec. I, 1., a), bb).

[218] Christopher Wellman, "Two Concepts," 223: "[one] faces a choice between the two competing concepts".

[219] Cf. ibid, 224, at fn. 25.

[220] Notably, it is not until this point that we actually have to decide between the two concepts.

[221] For a dissenting opinion on this matter, i. e. regarding a possible priority of 'theoretical adequacy' over 'extensional (practical) adequacy', see Rainbolt, *Concept of Rights*, 112. Rainbolt advocates a general priority of a concept's practical adequacy over its (meta-) theoretical benefits, yet he gives no meaningful arguments why exactly the kind of concept which encompasses more practical manifestations of a term is supposed to be *better* than others. That he simply takes for granted. Thereby his blunt remark "wishes do not make reality" (ibid) reflects exactly the kind of 'ambitionlessness', wide-spread in legal theory, that I wish to impugn in this context. Cf. also id, "Two Interpretations of Feinberg's Theory of Rights," *Legal Theory* 11 (2015): 229–230.

[222] MacCormick, "Rights in Legislation," 196. Cf. also id, "Wrongs and Duties," 140.

defer to theoretical cogency, needs to be raised and be entailed by any serious attempt to determine a concept of rights, unless this attempt wants to render itself useless in the sense of being obsolete as a theory at least indirectly concerned with questions of normativity. Certainly, a theory that judges practical aspects over theoretical ones cannot purport to aim at making a meaningful contribution to substantive theory design or to the proper assessment of practical normative questions. A CT concept is able to do so by terminologically framing the necessary stress ratio between individual autonomy and intersubjective authority. The rights-concept of IT is not able to do so insofar as it more or less restricts itself to a mere analysis of language and consequently a clarification of existent linguistic practice. Thus, in a way CT's *ambition* that legal theory should have an impact on everyday language, its demandingness, which is often enough an object of criticism,[223] should in fact be regarded as its decisive advantage in comparison to an interest theory that is convincing as a descriptive account of rights, but ultimately inadequate and ineligible as a conceptual one.[224]

[223] See above sec. III, fn. 222; Rainbolt, *Concept of Rights*, 112. Cf. also the foregoing remarks on rights of the incompetent, unwaivable rights, etc.

[224] Once more: This claim is made not in denial of but rather in full concession to the apparent disadvantages CT partly has in comparison to IT.

IV. Conclusion and Prospects

1. Summary: Line of Thought and Central Results

The central epistemological interest of this thesis was to determine the, or at least an adequate, concept of rights. The main result of the thesis thus comes more in the form of a strong suggestion rather than as an analytical truth, namely that rights in my view should be understood as valued or protected permissions, i. e. according to a (modest) version of Choice Theory. Hence, we ought to understand rights as elements of a normative system that empower individual agents by providing them with areas of unregulated discretion, and, more generally, that implement a justification prerequisite on authoritative power for any restraint on individual freedom. Although the road to this final result offered quite a number of theoretical hurdles and possible detours, I followed only those which seemed either inevitable or at least helpful in order to obtain a clearer understanding of the concept of rights.

Before engaging in a discussion about the proper concept of rights, we needed to clarify what exactly is meant by a 'concept' of rights, what separates such a notion from other theoretical phenomena. In this respect, we found that the linguistic property of a concept is that it is evaluative in the sense that one needs reasons to commit oneself to one concept leaving aside other possible ones, which essentially separates a concept from the purely descriptive scope of a term. This scope, by contrast, is acquired by means of a pure analysis of factual language use. Hence, a concept is not purely descriptive or analytical, but in parts always evaluative. At the same time, it does not necessarily have to imply practical, substantive implications for normative practice. Methodologically, our approach thus can be counted among those usually regarded as works of 'descriptive jurisprudence', whereas it does not deny the essential normative nature of concepts such as right, duty, law, etc. That is, it does not deny the fact that law can only be fully grasped as an 'interpretative practice'.

