On Disjunctive Rights

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Two sailors are about to drown after their ship having went down in a storm, and the rescue helicopter arrives at the scene. The pilot quickly realises that they will only have time to rescue one of the sailors before the helicopter runs out of fuel. Kant’s famous principle stating that “ought” implies “can” seems to yield that since both sailors cannot be rescued, then there can be no duty to rescue both sailors. The rescue team is then commonly believed to have a duty to save at least one of the two sailors, no matter whom. The idea seems straightforward and highly intuitive: if one has a prima facie duty to save both, but one cannot save both, then one has a duty to save one or the other.

Such scenarios are commonly described and discussed in terms of duties; in such unfortunate circumstances, what duty does the rescue team owe? The intuitive answer is a duty to rescue one of the two sailors. The notion of rights does not necessarily enter such discussion. However, if we approach the same scenario from a rights perspective, it will

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1 For one of its formulations, see Immanuel Kant, Critique of Pure Reason, A548/B576. For a discussion on how to interpret Kant, see Robert Stern’s "Does 'Ought' Imply 'Can'? And Did Kant Think It Does?", Utilitas 16(1) (2004), pp. 42-61. Stern argues that the principle is often given a too strong formulation (a formulation Kant would not have agreed with); allowing human capacities to set the limits for what is right and wrong. However, Stern’s criticism against the strong formulation need not concern us here, since in the case above (as well as in the subsequent cases to be examined) the capacities of the agents are not setting the limits for right and wrong, but for the rights and duties of the agents involved in the particular scenario (the "weaker conception" of Kant’s principle; see p. 59).

2 Matthew Kramer describes how such duty can work in the case of charity: “W owes a complex duty to each indigent person and charitable group, whereby W has to donate a certain portion of his income to each such person or group unless he elects to donate the relevant portion to some other such person or group.” (Matthew Kramer, "Rights Without Trimmings", in Matthew Kramer, Nigel Simmonds and Hillel Steiner (Eds.), A Debate over Rights (Oxford: Oxford University Press, 1998), pp. 7-111, at p. 26 n11, emphasis in original)
most likely be framed as a conflict of rights, with no intuitive solution. Most people would not hesitate to attribute relevant rights – moral, legal, or both – to the drowning sailors, but there seems to be little consensus on how such rights should be described. Given that we accept that duties and rights always go hand in hand, such asymmetry is puzzling and signals that there is something problematic in the way normative components are distributed in the scenario.

How can such scenarios be described in terms of rights, in a way that eliminates the perceived asymmetry between the right side and the duty side? The problem is not merely of theoretical significance. Similar quandaries permeate our moral world: in the legal realm, in domestic and international politics, as well as in our occupational roles and in our personal lives. On the assumption that rights and duties go hand in hand, then finding the wanted symmetry should not only be possible, but straightforward. Using the notion of disjunctive rights, Richard Arneson attempts such description:

[...] each of these persons has a right that one rescue either a group that includes him or some other same-sized group from among those who might be saved.

In a footnote Arneson adds: “Does the disjunctive right proposed in the text make sense? Yes, I say.” Although a notion little explored, the idea of disjunctive rights seems intuitively plausible. If both men have a right to be rescued, but circumstances do not allow both to be rescued, then it seems reasonable that both have, somehow, an equal right to at least some chance

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3 A scenario similar to the one I described above is provided by Joel Feinberg, although he does not use the term “disjunctive rights” (“The Moral and Legal Responsibilities of the Bad Samaritan”, Freedom & Fulfillment: Philosophical Essays (Princeton: Princeton University Press, [1984] 1992), pp. 175-196). Feinberg asks us to consider a case in which two babies are drowning in a pool, one 20 meters to the left of a man, the other 20 meters to his right. While he can easily save one, he has not enough time to save both. How should we then account for their rights? I will discuss some of his answers below.

of getting rescued. Using the notion of disjunctive rights then appears to make good sense.

In this article, I wish to both challenge and defend the idea of disjunctive rights. I will argue that the intuitive understanding of disjunctive rights proposed by Arneson is far too simplistic, making the concept superfluous or causing it to have strongly contra-intuitive consequences. Instead, I suggest that a more complex understanding should take its place.5

5 It might be objected that there are much better ways of accounting for the normative relations involved in the scenario above, then resorting to an idea of disjunctive rights. However, it should then be noted that, first, I will be committed to with this particular way, involving a notion of disjunctive rights, of handling similar scenarios. I do not claim that there are no other ways possible. That said, and second, it is not obvious that there are in fact better ways to make sense of the sailors’ predicament. Taking moral intuitions seriously seems to be at odds with approaches somehow discounting one or both sailors’ possession of rights in the scenario. There are several ways to attempt to solve the dilemma, but all of them are, I think, unsatisfactory. For instance, Judith Jarvis Thomson’s classical distinction between violating and infringing a right (“Self-Defense and Rights”, in Judith Jarvis Thomson, Rights, Restitution, & Risk: Essays in Moral Theory (Ed. William Parent) (Cambridge, Mass.: Harvard University Press, 1986), pp. 33-48) seems unhelpful here, as it does not explain the normative relations involved as much as it reformulated the problem. Similarly, it could be asked why rights are not always discussed fully specified, as the mixing of general and specified rights tends to generate unnecessary headache, such as the problem that constitutes the starting point for my discussion below. The view that rights essentially are fully specified is known as specificationism. According to such view, rights are, essentially, conclusive reasons for action. A moral argument is then an argument toward one or several rights, not an argument starting with, or merely including, rights. Although specificationism is surely a powerful idea, it seems to me that it suffers from considerable problems yet to be adequately handled, which is also the reason why I will not discuss disjunctive rights from the specificationist perspective. For a criticism of specificationism, see Judith Jarvis Thomson, “Self-Defense and Rights” (1986). For various defenses - ultimately unsuccessful, I believe – of specificationism, see Russ Shafer-Landau, ”Specifying Absolute Rights”, Arizona Law Review 37(209) (1995), pp. 209-225; Henry Richardson, ”Specifying Norms as a Way to Resolve Concrete Ethical Problems”, Philosophy & Public Affairs 19(4) (1990), pp. 279-310; Christopher Wellman, ”On Conflicts between Rights”, Law and Philosophy 14(3/4) (1995), pp. 271-295; John Oberdiek, ”Specifying Rights out of Necessity”, Oxford Journal of Legal Studies 28(1) (2008), pp. 127-146.
The paper is divided into three sections. First, I will situate the notion of disjunctive rights within an analytical framework for legal and moral rights. Such preliminaries, however short, might come across as rather tedious work. However, establishing a reasonably clear understanding of what rights are and how they are intended to work in general will give us a considerable advantage when discussing the notion of disjunctive rights in particular. A second reason for making an excursion into the analytical framework is that the terminology used by different scholars writing on the subject sometimes differs. By specifying concepts and distinctions in advance, confusion stemming from such differences should be avoided.

