

INTEREST-BASED RIGHTS, PEREMPTORINESS, AND EXCLUSIONARY REASONS

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Many theorists aim to argue for certain moral or human rights on the basis that they protect something of great value or a weighty interest. What I argue here is that this type of argument cannot justify the kind of right that its proponents often envisage, *ie*, a human right with a certain preemptory force. More specifically, I argue that, on this view, rights are not deontic relations between two parties that hold regardless of the circumstances; they are best seen as goals to be aimed at, which may or may not give rise to specified duties on others. Moreover, rights, on this view, cannot have the degree of preemptoriness required to distinguish them from mere reasons for action; cashing them out as exclusionary reasons may offer a distinctive account but it should be noted first, that this is at odds with the picture of rights as goals and second, with their grounding in (prudential) value. Given these implications of the argument, it becomes unclear why one might want to invoke rights in the first place rather than simply argue for the protection of interests.

I. INTRODUCTION

Many theorists aim to argue for certain moral or human rights on the basis that they protect something of great value and many such arguments simply make the case for the value in question and seem to assume that this is sufficient for justifying a right. Thus, a myriad of rights has been argued for on this basis, such as rights to revelatory autonomy, to artistic expression, to be loved, rights against social deprivation and of course rights of future generations or non-human animals. What I argue here is that this type of argument cannot justify the kind of right that its proponents often envisage, *ie*, a human right with a certain preemptory force.

This popular route from prudential value, *ie*, well-being, to rights via interests, seen as aspects of well-being, is the focus of this paper.¹ However, a full argument that shows how rights might be grounded in interests is not often provided; many such theorists claim to be relying on the one provided by Joseph Raz. Since I'm not aware of an alternative justificatory route from interests to rights, I will have to focus my critique on Raz's own argument and show that (a) this argument is not

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¹ I should also clarify that the argument in this paper focuses on moral claim-rights.

as straightforward as it is often assumed to be and (b) it has implications that are probably not welcomed by self-proclaimed followers of Raz. Many of these Razian arguments focus on the importance of the interest in question, the assumption presumably being that once it is established that it is a very weighty one, the case for the right in question has been made. As Raz himself notes, this exposes:

one common lacuna in much discussion of human rights. So much of that discussion focuses on the value of the putative right or its object to the right-holder, as if this is sufficient to establish that there is such a right. So often there is little concern to show why others are subject to duties in regard to the putative right or its object.²

Indeed, this missing step is precisely the one that can cause a lot of trouble for interest-based rights. I will argue that grounding rights in interests in the manner envisaged by Raz has two main implications that should trouble the proponents of interest-based rights: (1) these cannot be (human) rights, as they are often conceived and, more importantly, (2) they lose the peremptoriness that presumably makes rights worth arguing for. I will first outline this justificatory strategy in more detail before making those two points.

II. RAZ'S JUSTIFICATION OF A RIGHT

The best place to start the examination of this justificatory strategy is with Raz's own definition of a right:

'X has a right' if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.³

Let us note that Raz says here "other things being equal".⁴ This is to say that a weighty interest is a sufficient reason for holding others to be under a duty only when no competing considerations apply. But since other things are almost never equal, an argument meant to justify a specific right must do more than establish the weight of the grounding interest. Specifically, the premises of such an argument must include, according to Raz himself:

- (a) statements about the importance of the interest in question; and
- (b) statements establishing that the interest is not defeated by conflicting reasons or considerations.

² Joseph Raz, "Human Rights in the Emerging World Order" in Rowan Cruft, S Matthew Liao & Massimo Renzo, eds. *Philosophical Foundations of Human Rights* (Oxford: Oxford University Press, 2015) 217 at 222 [Raz, "Human Rights in the Emerging World Order"].

³ Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986) at 166 [Raz, *The Morality of Freedom*].

⁴ We may also note, in passing, that a necessary condition for having rights is being capable of having them, which, in Raz's view, means being the kind of entity that has "ultimate value" (*ibid.*).