Subsequently, before we were able to describe and discuss different concepts of rights, we needed to clarify the scope of rights. The somewhat easier part was identifying the features of the scope, i. e. the necessary features of any concept of rights, which we found to be normativity, advantageousness, and appendance. The considerably harder part was finding out what exactly that means, i. e. to work out the possible manifestations of these minimal conditions for being a

right, the actual normative phenomena that meet the requirements of the scope. In order to do so, *Hohfeld*'s basic analytical scheme of fundamental legal entitlements was supposed to prove helpful. Yet, in order to correctly assess his scheme in the first place, we needed to clarify quite a few more fundamental notions beforehand: the concept of actions, the structure of the deontic modalities, as well as the nature and significance of reasons, i. e. of norms, principles, and prescriptions.

Unquestionably, there is a strong link between the notion of rights and that of (human) actions. To have a right usually means either to have a right to do something or at least to have a right that someone else does or does not do something. Thus, in order to truly understand rights, we first needed a rough idea of what an action (and a respective omission) actually is. To begin with, we clarified that, to a certain degree, freedom in the sense of an individual's decision-making ability is a necessary, internal requirement of our normative practice. Accordingly, we affirmed and defended the principle of alternative possibilities, the idea that to perform an action essentially means to make a practical decision between different options. Thereby a practical decision was introduced as the element of an action which we suppose – which we have to suppose, in fact – in order to ascribe responsibility. Clearly, the notion of an action alone is not what determines a right, though. The notion of rights, as well as the Hohfeldian notion of entitlements, is inseparably connected to the normative demands associated with these actions, to action evaluations. Essentially, these demands come in the form of the deontic modalities, i. e. in the form of permission, obligation and prohibition. An important result of this work is that, for the most part, a right is (or at least should be understood as) a specific kind of permission. Therefore, the nature of permissions as permitted decisions, as normative exemptions, and therewith as alternatively allowed options of conduct, needed to be clarified by making a detour into the realm of deontic logic and the logical structure of the deontic modalities, as it is commonly perceived. This detour was especially important in order to clarify, or rather to repudiate, the often alleged distinction between unilateral and bilateral liberties, which does nothing but obfuscate the true nature of permissions as spheres of freedom, of unguided individual decision-making. As the result of a fine-grained analysis of the standard model for the deontic modalities, a new system of deontic logic had to be sketched. It is based on the insight that the notions of obligation, prohibition and permission cannot adequately be understood without reference to decisions, i. e. to multiple, alternative options.

Still, we were not fully equipped for a proper assessment of the theory of rights, because linguistic practice teaches us that rights are not always but rather only usually associated with actions. We are also used to thinking of more abstract rights such as one's 'right to life', from which practical rights might be derived, but which do not directly refer to any actions. In order to understand

this difference between practical and abstract rights or between practical and abstract reasons, we needed to examine the difference between norms and values. A suitable way to do so was to assess and in part revaluate theories concerned with principles as an alleged in-between phenomenon, theories such as those offered by *Dworkin* and *Alexy*. Even though a full and sufficient analysis of these theories was not possible and not intended either, presumably we were at least able to demonstrate the structural difference between practical and abstract reasons, as well as that between general norms and concrete prescriptions, by reference to the notions of relationing and concretisation. An (at least rough) understanding of these differences would prove to be inevitable for a proper understanding of how one's abstract 'right to bodily integrity' could actually become someone's duty not to harm the respective right-holder (at least not without her consent). The most central insight from this section was that practical reasons, i. e. norms and prescriptions, show a relational structure, i. e. an implied precedence of one abstract reason over others. In other words, in order to produce norms from a set of principles one has to relate these abstract reasons, whereas one applies norms, and thus receives prescriptions, by concretising them in the light of a specific case. Importantly, the relational form of practical reasons is mirrored by the logical structure of actions as practical decisions. In this respect, it appears appropriate to explicitly point out an aspect of this investigation which is believed to be a particular strength. Namely, all the points made thus far – the proposed concept of actions, the newly developed scheme of deontic modalities, including a multidimensional structure of the deontic modalities, as well as the proposed relational structure of norms and practical reasons – are not independent arguments, which could be debunked separately. As parts of a wide-angled, systematic endeavour, which this work aspires to be, in terms of argumentative force, they rather support each other mutually.[1]