Taking Arneson’s account of disjunctive rights as a starting point, the second section of the paper discusses some implications and problems accompanying such definition. The outcome of this section is overall negative: the notion of disjunctive rights appears to generate more problems than it solves, or it appears to be redundant as it collapses into ordinary rights with ordinary duties as their correlates.

In the third and final section, an improved understanding of disjunctive rights is suggested. The novel characterisation includes taking the disjunctive element seriously while adding necessary complexity. It is argued that disjunctive rights necessarily involve meta-rights, which despite always having two or more right-holders are nevertheless subject to unilateral waiving; characteristics that set them apart from standard garden-variety rights.

The Idea of Rights
The two main theories of the nature of rights are commonly identified as Interest Theory of rights and Will Theory of rights respectively. According to

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to Interest Theory, rights generally protect some important interests of the right-holder. According to Will Theory, rights function as to ensure room for choice on behalf of the right-holder. On this account, having a right always entails the right-holder being able to, and having the authority to, waive or demand enforcement of the right in question. These characterisations of rights are standard, although not always compatible. Some philosophers have proclaimed a tie between the Will Theory and the Interest Theory, and I will remain neutral between the two. Instead, I will try my analysis of disjunctive rights against both theories, when appropriate.  

Whatever characterization one opts for, it is commonly claimed that all rights are Hohfeldian incidents, while the reverse remains contested. Wesley Hohfeld argued that legal rights can be divided into four groups according to type, which he labelled as “incidents”: *claims, privileges, immunities and powers.* Each incident is said to have specific

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7 For analysis of the problems confronting the two theories, see Wenar (2005) and Sreenivasan (2005).

8 Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning,* edited by W. Cook (New Haven: Yale University Press, 1919). Hohfeld used the term “right” instead of “claim”. However, it is nowadays standard praxis to use “claim” for reasons of clarity. When referring to Hohfeld’s analysis I will therefore talk of “claim” even though he used the term “right”. Also, ”privilege” is sometimes exchanged for the term “liberty” (Hohfeld treated them as synonymous; see pp. 42-43). Hohfeld himself seems to have believed that only claims were proper rights (p. 38; see also p. 71). Exactly what it means that every proper right is a “claim-right” (a Hohfeldian “claim”) is open to some interpretation, however. The contemporary consensus, on which I rely here, seems to favour the interpretation that a proper right must at least include the Hohfeldian incident “claim”; for instance, see Orend (2002), pp. 22-23.
correlates, a claim called the Correlativity Axiom (CA):\(^9\) claims correlates with duties, privileges with no-claim, immunities with disabilities, and powers with liabilities.\(^{10}\) Hence, if X has a claim, then Y has a correlating duty, and so forth. The reverse is also true according to CA: if X has a duty, then Y has a claim, and so forth. Below, I will focus on (claim-)rights and their correlative duties, as the notion of rights is most closely aligned with Hohfeldian claims. When talking about a right then, I will not be referring to any of the other Hohfeldian incidents, unless explicitly stated.

Now, CA has persistently been subjected to criticism, as it is argued that not every right entails a duty, and that not every duty entails a right. According to CA this cannot be, since the right entails the duty, and vice versa. Below, my discussion will be premised on the assumption that CA holds.\(^{11}\) While not every philosopher will recognise such premise, the

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\(^9\) Kramer (1998), p. 24. It should be noted that the correlation between rights and duties – and more generally between the various Hohfeldian incidents – exists on the level of types, not tokens. Which precise duty that correlates with a specific right is a matter of convention, not conceptual contents.

\(^{10}\) Hohfeld (1919), pp. 36, 38-64. The incidents power and immunity are what is called second-order incidents (or secondary rules; as opposed to the first-order incidents/primary rules right and privilege). Second-order incidents govern the first-order incidents. If X has a power, X can alter the normative situation of Y by changing Y’s first-order incidents. This means that “X has a right” can be explained by some of the following sentences: (1) X has a claim against Y that Y φ if and only if Y has a duty to X to φ; (2) X has a privilege to φ if and only if X has no duty not to φ (that is, Y a no-claim that X do not φ); (3) X has a power if and only if X has the ability within a set of (moral) rules to alter X’s own or another’s Hohfeldian first-order incidents (that is, Y is, within a set of (moral) rules, liable to have his or her Hohfeldian first-order incidents altered by X); or (4) Y has an immunity if and only if X lacks the ability within a set of (moral) rules to alter Y’s Hohfeldian first-order incidents (that is, X has, within a set of (moral) rules, a disability to alter Y’s Hohfeldian first-order incidents). I have here borrowed Wenar’s (2005) definitions of the correlative relations; definitions which I hold to be close to standard today. Hohfeld himself does not provide us with such neat formulas, although nevertheless writing with an admirable clarity.