Thus, to re-iterate, a right exists when an interest:

is a reason for another to behave in a certain way which protects or promotes it, and only when this reason has the peremptory character of a duty, and, finally, only when the duty is for conduct which makes a significant difference for the promotion or protection of that interest does the interest give rise to a right.⁵

In other words, we start with an interest, establish that it is generally an important rather than a trivial one such that *if* there are no conflicting considerations the interest can justify holding others under a duty. But when conflicting reasons or considerations apply, these must be weighed against the importance of the interest in order to establish that a duty is justified. Note that it is not the case that a weighty interest simply gives rise to a right which is then weighed against competing considerations in order to see what duties are justified in the circumstances. Rather the right emerges as a(n) (intermediate) conclusion of this process that establishes the existence of some duties (owed to the interest-holder). The weighing takes place before even establishing that a duty exists, and it is the interest that is weighed against competing considerations. Once the duty is in place, so to speak, the right begins to take shape.

This final clarification is important because it shows, in my view, that the duty is justificatorily prior to the right; that is to say, the existence of a duty is established first and the right may emerge later, as an “intermediate conclusion”. This, however, goes against what proponents of a Razian view typically maintain; on this view, rights are supposed to be prior to and the ground of duties, rather than the other way around. This is seen as an advantage of the view because it helps to account for the so-called dynamic aspect of rights; that is to say, rights can give rise to new duties, as well as new duty-bearers, depending on the circumstances. But, if the interpretation of Raz’s argument offered above is correct, it seems that it is duties that ground rights. Interests give reasons to act but only some of those reasons have the peremptory character of a duty; at least one such duty must be justified for a right to exist, even if the right may then ground further duties.

It may be replied that this does not show that duties are prior to rights; it may be the case that “they coexist at the point of recognising the claim-right/duty relation”.⁶ This reply presupposes, I think, that a duty (owed to or directed to the interest-holder) entails a right, to the object of the duty; in other words, the reply presupposes the Hohfeldian correlativity that Raz – and sometimes Razians – explicitly rejects. (I will return to a discussion of correlativity below.) It is not the case, I believe, in the Razian framework that a duty, even a directed one, correlates with a right to the performance of the action required by the duty; so they do not coexist in that sense. Raz is at pains to deny that statements of rights can be translated into statements of corresponding duties; rather the *same* right can give rise to multiple duties which “fall short of securing [the object of the right]”.⁷ But while Razians insist that it is rights that ground duties, my point is that for a right to exist, at least some duties

⁵ Raz, *The Morality of Freedom*, *supra* note 3 at 183.

⁶ I owe this objection to Andrew Halpin.

⁷ Raz, *The Morality of Freedom*, *supra* note 3 at 170.

must be justified *directly* by the interest that grounds the right. An interest that fails to justify holding anyone under any duty will not ground a right. It is thus the interest that is the ground of duties rather than the right. The upshot of this point is twofold: on the one hand, it draws attention to the thought that an interest that does not ground any duties at all does not ground a right either, an observation that is sometimes ignored by proponents of interest-based rights, and, on the other hand, it emphasises the centrality of interests to this account. If interests can justify holding others under a duty, it is unclear what role rights play in this picture.

I will now turn to some problems with this kind of argument, the common thread of which is that rights justified in this way just don't look like what many, including some of the people putting forward such arguments, would think of as rights. I first argue that, inasmuch as the move from interests to rights needs to establish the existence of duties owed to the right-holder, as indeed Raz thinks it should, this kind of argument cannot ground (*human*) rights as they are usually understood. There are three different but related points I wish to make here: first, on this view, rights do not have correlative duties; second, rights based on interests have no fixed content (do not always hold); and third, they are not universal. Let me address them in turn.