Finally, with the notion of a 'normative system' we introduced a new theoretical concept in this work, which is not directly linked to the notion of rights as such, but whose primary purpose was to limit the theoretical scope of the enterprise as a whole. By restricting ourselves to the investigation of rights only in specific, already determined normative contexts, i. e. for the most part within one specific normative system, we consciously avoided problems regarding the general justification and justifiability of these rights, e. g. questions regarding the possible existence of 'natural rights', as well as problems regarding conflicting evaluations of the same action. Thereby the central feature of normative systems, namely that any one action can only be assigned one deontic demand, was a most useful presupposition for our consequent investigation, as it allowed

[1] On the downside, one might say they stand *and* fall together. Thus, presumably, if one feels unconvinced by only one of the points made, he or she may either question the entire endeavour, or let him- or herself be convinced by the (assumed) cogency of the other parts. I readily leave this decision to the benevolence of the reader.

us to reduce the complexity of actual normative practice to a minimum for the purpose of this concrete inquiry, whilst at the same not losing all explanatory relevance, as we at least sketched the necessary and vast multiplicity of normative systems in practice.[2]

Based on these more general theoretical insights we were thus able to adequately carve out possible manifestations of the scope of rights, originating from, though not simply adopting the logic of *Hohfeld*'s fundamental legal relations. We acknowledged *Hohfeld*'s perspicacity in linking the notion of rights to bilateral relationships, in distinguishing two levels of normative positions, *Hohfeld*'s first- and second-order relations, and for the most part also in linking the notion of advantageousness to the idea of someone else's having a respective duty. Yet, we were able to point out flaws in *Hohfeld*'s analytical framework as well, especially in his account of liberties and their supposedly correlative 'no-rights'. Upon closer inspection, both of them are reductive to an extent that they no longer have any meaningful explanatory relevance. Also, even though *Hohfeld*, not entirely unjustly, regarded only his claim-rights as 'rights in a stricter sense', he also wrongly regarded his other entitlements as somewhat advantageous for their holders. If he would have taken the notion of advantageousness, which we equated with the idea of the appendance of a reason, more seriously, he would have had to considerably strengthen these positions – precisely to the extent that all of these either are or at least imply specific claim-rights. This might not have been *Hohfeld*'s aim in the first place, but only thus they would meet the requirements of the scope; only thus we could regard a certain position as a potential right. Hence, resembling the four Hohfeldian entitlements, we were able to work out four distinguishable manifestations of the scope of rights, four fundamental positions we could possibly refer to as rights: claim-rights, liberties, immunities, and powers. Thereby we distinguished passive entitlements, i. e. first-order claim-rights and second-order immunities, which are both defined solely by the duties of other agents, and active entitlements, i. e. first-order liberties and second-order powers, which are held by virtue of being permitted to perform the action in question, and this very permission being the reason for others to be under correlative respect duties. As the decisive criterion to differentiate between first- and second-order entitlements, we identified the question of whether an entitlement refers to the content of another, subordinate, intersubjective normative system. Hence, most notably, we introduced an original conception of normative powers, which regards them as a specific kind of protected permission that is entailed by a normatively con-

[2] Apart from their reductive role in terms of theoretical complexity in this context, I strongly believe the notions of normative systems and their necessary multiplicity to be capable of growing into a useful tool in the task of properly mapping normativity as a whole in the future.

veyed control over certain intersubjective reasons from a superordinate level of justification.