\(^{11}\) Given a conceptualization of rights that does not include CA, disjunctive rights might be a conceptual non-problem. Much of the problems related to the notion of disjunctive rights that I will discuss in this paper stem from the relation between rights and duties;
arguments in favour of it, in conjunction with the rather dubious quality of the arguments against it, suffice to establish CA as a plausible assumption.\(^\text{12}\)

The acceptance of a particular characterization of disjunctive rights may be influenced by which justificatory path one appoints as leading to a basic right (a right not itself justified with the help of some other right). There are basically three ways to establish a basic right: (i) the right is justified by some reason which does not involve or rely on any rights or duties, (ii) the right is entailed by a duty, which is justified by some reason that does not involve a right,\(^\text{13}\) or (iii) the right is justified by some duty in conjunction with some reason, where neither conjunct involves a right.\(^\text{14}\)

Nevertheless, for reasons referred to above, I suggest that CA should be regarded as a reliable premise.

\(^\text{12}\) First, it should be pointed out that CA was never intended to describe our actual usage of the terms “rights” and “duties”. Matthew Kramer has defended Hohfieldian correlativity saying that “[a] key to grasping Hohfeld’s project is to recognize that it was purificatory (analytically purificatory) and definitional rather than empirical or substantive.” (Kramer 1998, p. 22) If so, then according to Kramer any critique of CA taking common usage of the term “right” as its starting point will be misconceived. That said, in so far we treat the concept of rights as a concept supplied with a moral justification, then how the term is commonly understood is of some importance. For examples of the debate over CA, see Hart (1955), p. 182; Raz (1986), pp. 170-172, 210-213; Shafer-Landau (1995), p. 221; David Lyons, "The Correlativity of Rights and Duties", Noûs 4(1) (1970), pp. 45-55; Kramer (1998); Jack Donnelly, "How Are Rights and Duties Correlative?", Journal of Value Inquiry 16 (1982), pp. 287-294; Marcus Singer, "The Basis of Rights and Duties", Philosophical Studies 23 (1972), pp. 48-57.

\(^\text{13}\) This type of justification has been the object of criticism, as it has been argued that given CA, there can be no justificatory relation holding between rights and duties, regardless of direction. Alan Gewirth has, I believe, convincingly defended the compatibility between CA and a justificatory relation: "It is indeed true that ‘A has a right against B’ and ‘B has a duty to A’ are logically equivalent. They do indeed signify the same relation, in the sense of the same whole relational complex. But from this is does not follow that the bare constituent relations signified by ‘right against’ and ‘duty to’ are themselves also the same.” ("Rights and Duties", Mind 97(387) (1988), 441-445, at p. 443)

\(^\text{14}\) It should be pointed out that this justificatory path does not involve factual elements since, if adequate specification is provided, they are already included in the rights/duties that we seek justification for.
Traditionally, philosophers have opted either for (ii) or (iii), placing duties before rights on the justificatory path. Consider the view of Simone Weil; an early critic of right-based moralities. According to Weil, rights as they are commonly understood are claims in someone’s possession and directed toward others. As the possessions of individuals, they exist and have their function within a commercialized framework, making them into commodities to be bargained over. Underlying such view is the assumption that rights can be waived and controlled by the right-holder, thereby implying a notion of power closely tied to that of rights, not unlike the power to dispense or to hold on to, say, a bike or a computer. In sharp contrast, duties stem from impersonal justice, which stands authoritative regardless of power or preferences of the right-holder. Rights, according to Weil, should then be understood merely as descriptive of the receiving end of duties, being justified and explained by them.

Later writers have opted for a different path of justification, placing rights before duties. On Raz’ influential account, the justificatory path first leads to rights, then continues to duties. The same view is also Alan Gewirth’s: “Rights, then, are prior to duties in the order of justifying purpose or final causality, in that respondents have correlative duties


17 One explanation for this might be that the prevailing view of rights has gone from rights as properties to rights as reasons. See Briand Orend, Human Rights: Concept and Context (Petersborough: Broadview Press, 2002), pp. 18-19, for a brief argument for the latter view.

because subjects have certain rights.” Dworkin also seems to believe that rights have justificatory priority over duties, as does Nicholas Wolterstorff. The defence of rights as justificatory prior usually appeals to a variety of common-sense examples. One example belonging to Joel Feinberg is a case in point: “It is because I have a claim-right not to be punched in the nose by you, [...] that you have a duty not to punch me in the nose. It does not seem to work the other way round.” Although such arguments might not, in the end, be convincing, rights are commonly seen not simply as an additional extra to duties, but as enjoying justificatory priority over them.

A further important distinction for the discussion below is that between conditional and unconditional rights. Conditional rights has the form of “If …, then X has a right to P.” Note however, that since every right can be fitted with some kind of condition, not every sentence can be allowed to occupy the vacant slot in the formula of a conditional right. What are of interest to us here are rights that, in order to be actual or prima facie, requires a deontic condition to be fulfilled (someone else exercising a specific right, or discharging a specific duty, or failing to do so) or some material condition to be fulfilled (a state of affairs that somehow can be characterised as not belonging to standard background conditions).

Last, rights can be seen as types or tokens. A type-right is simply a right that is abstracted from the right-holder and its present context. A token-right, in contrast, is an actual instance of some type-right; a right existing in relation to a specific right-holder and in a specific context. Two individuals each having a right to life can thus be said to share the same type-right (“X has a right to life”), although having different token-rights.

("Adrian has a right to life" and "Beatrix has a right to life"). Thus token-rights can come into conflict while being of the same type.

The above distinctions and assumptions by no means exhaust the conceptual framework that can be called into support of a discussion about rights. Nonetheless, they will facilitate the discussion of the idea of disjunctive rights and will enable us to see how it can fit into a more general rights discourse.