III. INTEREST-BASED *HUMAN* RIGHTS

Arguably rights in general have *correlative* duties. While proponents of interest-based rights sometimes claim that the rights they defend *correlate* with duties, the kinds of duties envisaged are not, strictly speaking, correlative to the rights in question. The notion of correlativity, introduced by Hohfeld, has a rather technical sense and it is unhelpful if it's used to refer more generally to any duties generated by rights. It may be worth noting that, for Hohfeld, all four positions that are usually referred to as rights (liberties, claims, powers and immunities) have correlative positions, which is the position of the other party in the normative relationship in question. Thus, liberties correlate with no rights, claims correlate with duties, powers correlate with liabilities and immunities with disabilities. However, the most frequently discussed normative relation is the claim-duty correlative relationship. To say that a claim and a duty are correlative is to say that they mutually entail one another; thus, having a claim against someone just means that they have a duty to you. For instance, my claim right against you that you read my paper correlates with or entails your duty – owed to me – that you read my paper and conversely, your duty owed to me to read my paper entails my right that you read it. In particular, we should note that the content of a correlative duty is the same as the content of the right in question.

Duties generated by interest-based rights are not correlative to those rights in this sense. Indeed, as Raz explicitly states, his view does not endorse the correlativity axiom proposed by Hohfeld. On a Razian view of rights, a single right can give rise to many different duties with different contents, depending on the circumstances. For example, a right to education may generate a duty on other individuals not to prevent children (girls for example) from getting an education but would also usually generate a duty on public authorities to provide educational facilities; this latter duty could of course have different contents in different contexts. Now,

it may well be the case that the duties in question are owed or directed to the right-holder; indeed, an attractive feature of this view is that the very justification of a duty also indicates its “direction”: since it is justified by an interest it must be owed or directed to the party whose interest it is. But the issue of “direction” should not be confused with the notion of correlativity; while correlative duties are also directed, not all directed duties are correlative in the sense explained above. A better term for the kind of duty generated by interest-based rights would be duties “corresponding” – rather than correlative – to rights.

I should also note that some argue that the Razian account is compatible with Hohfeldian correlativity.⁸ That is to say that the fact that a right can ground further duties is no threat to correlativity since a proponent of Hohfeldian correlativity can accept that we can speak of rights as well as their correlative duties at different levels of specificity. So the fact that a (more general) right grounds other rights/duties does not preclude that general right from having a similarly general correlative duty while the more specific duties will correlate with more specific rights. In other words, neither the dynamic character of rights nor their justificatory priority is incompatible with correlativity.⁹ This is correct but what Raz and his followers want to reject is precisely the idea that rights and their corresponding duties need to have the same level of specificity. In other words, Razians wish to maintain, it seems to me, that it is a single, abstract right that grounds different duties of different levels of specificity; all these duties correspond to the *same* right.

Having said this, it is not always clear whether Raz does accept that duties generated by a general right correspond to or even correlate with a more specific one; at times, he suggests that, where a general right grounds certain duties in specific circumstances, these correspond to derivations of the general right. “A general right is, therefore, only a *prima facie* ground for the existence of a particular right in circumstances to which it applies.”¹⁰ We thus seem to have two different notions of a right operating at the same time in the Razian framework. First, we have what we might call an “R(azian)-right”, which is the general right that can ground several different duties and, in some circumstances, none, but does not correlate with these duties. Second, we have “H(ohfeldian)-rights”, which stand in a relationship of biconditional entailment with duties; they would thus be more specific rights that are entailed by the duties generated by general rights against specific parties in specific circumstances. Of course, on this understanding of rights, the general right itself would correlate with a duty of the same level of specificity. But it is important to restate here that this duty should have the same content as the right if it is to correlate to it; it will not do to claim that each important interest/right correlates with a general duty to “respect” or “promote” that interest. Duties are usually cashed out in terms of actions or omissions, which can themselves be specified at different

⁸ Matthew H Kramer, “Rights Without Trimmings” in Matthew Kramer, NE Simmonds & Hillel Steiner, eds. *A Debate Over Rights: Philosophical Inquiries* (Oxford: Oxford University Press, 1998) 7; Matthew H Kramer, *Rights and Right-Holding: A Philosophical Investigation* (forthcoming, August 2024) [Kramer, *Rights and Right-Holding*].