In the following, we specifically clarified once more that the entirety of the aforementioned four entitlements marks the outer limit of any cogent concept of rights, not its necessary content, though. Thus, consequently we were in need of a conceptual evaluation of these entitlements, i. e. an answer to the question of which of them – alone or in combination – would serve as a good, sensible, useful concept of rights. In this respect, we found that its practical adequacy, i. e. the ability to consistently account for most practical instances of usage of the term, very much counts in favour of Interest Theory, whose concept comprises all four entitlements. However, this advantage is accompanied, and in a way payed dearly for, by a meta-theoretical vagueness and inaccuracy of Interest Theory. What Choice Theory, on the other hand, lacks in practical adequacy, it more than enough makes up for in meta-theoretical accuracy. That is, in contrast to Interest Theory it offers an account of rights which allows for a much clearer theoretical distinction between rights and duties. Especially, Choice Theory's concept of rights terminologically reframes the stress ratio in the justification of moral and legal rules between the authority's claim to make decisions and thus impose binding duties and the individual's aspiration to make use of his or her own decision-making ability. Finally, favouring the theoretical merits of a concept of rights over mere practical linguistic amenities, a modest, normatively neutral Choice Theory, that regards only normatively protected decisions as rights, ultimately appeared to be the preferable option.

2. A Few Concluding Remarks

At the bottom line, what are all these insights worth for (future) legal theory? To be honest – and to the author's great distress at times during the writing of this thesis – the answer is: not nothing, but, if anything, very little. I intend to say 'precious little', though. As already mentioned at the beginning, what is presented here is a theory solely concerned with the linguistic concept of rights. As much implies that with regard to substantive normative philosophy it is a meta-theory, aiming at nothing but conceptual clarity by unification and simplification.[3] As such it does not directly contribute anything to the solution of ordinary practical moral problems or legal disputes. Presented were the outlines of a theory that has no direct practical implications, whatsoever. However, properly applied this theory is able to widen our understanding of rights and rights talk. In addition, by applying it one should be able to work out one's substantive theory more accurately and clearly, which implies the ability to draw a

[3] Cf. Cruft, "Beyond Interest and Will Theory," 348.

reasonably clear line between normatively neutral conceptual inquiries on the one hand, and justificatory thinking and arguing in legal philosophy in a stricter sense, i. e. theories of the good and of right and wrong, on the other. The concept of rights, as presented here, does set the boundaries on and the mode of discussion for proper substantive questions. It should enable the normative philosopher to design his or her theory a bit more accurately, and distinguish it more clearly from competing approaches. As indicated earlier, employing a CT concept such as ours as a basis for a substantive theory design, the question any theorist needs to ask herself is not 'what kind of rights, if any, does my theory contain?' but rather 'how important are rights (to us)?' This question is then tantamount to asking, 'exactly how important is individual freedom (to us)?' On the other side stands the equally important question 'how important are common principles and norms to us and what exactly should they contain or protect?' This interplay, this contrast of individual competence and authoritatively predefined content is what every substantive theory needs to be concerned with, and the possible answers may indeed vary greatly on the basis of our concept of rights.[4] Accordingly, the author is acutely aware it is not conceptual questions that matter in solving practical social conflicts. Hence, what is and what will always be needed more urgently is a cogent justificatory theory of what should be protected by the law, i. e. a general theory of justice.

Even though our concept of rights does not contribute to such a theory in any way other than rendering its design more accurate, I still assume that the concept proposed here advocates, surprisingly perhaps, a philosophy of freedom in a way. As scrutinised earlier, it does not promote a justificatory priority of freedom. Yet, its very existence necessarily allows for individual freedom to exist alongside authoritative power. Hence, it is certainly not part of a philosophy of freedom in any stronger sense, i. e. not an advocate for a liberal normative theory favouring the right over the good, a philosophy which decides 'in case of doubt in favour of freedom', as *Kant*, *Rawls*, and others propose. Yet, our concept of rights, and in fact this whole thesis, is animated with the insight that the very idea of rights – and therewith also any language of rights and any substantive approach incidentally implying the notion of rights – directly implies the idea of a value of individual decisions between alternate options of conduct, of individual normative definatory power, and therewith of individual responsibility. The notion of rights thus is (or at least should be) but the mode to claim and consequently to exercise this subjective ability and to be respected in doing so by other agents in an intersubjective context. It seems almost impossible to find more precise words in order to describe this central idea than those from this

[4] Possibly even to a degree where rights are disregarded entirely. As much would be the backlash of a substantive theory that entirely rejects the worth of individual freedom for social life, which – so much may be said despite the aim of being normatively neutral – will be hard to substantiate.