Disjunctive Rights

Arneson has claimed that disjunctive rights are both common and straightforward.22 The idea of disjunctive rights forms a part of Arneson’s argument against the libertarian reply to so-called shallow pond-objections; cases where a small child is about to drown in a shallow pond, and where a rescue can be carried out by a bystander at almost no cost whatsoever. Intuitively, we – whether libertarians or not – feel that the child has a right to be rescued and that the bystander, based on the ease with which he or she can perform the rescue, therefore has a corresponding duty to rescue the child. Libertarians have objected that such duty will sometimes come into conflict with another intuition; that the demands of morality must not be set too high as to require the impossible; that is, it must not violate Kant’s “ought-can” principle. Not only are opportunities to save someone’s life at a very small cost plenty (think about all the starving children in sub-Saharan Africa) and will eventually accumulate a seemingly unreasonable burden, it is also – as a matter of fact – impossible for one person to rescue everyone that have an equal right to life and a derivate right to rescue. Libertarians therefore respond that in the shallow pond case, the child’s right does not correlate with a duty to rescue her. From the libertarian perspective, the sum of similar rights would also cancel out the bystander’s self-ownership, which would then be another instance of an unreasonable burden. Reasonably then, according to the libertarians, this leaves the child with

only a negative right: a right not to be drowned, correlating with a duty not to drown her.

The distinctly libertarian response is arguably value-laden, as the notion of “self-ownership” occupy its centre. If using Kant’s “ought-can” principle however, the same conclusion is reached through a less contested route: if we cannot rescue all, then we cannot be bound by a right belonging to each person in the need of a rescue to perform such rescuing. And if we have no such duty, then according to CA, there is no correlating right to rescue. Instead, we have to make do with negative rights only, or come up with another way of maintaining the idea that the child in the pond has some full-fledged positive right requiring our action.23

Trying to rescue the idea that the drowning child has indeed a right requiring the bystander to act, Arneson argues the following:

[The libertarian] might respond that if the number of potential rescues vastly exceeds the number of rescues any individual is obligated to undertake, how can there be a strict obligation owed to any particular persons? One answer is that the obligation is disjunctive: one must rescue some subset of the total of people whom one might save, and each of these persons has a right that one rescue either a group that includes him or some other same-sized group from among those who might be saved.24

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23 To stress the importance of the discussion below, it should be pointed out that the distinction between negative and positive rights/duties is contested, as it relies on the distinction between action and inaction. For instance, Henry Shue who describes the dichotomy between positive and negative rights as “intellectually bankrupt” (Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy, 2 ed. (Princeton: Princeton University Press, 1996), p. 51). Alan Gewirth succinctly explains why: “[…] for someone’s behavior to be an action, it is not necessary that he engage in gross bodily movements, or indeed any bodily movements at all. What is both necessary and sufficient is that he behave voluntary and purposively […]” (Reason and Morality (Chicago: University of Chicago Press, 1978), p. 219).

In the footnote at the end of the quote, Arneson provides a further example of how a disjunctive right should be understood:

[The disjunctive right] is no more mysterious than a back-up job offer. Being the recipient of such a conditional offer, I have a right to be offered the job if and only if the first-ranked candidate, to whom the job has been offered, turns it down.25

This seems like a promising approach. Using the notion of disjunctive rights, perhaps we can make better sense of a range of well-known ethical problems. For instance, remember Philippa Foot’s Trolley Problem: you have to choose between letting a runaway trolley hit five people standing on the track, or switching the trolley onto a side track where only one person will be killed.26 Possibly, the problem can be analysed in terms of disjunctive rights rather than relying on prima facie rights, or on the infringe/violate distinction. Each individual standing in the way of the train then maintains a disjunctive right to life, and the bystander has a correlating duty not to let a subset of them die; presumably (but not necessarily) the largest possible subset. The idea of disjunctive rights, in Arneson’s version, might also be a good tool for making sense of imperfect duties. A persistent worry about some imperfect duties is that they do not seem to fit well with a Hohfeldian taxonomy including CA. For instance, Feinberg states that “[d]uties of charity, for example, require us to contribute to one or another of a large number of eligible recipients, no one of whom can claim our contribution from us as his due.”27 Using the notion of disjunctive rights, we could then say that the imperfect duty at least sometimes correlates with disjunctive rights: although it is true that no single individual can claim the charitable contribution as his due, he has a legitimate claim to be included in

the set of eligible recipients from which the actual recipients are chosen through some morally neutral procedure.

In order to understand the notion of disjunctive rights and to examine its usefulness, it is instructive to take Arneson’s account as our starting point. However, even at the outset of such examination we must engage in a bit of cleaning-up. Remember how Arneson characterized disjunctive rights and duties. A disjunctive right was described with the help of an example: “Being the recipient of such a conditional offer, I have a right to be offered the job if and only if the first-ranked candidate, to whom the job has been offered, turns it down.”

This is unsatisfactory for two reasons. First, it misconstrues the core idea of disjunctive rights, as there is nothing distinctively disjunctive about the rights in the scenario. Second, it fits badly with Arneson’s definition of a disjunctive duty: “[...] one must rescue some subset of the total of people whom one might save, and each of these persons has a right that one rescue either a group that includes him or some other same-sized group from among those who might be saved.” In the case of the disjunctive right described by Arneson, the right is a standard conditional right, and acknowledged to be so: if a certain condition is first satisfied, then A has a right to φ. If Arneson’s example is a paradigmatic example of a disjunctive right, then indeed there is nothing mysterious about disjunctive rights, because disjunctive rights are nothing but standard conditional rights. As he claims, they then make sense. But disjunctive rights are best described as something different from, or as a special kind of, conditional rights. Arneson’s description of disjunctive duties seems to reveal this. In Arneson’s example of a disjunctive right, the move from one disjunct to another is subject to a conditional clause, while in Arneson’s idea of disjunctive duty, the disjunction between the participants is conditioned upon Kant’s principle coming into play; the choice between the disjuncts is not conditioned. Arneson’s example of a disjunctive duty seems to involve an actual choice on behalf of the duty-holder, while that seems not to be the

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case in the example involving the second-ranked candidate. Any interesting concept of disjunctive rights should be of the first kind, not the second.