⁹ Kramer, *Rights and Right-Holding*, *supra* note 8 (manuscript at ch 3, para 3.3).

¹⁰ Raz, *The Morality of Freedom*, *supra* note 3 at 184.

levels of generality; so, the right itself should be expressed as a claim to an action or omission. A right to have one's interest respected is no different from an interest.

Why does this difference matter? The idea of correlativity (of claims and duties in particular) has appeal, inasmuch as it does, because it indicates that rights are best conceived of as a deontic relationship between two parties such that one's having a (claim-)right cannot be separated from someone else having a duty to accord that claim. So, stating that someone has a right just means stating that someone has a duty with the same content; no further argument is needed to justify the duty in question. This is not the case for R-rights. Such rights can effectively exist even though it is unclear who has a duty to secure the object of the right; they may ground certain duties in certain circumstances but there may be circumstances in which a right does not ground any corresponding duties. I would suggest that this is a less appealing view of a right and one that does not distinguish it from an interest. In stating sometimes that interest-based rights have correlative duties, the proponents of the view thus illicitly help themselves to a different and more compelling concept of a right. This connects to a second point I wish to make, namely that interest-based rights have no fixed content.

Given that the would-be right-holder's interest is only half the story, and we need to consider conflicting moral considerations that apply in any given set of circumstances, and specifically the costs to the potential duty-bearer, a right based on the same interest may exist in one set of circumstances but not others. Consider the much-discussed child-drowning scenario. The child surely has a strong interest in being saved which could ground a right to be rescued. But if the costs to me, the only bystander, are sufficiently high, I do not have a (directed) duty to save the child; thus, the child has no right to be saved *against me*. This is, I submit, a strange and unattractive view of rights. We invoke rights precisely in order to suggest that we are owed a certain kind of treatment regardless of the circumstances; a right that "disappears" when the costs of complying with duties generated by it does not seem worthy of the name. It is more plausible to think that a drowning child always has a right to be saved, against any bystander, but in some cases, this right is justifiably infringed.

The Razian may wish to accept this point and grant that there is indeed a general right to be rescued but it grounds no duties in certain circumstances. But if it's not the case that I'm failing to comply with a duty owed to the child, it is dubious to say that I'm infringing a right, even justifiably. Moreover, if a right can hold against me even though I have no duty corresponding to it, it then becomes unclear why we need to consider whether an interest can ever justify holding others under a duty; it seems that it could be argued that an important interest always grounds a right, one that may never ground any duties, as indeed some proponents of this strategy seem to assume. So the Razian has to choose between a right that has fixed content but no corresponding duties, which is effectively a mere interest, and a right that vanishes in certain circumstances, which is at odds with the commonly assumed picture of human rights, as rights that hold for everyone regardless of the circumstances.

Finally, this picture of rights as grounds for many different duties does not sit well with the most widely accepted notion of human rights, one that is also implicit in arguments that attempt to ground rights in important human interests

(*eg*, interests against social deprivation, to be loved, to a clean environment, *etc*). Such arguments presumably invoke human rights precisely in order to suggest that all humans are entitled to the same kind of treatment regardless of where they are; in other words, precisely because of their universality. The Razian framework, however, cannot support rights of this kind. Indeed, Raz himself does not subscribe to a traditional or orthodox view of human rights, according to which they are moral rights held against everyone simply in virtue of their humanity; and are thus universal across not only space but time as well. Raz is unsurprisingly one of the main critics of this view of human rights; on his view, human rights are those fundamental rights held only against one's own state that can limit a state's sovereignty. So, the duties that each state has that correspond to human rights may differ depending on the resources available in that state. But even on the political conception of human rights, one should accept that human rights are at least synchronically universal, as indeed, Raz himself seems to.¹¹ But this would probably entail that human rights are restricted to those whose fulfilment does not entail great costs anywhere in the world currently. It is thus more likely that the only human rights that can be justified based on interests are those that are traditionally described as "negative" rights to non-interference rather than various rights to goods and services that proponents often want to justify.