(rather famous) quote from *Hannah Arendt*, which in just a few words distils the central thoughts of my thesis, and which in turn makes a fitting quote with which to close this book:

Kein Mensch hat […] das Recht zu gehorchen.[5]

Admittedly, the statement was made in a rather different context and with another motivation and theoretical interest regarding the scientific assessment of the phenomenon of 'rights'. *Arendt*'s main purpose at the time was to describe and defend the (undoubtedly substantive) rights theory of *Kant* in the context of her assessment of Adolf Eichmann's trial in Jerusalem, who – in a grotesque attempt to defend himself and justify his actions as a high-ranking Nazi-official – explicitly appealed to the Kantian categorical imperative. Thus, her main intention was to deny Eichmann – and anyone for that matter – the use of *Kant*'s concept of duty in order to justify blind obedience to authoritative rules and commands. Hence, her intention was certainly more to defend the consistency of Kantian moral philosophy against ignorant misuse than to offer an account of the nature or an analytical concept of rights. Still, reading and interpreting the quote more freely, *Arendt* apparently, even though maybe unwillingly, also got right to the heart of a central aspect about the concept of rights as such, probably *the* central aspect of this thesis: the apparent dichotomy of individual freedom as well as individual responsibility in the form of rights on the one hand, and externally dictated normative requirements in the form of duties on the other – the inevitable contrast of individual competence and authoritatively imposed content.

[5] In English: *No one has the right to obey.* Original quote by Hannah Arendt, interview with Joachim Fest, *HannahArend.net* 1, Vol. 3 (May 2007), http://www.hannaharendt.net/index.php/han/article/view/114/194.

Glossary

Abstract Reason = normative → content of a → principle/value.

Action/Action as Such = at least one → practical decision plus at least one imputable practical effect, or a series/chain of such effects.

Appendance = direct association of a → reason with an entity/subject, which is based either on positive ascription to that entity as an act of will, or is due to the intrinsic nature of the reason associated with the entity. A. as a concept remains agnostic in this respect.

Authority = generic term for the justification of a → normative system's → content due to either the persistence/inaccessibility of its content, an act of superordinate → competence, or a combination of both.

Coherence = specific manifestation of normative → consistency; describes the state of a multitude of → normative systems, in which two or more of them produce competing → normative demands regarding the same → action, whereas they are reconciled through a superordinate → permission.

Compatibility = specific manifestation of normative → consistency; describes the relation of two or more distinct → prescriptions, imposed by distinct → normative systems; they are compatible if it is possible for them to be jointly valid within the same normative community, which is the case if they are reconciled through a superordinate system's → permission.

Competence = a normative → definatory power with regard to a certain normative matter; comes in the deontic form of a → permission.

Concept = the evaluated → scope of a term, whereby evaluation happens with the aid of conceptual → reasons.

Conclusive Reason = normative content of → prescriptions, i. e. insofar as the prescription entails content, which is the case only with specific → duties.

Consistency = see → homogeneity, → satisfiability, → compatibility, → coherence.

Content = the → reasons, both abstract and practical, provided by a → normative system.

Definatory Power = ability to define or control normative → content; necessarily accompanied by every → permission.

Dilemma/True Dilemma = a practical decision situation, in which none of the available → options of conduct are legitimate; in a way, a specific prescription which cannot be complied with and which therefore, in practice, needs to be resolved for one of the other three.

Duty (or Duty Simpliciter) = predefined → normative demand; generic term for → obligation (O) and → prohibition (F).

Entitlement = manifestation of the → scope of rights, i. e. not a normative → concept but a technical term employed as a generic term for different manifestations of the scope of rights.

Homogeneity = specific manifestation of normative → consistency; core trait of any → normative system. Describes the idea that every specific → action is matched with only one specific → normative demand.