Now, trying to formulate an adequate definition of disjunctive rights is instructive in itself as it reveals the problems surrounding the concept. Let us consider some possibilities. Starting out with Arneson’s appropriately pruned description of disjunctive rights, we get the following definition of disjunctive rights:

A has a disjunctive right iff (i) A is a member of set S, (ii) each member of S has a right that C φ to some subset of S, and (iii) C owes a duty to each member in S to φ to some subset of S.\(^{31}\)

If applied to our unfortunate sailors, both are then seen as members of S (i), both have a right that the rescue team rescues one of them (ii), and the rescue them has a duty to rescue one of them, it being unspecified whom (iii).

The first problem confronting such definition is that it seems to sit badly with Interest Theory, as the definition appears to involve third party beneficiaries at its core. Both A and B (and every other member of S) were said to have a right against C, but only some subset of S seems readily describable as the beneficiaries of C φ-ing.\(^{32}\) Hence the link between having a right and having one’s interest protected seems lost. Of course, the Interest Theorist can reply that *given the tragic circumstances*, A and B having disjunctive rights and a potential for becoming beneficiaries of C φ-ing do indeed protect their interests, or at least their interests as can possibly be met within the actual circumstances. But such retort can be accused of severely reducing the significance of the (Interest Theory) concept of a right. For what if S consists of, say, 100 000 individuals, each having a disjunctive

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\(^{31}\) Incidentally, this characterization is very similar to the one given by Feinberg ([1984] 1992), p. 184. It should be noted that the definition above presuppose (depending on which conception of rights one prefers) that there are no other moral reasons that intervene in such way to tilt the scale in favour or rescuing one rather than the other.

\(^{32}\) Feinberg ([1984] 1992), p. 184, notes the intuitive problem with the duty-holder being allowed to fulfil the moral right of both right-holders while only rescuing one of them.
right to be rescued by C from some looming natural disaster? Disjunctive rights then amounts to the right-holder having very small statistical chances of winning the grand prize: they can therefore be described as lottery rights. Given Interest Theory of rights, such lottery rights may not be rights at all.\textsuperscript{33}

It might be debated whether or not lottery rights are meaningful or not. Let us assume that they are; that the price one has a chance at getting is simply so significant that have only a very slim chance (say, 1 in 100 000) at actually gaining it is immensely important. A second problem then arises: what, more exactly, does one have a right to if one has a right to a statistical chance of gaining X? How should we describe such lottery rights? On the face of it, there seems to be nothing strange about the idea. But lotteries are more complex than one might think. Lotteries seem to involve, among other things, two separate but necessary rights: having a lottery ticket implies a right to be considered (along with n other ticket owners) for receiving the prize, and a right to that prize if one’s ticket number comes up. The first right is an unconditional claim-right; the second right is equipped with a conditional. If disjunctive rights are anything like lottery rights then, there is nothing inherently distinctive about them.

There is nothing wrong with lotteries functioning this way. But this is patently not the way disjunctive rights work. If that was the case, disjunctive rights could be described as follows: Both A and B each has a right to be considered for a rescue by C, and C has a duty, correlating to A’s right and to B’s right, to consider A and B for a potential rescue. But A and B also have a further (conditional) right, exceeding their mere rights as eligible candidates for rescue. Following the lottery analogy all the way, if C chooses to rescue A, then A has a right to be rescued. On the other hand, if C chooses B, then B has a right to be rescued. But that seems unacceptable. First, it could be interpreted as saying that A and B has rights that are not revealed until C performs his duty. But that is patently odd, if C knows his duty, we would also know, at least roughly, the corresponding right. And if

\textsuperscript{33} Whether or not disjunctive rights \textit{actually} become pointless under a Interest Theory interpretation is, I think, not easily established, and therefore I rest content by pointing out the risk. Whether or not an interest is sufficiently protected is decided by reference to some norm, and therefore we need to agree on that norm before the issue can be settled.
the rights are revealed by some action of C’s, that C do not know is his or her duty, it would imply that the language of right loses its action-guiding function. Second, we might interpret such position as saying that the rights of A and B do not exist until C acts upon his choice. But this is equally unacceptable, since it would allow arbitrary choices by moral agents to determine possession and dispossess of moral rights, rather than answering to such possessions. Within the lottery it is morally permissible, even obligatory, for the lottery manager to arbitrarily appoint the possessor of the final right to the prize among those who have a right to consideration, but this is because the lottery itself is perceived as a (legitimate) rule-governed institution. In the case of the rescue scenario, the situation itself cannot be accurately described as a legitimate rule-governed institution in any relevant sense. Rather, it is simply an accidental scenario in every sense of the word, and C is in no position to appoint right-holders. Disjunctive rights should therefore not be equated with lottery rights.

We must therefore return to our initial worry about disjunctive rights as statistical chances. Our challenge is to describe such rights in the appropriate way; a way that render it consistent with how we commonly think rights function and with normal usage of the term. Now, it seems plausible that if A has a disjunctive right that C does φ, then A has, at least, a right to be equally considered as the recipient of C’s φ-ing. But what about the actual rescuing? Perhaps we can dispel the problems surrounding the lottery ticket analogy by simply cutting out the right-duty discourse from the description of the second part of the lottery ticket analogy. While both A and B each has an unconditional and full right to be considered, each of them simply enjoys a certain statistical probability of becoming the beneficiary of C’s duty. The right then pertains to the inclusion in the group under consideration; the element of probability pertains to the chance of being the beneficiary of C’s duty.

But this obviously will not do. The right to consideration has its own correlating duty and benefit – the duty to consider and the benefit of

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35 In Hohfeldian terms, the lottery manager has a power to alter the participants first-order incidents within some particular scheme of rules.
being considered. If a right to consideration was all the normative content of a disjunctive right to be rescued, then C could fulfil his duty to consider rescuing A or B without being obligated to actually rescue any one of them. But that would be absurd. Moreover, we are left in the dark regarding what right correlates with C’s duty to rescue, if he even has one.\textsuperscript{36} We have then still to present an acceptable interpretation of Arneson’s definition.