This may not deter proponents of interest-based rights from pursuing this justificatory strategy; they may reply that, on this view, rights are meant to be merely "intermediate conclusions" in arguments from ultimate values to duties. The notion of "intermediate conclusions" is somewhat slippery, but it is meant to convey the thought that rights are best conceived of as "ideas located at a more abstract level" than the Hohfeldian relations between correlative positions.¹² They are not simply reflexes of duties but rather abstract entitlements, which indicate that some duties are owed to the holder of an interest in respect of that interest. This view of rights is not without appeal, especially when it comes to human rights, which may lie precisely in the virtue identified by Raz, namely that such intermediate conclusions enable a common culture to be formed around them, "in spite of a great degree of haziness and disagreement concerning ultimate values".¹³ In other words, there could be agreement about certain abstract rights even if there is disagreement about their justification and more importantly implementation. This is perhaps also more in line with international practice, which treats human rights as aspirations or ideals to be "progressively realised". This is not the place to settle these debates about human rights, but it is worth highlighting that human rights understood in this way are vulnerable to the much-discussed claimability objection raised by Onora O'Neill to universal socio-economic rights; without clearly specified correlative duties, it is unclear who, if anyone, is responsible for the violations of these rights.

¹¹ Raz, "Human Rights in the Emerging World Order", *supra* note 2.

¹² NE Simmonds, "The Puzzle of Rights" (2020) 65(2) *Am J Juris* 181 at 189 [Simmonds, "The Puzzle of Rights"].

¹³ Raz, *The Morality of Freedom*, *supra* note 3 at 181.

IV. PEREMPTORY FORCE AND EXCLUSIONARY REASONS

A second problem with interest-based rights is that rights seem to lose their special strength or role. I take the motivation for appealing to rights – in addition to interests – to be that rights are invested with a special or preemptory force; this generally refers to the way in which rights may operate to exclude some considerations from deliberation: “rights cut short debate and preclude the balancing of various considerations against one another”.¹⁴ While this may be a rather strong understanding of preemptoriness, Razians often claim that interest-based rights possess preemptory force because they operate as “exclusionary reasons”. But exclusionary reasons, a trademark of Raz’s work, are both controversial and unlikely to have the kind of preemptory force required; moreover, it’s unclear that R-rights can operate as exclusionary reasons.

Note first that Raz never explicitly claims that rights are exclusionary reasons; it is rather (mandatory) norms and rules that must be explained by reference to “exclusionary reasons”, which are “second-order reason[s] to refrain from acting for some reason”.¹⁵ While the duties generated by rights may also give rise to exclusionary reasons, it would be unwarranted to conclude that R-rights also give rise to such reasons given the absence of a one-to-one relationship between rights and duties.

Moreover, the notion of exclusionary reasons is often misunderstood. It is often said that an exclusionary reason “functions by excluding other reasons”;¹⁶ indeed, this seems consistent with Raz’s definition according to which an exclusionary reason is a “reason for not acting on certain conflicting reasons”.¹⁷ This is sometimes taken to mean that complying with the exclusionary reason requires not performing any of the actions required by conflicting, first-order reasons. In other words, it is thought that complying with the duties corresponding to rights takes precedence over all other actions that we may have good reasons to perform. If this were the case, rights, or at least their corresponding duties, would have preemptory force.