Interest = an aspect of an entity's well-being as interpreted from an intersubjective perspective, i. e. the entity's well-understood interest/intended advantage.

Legitimacy = conformity of an → option of conduct with the → content of a → normative system; as such, l. is a binary concept, i. e. an option of conduct can only be legitimate (L), or illegitimate (IL).

Norm = general but, due to its relational form, directly applicable → practical reason.

Normative Demand = generic term for multidimensional deontic modalities (O), (F), or (P), i. e. labels for → actions as such.

Normative Exemption = lack of normative → content with regard to a certain normative matter, which entails a → permission and therewith individual → definatory power with regard to that matter.

Normative Status = generic term for unidimensional deontic modalities (L) or (IL), i. e. labels for solitary options of conduct.

Normative System = the → homogeneous, inductive-deductive process of application of a multitude of → reasons to a set of addressed agents' specific → actions; exists by virtue of an → authority.

Obligation = positive → normative demand (O) to perform a certain → action X.

Option of Conduct = factual or hypothetical behaviour of an agent, irrespective of possible alternatives; as such often mistaken for an → action.

Permission = normative demand (P), which entails a → competence for the addressed agent.

Practical Decision = essential feature of any → action; leverage point for the ascription of responsibility.

Practical Reason = normative content of → prescriptions and → norms; applicable due to its relational form.

Prescription = the concrete → normative demand for a specific → action; cf. also → conclusive reason.

Principle = an abstract, non-applicable reason; see also → value.

Prohibition = negative → normative demand (F) not to perform a certain → action X.

Reasons = see → practical reasons, → abstract reasons; → conclusive reasons represent a specific subform of the former category.

Rule = see → norm.

Satisfiability = specific manifestation of normative → consistency. Two or more distinct → prescriptions, imposed by distinct → normative systems, are satisfiable in case it is possible to comply with all of them at once, which goes for → permissions in combination with → duties, but not for → obligations in combination with → prohibitions.

Scope = describes the necessary, commonly agreeable features of a term; is won purely by means of analysis of factual usage. Manifestations of the s. are such practical phenomena that meet all the requirements.

Value = see → principle.

Addendum: Glossary of Hohfeldian Incidents (in systematic order)

Traditional, reductive reading

Hohfeldian Duty = a → duty, which exists towards another entity, the holder of a → claim-right, due to the → appendance of the → reason underlying the duty with the claim-right-holder.

Claim-right = describes the fact that the reason behind a → duty as a predefined → normative demand is → appendant to the claim-right-holder.

Hohfeldian Liberty = a plain or 'naked' → permission (P) to perform an action X.

No-right = describes the fact that a person A has a → liberty, which entails that A is not under a → duty towards anyone, which in turn excludes the possibility that someone has a claim-right towards A.

Hohfeldian Power = the ability to change certain → normative demands of oneself and others by means of performing a certain → action, which makes H. p. normative in effect, but not in provenance.

Hohfeldian Liability = describes the position affected by the exercise of a → Hohfeldian power.

Hohfeldian Disability = describes the lack of a → Hohfeldian power.

Hohfeldian Immunity = describes the position correlative to a → disability, i. e. of a position that cannot be altered by the disability-holder.

Modified entitlements in order for positions to qualify as manifestations of the scope of rights

Liberty = a protected/valued → permission, i. e. a permission in a → normative system that generally contains the → principle of 'individual freedom/autonomy'.

Respect Duty = a → Hohfeldian duty towards liberty-holder A which is based on respect for the exercise of individual autonomy by A.

Power = personal → authority, i. e. a → permission to exert → definatory power over some subordinate, intersubjective → content, which is addressed at other agents.

Liability = specific → respect duty to comply with the results of someone else' execution of a → power.

Disability = specific superordinate → duty, i. e. a lack of → definatory power with regard to some subordinate, intersubjective content.

Immunity = describes the fact that some other agent is under a → disability. As such advantageous for i.-holder A, either in case A has a respective → power, or in case A already benefits from the subordinate → content which cannot be altered by the holder of the → disability.

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