Let us then reconsider the definition, this time placing emphasis on its third component: C’s duty. Does it help if we start with the duty, and then from there move to correlating rights? As argued above, even given CA, the justification can be found closer to one of the two sides of the correlation. While modern philosophers tend to favour justifications tied primarily to the right side, justification via duties has been a frequent tactic among early rights theorists. Although A will have a right regardless of whether its foundation is found on the duty side or the right side, it matters for the acceptability of a theory from which side we argue.\textsuperscript{37} In our initial example, we started with two sailors endowed with rights. Instead, we should now rethink the example and start with the assumption that the rescue team – \textit{qua} professionals and human beings – has a duty to rescue the two sailors. Taking this duty as basic, what rights are we most likely to accept as correlating to such duty, given the circumstances?\textsuperscript{38}

I believe that this simple move lend some plausibility to Arneson’s characterization of disjunctive rights. If C’s duty is justificatory prior, then A and B’s correlating rights appear restrained, instead of their

\textsuperscript{36} I focuses on consideration above; Feinberg, when discussing a similar idea, focusing on \textit{equality in} consideration. As Feinberg ([1984] 1992, p. 184) notes however, such equality can be fulfilled without both consideration and any actual rescuing.

\textsuperscript{37} Dworkin (1977), p. 171, makes a similar point when he argues for the justificatory priority of rights.

\textsuperscript{38} As mentioned earlier, CA operates on the level of types, not tokens. Even if we grant that rights and duties always correlate, which right that correlates with which duty remains to be determined in the light of moral convictions, conventions and contexts. While on the type level rights and duties have equal status, they are not always perceived in that way; a fact which in turn affects how the correlation is construed at token level. Therefore, it makes sense to investigate if one could get a different picture on the token level, depending on in which end one starts when searching for the correlate.
rights restraining the correlating duty. Viewed from C’s duty then, it seems natural to say that A and B each have a right that C rescues one of them – a right amounting to a certain probability of rescue – as the link between interest and a duty may be perceived as weaker than if it would ground the right directly.

But changing the justificatory ordering is problematic, for several reasons. To begin with, it will collide with many modern theories of rights, as it relies on an approach no longer in fashion. Although that might not be all that worrying – currently fashionable does not equal philosophically reasonable – the fact that most of the problems described above are still unresolved is more alarming. Changing the order of justification will only lend some intuitive appeal, not philosophical soundness. Moreover, the wanted result seems to be at odds with the premise of this entire discussion – taking intuitions about rights seriously. For what lends the above tactic some credibility is that it put the duty to rescue at the forefront, at the expense of the sailors’ rights.

Perhaps such shifting of justificatory priority does not that drastically reduce the value and meaning of the sailors’ right. Nevertheless, seen from the perspective of Will Theory, the definition will still not be acceptable. According to Will Theory, a genuine right always involves the right-holder being able and authorized to waive or demand enforcement of his claim. That requirement, however, is not fulfilled in our present definition of disjunctive rights. If A has a disjunctive right against C that C rescue either A or B, then A seems to be in no position to waive C’s duty. Hence, according to Will Theory, A has no right against C. To such claim, the obvious rejoinder would be this: Is not C’s duty a case of over-determination, as its content is given by two separate but identical duties – two token duties of the same type – owed to A and B respectively? A can control the duty owed to him, but an identical duty is still owed to B, meaning that A certainly has a right.

Such reply is quite contra-intuitive and unlikely to be compatible with the spirit of Will Theory. The function of a right, according to standard Will Theory, is to protect some room for choice for the right-holder. But on the conception of disjunctive rights currently discussed, A
waiving his right (and thus also the duty) have no direct effect whatsoever on C’s action; he or she is, ceteris paribus, still obligated (to B) to do or to forebear the same action. The room for choice allowed to A is thus between not waiving and waiving without any effect.

Seen from Will Theory of rights, Arneson’s definition raises familiar problems, although with some interesting consequences. Let one of our sailors, B, be unconscious due to exhaustion and hypothermia – simply put, B is unable to waive or demand enforcement of his (disjunctive) right to rescue for the remaining duration of the scenario. By itself, this is the classic problem for Will Theory: according to its standard interpretation, B has no right at all – something that may strike us as counter-intuitive. But that may not be the only problem confronting a Will Theorist’s interpretation of disjunctive rights. The Will Theorist is faced with two different ways to interpret such scenario. First, the Will Theorist can say that when B loses his right, A then ceases to have a disjunctive right, and instead retains an ordinary right to be rescued, as the competition has disappeared, so to speak. But this comes with the rather high cost of implying that C has a duty not to rescue B (if C has, all things considered, a duty to rescue A, then it is not permissible for C to do whatever would surely amount to not rescuing A; and as rescuing A and rescuing B is mutually excluding, C’s duty to rescue A equals a duty not to rescue B), which would strike most people as a morally bankrupt conclusion.

A second way to interpret the scenario is that when B loses his right, A still has his disjunctive right. This would be an interpretation meant to have some intuitive appeal, as B’s life might then be rescued through A’s right (although it is unclear, I think, what other reasons there are for A retaining a disjunctive right). But if A then waives his right – correlating to a duty owed by C to rescue either A or B – he effectively takes away B’s status as a potential beneficiary, resulting in a situation where B is left drowning without rights and C with, ceteris paribus, no duty to rescue either one of A or B. There is nothing illogical or conceptually strange about such outcome. It is, however, strongly contra-intuitive. What seems to make the scenario morally perverse, I think, is not merely the fact that A can alter B’s status as a potential beneficiary in a very lethal way (after all, B’s potential
benefit would be paid in full by A), but the fact that *B did incur such power in a morally arbitrary way*. It seems to me that there is something inherently inadequate with a moral theory that arbitrarily distributes powers over others’ lives.