But this is not how Razian exclusionary reasons operate. An exclusionary reason excludes being *guided* by a certain first-order reason, not necessarily engaging in the action that the first-order reason points to. This is to say that an exclusionary reason does not rule out *conforming* to an excluded first-order reason; it only rules out being *guided* or, to put it simply, being motivated by it. We can illustrate the difference with a simple example. Say that I promised my friend to meet her for lunch but, as the lunch approaches, the weather is forecasted to get worse, and I really

¹⁴ NE Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights*, 2d ed (London: Sweet & Maxwell, 2002) at 256 [Simmonds, *Central Issues in Jurisprudence*]. Readers familiar with Simmonds’ work will notice that the discussion here is indebted to and aims to offer further support for the arguments he makes against the Razian view in various places but while Simmonds focuses on legal rights, the arguments here are about moral rights. See Simmonds, *Central Issues in Jurisprudence*, *supra* note 14 at 291–304; Simmonds, “The Puzzle of Rights”, *supra* note 12; NE Simmonds, “An Age of Rights?” (2023) 36(2) *Can JL & Jur* 553.

¹⁵ Joseph Raz, *Practical Reason and Norms* (Oxford: Oxford University Press, 1999) at 39 [Raz, *Practical Reason and Norms*]; Joseph Raz, “On Exclusionary Reasons” <<http://dx.doi.org/10.2139/ssrn.3933033>> (29 September 2021) at 3 [Raz, “On Exclusionary Reasons”].

¹⁶ Peter Jones, *Rights* (London: Macmillan Press, 1994) at 54.

¹⁷ Joseph Raz, “Promises and Obligations” in PMS Hacker & Joseph Raz, eds. *Law, Morality, and Society: Essays in Honour of H.L.A. Hart* (Oxford: Clarendon Press, 1977) 222.

don't fancy going out. This reason for not meeting my friend is, however, one of the excluded ones so I should not be guided by it. If, however, it turns out that another friend is having a crisis and needs to talk to me urgently and I fail to go out and meet my friend for that reason, I will not have been guided by the excluded reason even though I acted in conformity with it. A slightly modified example can also illustrate one of the (many) difficulties with exclusionary reasons. Let's say that just before going out for lunch, I get a terrible migraine, which makes it very difficult for me to go out and meet my friend. It then seems permissible to stay in and cancel lunch. The difficulty is that, although Raz claims that exclusionary reasons exclude by *kind* not *weight*, it is difficult to clearly separate the two. Exclusionary reasons seem to exclude (only) reasons of personal convenience and/or inclination.¹⁸ But at which point does an inconvenience (bad weather) become a serious obstacle such that acting on that reason is not excluded?¹⁹

In later work, Raz seems to suggest that the role of an exclusionary reason is precisely to make it more likely that one conforms to a first-order reason: “[t]here is an exclusionary reason, a reason not to be guided by the base reason in circumstances in which one [is] likely to better conform to the base reason if one excludes it and is guided by another reason”.²⁰ This may be the case when temporary conditions (anxiety, inebriation) or physical or mental limitations of the agent make it difficult to assess or be guided by the balance of first-order reasons. And, indeed, he seems to restrict exclusionary reasons to this kind of case: “Exclusionary reasons are on the scene *only* in the subclass of cases where there is a better way of conforming to the base reason than by being guided by it” [emphasis added].²¹

It can be argued that Raz uses two notions of exclusionary reasons, one objective and one subjective. On the objective conception, an exclusionary reason is a reason “not to act on a reason that figures in the objective balance of reasons”; on the subjective one, an exclusionary reason is a reason “not to act on one’s (present) judgement of what an objective reason requires”.²² Be that as it may, it’s reasonably clear that for Raz, exclusionary reasons do not rule out certain actions required by first-order reasons; they are “reasons for not being motivated by certain (valid) considerations. They are not reasons for not conforming with the reasons”.²³ So, it would be hasty to conclude that other people’s rights give us reasons to exclude all actions that detract from respecting their rights from consideration. So, to sum up, it is neither the case that rights, as intermediary conclusions, operate as exclusionary reasons nor that exclusionary reasons rule out actions that may detract from respecting or promoting rights.