There is a further consequence forced upon not only Will Theory, but upon Interest Theory as well. In case of disjunctive rights, understood in the way Arneson seems to understand them, both interest and will preservation are drastically reduced by the number of members in S. If the defenders of Will Theory and Interest Theory do not want their respective theory to become diluted indefinitely (by the possibility of a almost all-encompassing S), then they can reply, as was pointed out above, that interest and will preservation are always measured in relation to actual context. In the case of the drowning sailors, whatever interest or will that is salvaged by a disjunctive right is far better than what would be left without such right. But this has the consequence of committing Will Theory and Interest Theory to a light version of specificationism, making rights relative to actual context, according to which rights can only be determined to exist after having weighed interest or will preservation in the actual case. Although not full-fledged specificationism, it will be haunted by the same kind of problems confronts the specificationist. Such commitment thus comes with its own problems, which I will not discuss here.

So both Will Theory and Interest Theory, at least in their most common versions, seem to have trouble harbouring disjunctive rights. However, in what follows I will argue that the idea of disjunctive rights has so far been misconstrued. If construed correctly, then there is no inescapable conflict between disjunctive rights and either Will Theory or Interest Theory, nor a great collision with how we commonly understand and use the term “rights”.

*Why (Proper) Disjunctive Rights Are Not Like Other Rights*

39 According to specificationism, rights exists only as fully specified, in contrast to *prima facie*. Hence they exist only as the endpoints of moral arguments, not as premises.

40 Ultimately, I believe that specificationism is an *ad hoc* solution too far removed from common rights discourse.
What I will call a *proper disjunctive right* cannot be reduced to common garden-variety rights involving conditionals. The definition we started from – Arneson’s – is too broad, as it allows for non-proper disjunctive rights; that is, rights with disjunctive conditions that are reducible – both content-wise and in an explicationary sense – to straightforward individually held rights with correlative duties, supplemented with some conditional clause(s). Proper disjunctive rights differ from common rights in their Hohfeldian description; most importantly by encompassing Hohfeldian incidents on several levels. By getting the structure of disjunctive rights right, we will be able to see in what way disjunctive rights are special.

Proper disjunctive rights contain *meta-rights*, or second-order rights: that is, rights concerning rights, correlating with duties concerning duties. Both A and B has a right to be rescued by C: A has a right R1 with the content “A is (to be) rescued by C” and B has a right R2 with the content “B is (to be) rescued by C”. The disjunctive right held by both A and B does not alter this fact. What it does is that it adds a right on top of the first-order rights; a meta-right R3 that “Either R1 or R2 is (to be) fulfilled by C”. A and B hold the same token R3. Moreover, if R3 is waivable (and there are clearly instances where this would be desirable), then R3 can be *unilaterally waived*, despite both right-holders being conceptually tied to R3.

The two defining characteristics of disjunctive rights – disjunctive rights as complex rights containing meta-rights, and R3 being unilaterally waivable – need to be explained. Beginning with the first characteristic, to see why postulating a meta-level is appropriate, ponder the following case, which might be felt to be somewhat less emotionally loaded:

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41 In order to avoid confusion, I prefer the term ”meta-rights” instead of Hohfeld’s ”second-order” incidents. Hohfeld’s second-order incidents are usually limited only to powers and immunities.

42 On my account disjunctive rights thus seems to fit Carl Wellman’s description of an ordinary rights as a ”complex structure of Hohfeldian positions consisting of a defining core together with associated positions that together confer some defined sphere of dominion upon the right-holder” (for a recent expression of his theory, see Carl Wellman, *The Moral Dimensions of Human Rights* (New York: Oxford University Press, 2011), pp. 18-19). Hence it is not the complexity in itself that sets disjunctive rights apart, but their internal structure.
Adrian and Beatrix each has the same disjunctive right against David; a right that David pays $100 either to Adrian or Beatrix, since David owes them both money but is prevented from paying both of them since he only have a $100 bill at his disposal. However, to Adrian the whole deal seems wrong: he believes that David should pay him the $100 and that Beatrix should not be paid at all. Out of a sense of righteousness, Adrian waives his right that either he or Beatrix be paid $100, as he feels that the either-or scenario is simply immoral.

Now, as was brought to attention above, we have an interpretative choice to make. Either Adrian’s waiving of his right means that the basic premises of the scenario are thereby changed, taking away the disjunctive condition and leaving Beatrix with a standard, non-disjunctive claim against David, or Beatrix retains her disjunctive right against David. If choosing the first path, we saw above that it led to some rather contra-intuitive results. Ignoring such worries, we still need an explanation for why Beatrix’ disjunctive right can be altered through Adrian waiving his. The explanation perhaps most readily available is that Beatrix is again attributed with a plain, standard right against David because of logical reasons. By introducing Kant’s principle as a premise we arrive at disjunctive rights; if the principle is unfulfilled, then we revert back to individually held standard rights. But this rather retreat is not supported by logics, not in either direction. On its standard interpretation Kant’s principle does not leave us with a duty to rescue A or B, but – if relying on standard deontic logic – with no duty at all. If the reversed order is present – A and B has disjunctive rights – Kant’s principle left unfilled does not entail that B has a standard right after A has waived his right. The move from conflicting rights and Kant’s principle to disjunctive rights can only be done with the help of an additional normative principle or value; similarly, moving from a disjunctive right and an unfulfilled Kant’s principle requires an additional normative principle or value. Of course, this is part of the explanation why disjunctive rights seems so problematic.

So what about our other option? What is wrong with assuming Beatrix to hold a disjunctive right after Adrian has waived his disjunctive right? For reasons explained above, David then owes a duty to Beatrix either to pay her or to pay Adrian, and in such case Adrian has no moral grounds for waiving being (or claiming to be) the object of David’s duty to pay him $100. Beatrix duty thus potentially forces David’s actions upon Adrian, who in our present scenario is left entirely without relevant normative resources. Also, consider a scenario in which both Adrian and Beatrix waive their respective disjunctive rights, meaning that neither of them has any right against David that he pays one of them $100. Perhaps both feel that their respective disjunctive right reflects some kind of injustice. If so, then Adrian and Beatrix have no first-order rights to fall back upon; they simply lose all their claims against David, regardless of the grounds for the initial claims staying the same.

It might be objected that the implications worried about above are acceptable. In the idea of a conjunction of a power and a liberty to waive is also inherent an idea of responsibility: if Adrian and Beatrix decide to waive their rights, then they have to accept the costs of doing so. Now, I do not object to the idea of a responsibility being tied to the waiving of a right. Instead, I believe that in the case of disjunctive rights, such responsibility is too strict if interpreted as leaving both Adrian and Beatrix without any valid claims to the $100. Consider Judith Jarvis Thomson well-known argument against specificationism, saying that it leaves moral residue unexplained.44 Her argument seems to me quite right, and also to be applicable to our present discussion: If Adrian and Beatrix waive their respective disjunctive right, and those rights were all they had, then we are left with a moral residue – both Adrian and Beatrix appears, intuitively, to have some claim against David that he pays them at least some sum of money. The best way to make sense of such residue, I think, is by describing disjunctive rights as

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involving, although not exhausted by, meta-rights; once waived, first-order rights remain.45

But such structure of first-order rights and meta-rights might appear pointless, since the waiving of a meta-right by either Adrian or Beatrix will create an asymmetry that, for reasons explained above, is deeply problematic. Besides disjunctive rights involving meta-rights, I therefore suggest that we also interpret them as being unilaterally waivable although being inherently collective to their nature. This unilateral waivability stands out, since disjunctive rights were described as rights having the same right-token (R3) shared by at least two individuals or groups. In a sense then, it would seem natural to simply describe disjunctive rights as some kind of collective rights, in which waiving at least some element would require collective waiving. That said, the reason why disjunctive rights are not an instance of collective rights is that requiring R3 to be waived in concert would imply that one of the right-holders can bind the other to the right simply by denying to waive it. Simply put, if R3 must be collectively waived, then A can prevent B from releasing C from C’s duty to B, and that, I believe, would go against the core of the idea of rights, regardless of whether we prefer Interest Theory or Will Theory. On Will Theory, someone having a right means that he or she can release the duty-holder from the duty; this criterion is clearly not met if R3 must be collectively waived. On Interest Theory, it seems equally strange to say that the right-holder cannot release the duty-holder of his or her duty when the fulfilment of the right is a burden rather than a benefit. Conceptually then, it seems odd not to allow R3 to be unilaterally waivable.

For moral reasons, it also seems somewhat odd to deny unilateral waivability. Even if the opportunities are similar among the right-holders, to be able to prevent someone else from waiving his or her right – be it a beneficial or a burdensome right – seems at least to require a background justification. Consider the paradigmatic case of someone having

45 Of course, this does not mean that the problem of conflicting rights is solved. Reverting back to first-order rights allows us to explain the moral residue, but it does not provide us with a solution to the ethical dilemma that disjunctive rights were intended to solve in the first place.
a Hohfeldian power to alter, or simply preserve, someone else’s first-order Hohfeldian incidents; a judge. We see nothing strange in the judge having such powers vested in him or her, because we believe that there is an appropriate background justification (be it legal or moral) in place for why such powers have been bestowed him. But in the case of our drowning sailors, as in the case of David’s debt to Adrian and Beatrix, no such background justification seems present. There is then nothing that provides us with reasons that establish special powers to one of the right-holders.

Now, an obvious retort would be that unilateral waiving of a right amounts to coercion of the other right-holder just as much as binding the other to the right does if requiring joint waiving. This is, in a way, a perfectly legitimate objection. However, the baseline – mirrored in the initial set of rights – is not a right-holding collective, but individual right-holders. Moving from individual right-holders to a description in which the right-holder is, in respect to the waiving of the right, a collective thus requires an explanation as well as a justification. Allowing unilateral waiving preserves the moral status of the right-holders established at the outset, while denying unilateral waiving requires an account of the transition from individual right-holders to a collective entity.46 Succinctly put, I do not believe such explanation is forthcoming.

Another argument pointing toward unilateral waiving of the meta-right in disjunctive rights is that if the meta-right is not unilaterally waivable, the most plausible explanation – having the discussion above in mind – is that the meta-right is only shared at the type-level, not at the token-level. A and B then has identical meta-rights (sharing the same type-right), but not the numerically same meta-right (each having a separate token-right). Since A and B have separate rights, one cannot waive the other’s right-token but only one’s own. But if what have been said above is correct, this would have a paradoxical result. For if A waives his token-right R3 and reverts back to his possession of R1 (which is a token-right not

46 Of course, a quicker defense would be to refer to Will Theory, according to which having a right entails being an individual – or at least an individual entity – with the power to waive and demand enforcement of the right. However, since I do not wish to ground my discussion in either of Will Theory or Interest Theory, I refrain from such tactic.
shared by B), while B retains his token-right R3, then according to B’s R3 C has a duty to rescue to either A or B, and a duty to recue A, corresponding to R1. But since R3 does not determine which one to rescue, while A’s R1 does, it is impermissible for C to rescue B. By waiving his meta-right R3, A has thereby ensured that C is under a duty to rescue him instead of B. That, I think, is an unacceptable consequence.

If my characterization of disjunctive rights is correct, what have we gained? Clearly a solution to the dilemma has not been presented: quite to the contrary, my account allows for the sailors to revert back, through unilateral waiving, to the initial conflict between two equally valid and pressing rights to be rescued. This might be something we have to live (or die) with: ethics will not always be able to guide us to ideal outcomes.\footnote{That said, I believe a case \textit{can} be made that my account actually brings us closer to such a solution. By appealing to a principle of solidarity, it can be argued that the sailor who unilaterally waives the disjunctive right has thereby denied that solidarity, and therefore is less deserving of a rescue. However, such solution will only be a partial solution; all versions of the dilemma will not be resolved.}

On the other hand, I believe my characterization does allow us to hold on to the intuition that the sailors – and Adrian and Beatrix – do have rights that persist in the face of tragic circumstances, and that such rights at least sometimes can be constructed in such way as to correlate with a realistic duty to rescue. This, I think, is an important gain.