Could the duties corresponding to rights, and thus perhaps H-rights, rather than R-rights, be exclusionary reasons? Let me first clarify here that I am envisaging *moral* rather than legal duties (and rights). As I hope will become clearer later, there

¹⁸ Ulrike Heuer, *The Point of Exclusionary Reasons* (2023) at 21 (unpublished) [Heuer, *The Point of Exclusionary Reasons*].

¹⁹ See also Simmonds, *Central Issues in Jurisprudence*, *supra* note 14 at 262–263.

²⁰ Raz, “On Exclusionary Reasons”, *supra* note 15 at 14.

²¹ *Ibid* at 12.

²² Stephen R Perry, “Second-Order Reasons, Uncertainty and Legal Theory” (1989) 62(3 & 4) S Cal L Rev 913 at 928–929.

²³ Raz, *Practical Reason and Norms*, *supra* note 15 at 185.

is no problem in maintaining that valid legal norms and rules give us reasons to exclude certain kinds of considerations from deliberation and comply with the rule. But it's not clear that the same holds for moral duties generated by interests. The question here is whether such duties have a special role to play or are reducible to ordinary reasons with perhaps extra strength or weight?

On the Razian view, duties or obligations – hereafter “duties” – can be understood as protected reasons, where a protected reason combines a first-order reason with an exclusionary reason not to be guided by certain excluded reasons.²⁴ As Ulrike Heuer argues, this allows the Razian to explain “how obligations are normatively different from first-order reasons without appealing to strength or weight” while allowing that they are defeasible since they can conflict.²⁵ If moral duties generated by interests – as opposed to promises – can also be understood as protected reasons, perhaps they have a certain preemptory, albeit not conclusive, role that is not only accounted for by the weight of the interest. Heuer considers some objections to the protected reasons account and argues that they can be answered so the protected reasons account is a good explanation of moral obligations. However, she admits that it may not be a good account of value-based reasons to act. This is particularly relevant to the argument here since obligations generated by interest-based rights are ultimately grounded in prudential value, *ie*, well-being. It is clear that this kind of value gives us a first-order reason to act; it is not clear when and how this reason “has the preemptory character of a duty” as Raz puts it.²⁶ It can be easy to explain why promissory obligations as well as directives issued by an authority are binding and provide exclusionary reasons for an agent since their bindingness is content-independent. In other words, the fact that it is a promise, or a norm issued by an authority, can itself make it an obligation that must be complied with, without enquiring into the balance of first-order reasons (that may have backed that obligation). But this explanation is hard to reconcile with Raz’s general view that reasons (and duties) depend exclusively on values.

V. PEREMPTORINESS OF DUTIES ON A VALUE-FIRST ACCOUNT

The point I am hoping to make in what follows is that a value-based account cannot explain the preemptoriness of duties. Contrary to what Raz may want to claim, a consistent account of moral obligations as different from first-order reasons does need to appeal to some content-independent factor that comes into play in establishing the obligation. In other words, well-being cannot ground duties with a degree of preemptoriness, unless by that we just mean that some are stronger reasons than others.

The problem with this account will become apparent if we consider potential conflicts of rights. Indeed, proponents of this approach seem to accept that since many interests ground rights and, since interests inevitably conflict, rights will inevitably conflict as well; as Waldron points out, “if rights are understood along the

²⁴ Heuer, “The Point of Exclusionary Reasons”, *supra* note 18.

²⁵ *Ibid* at 3.

²⁶ Raz, *The Morality of Freedom*, *supra* note 3 at 183.

lines of the Interest Theory proposed by Joseph Raz, then conflicts of rights must be regarded as more or less inevitable”.²⁷ Proponents of this approach tend to be rather casual about conflicting rights and typically propose solving a conflict by weighing the grounding interests against each other in order to decide which right should prevail in the circumstances. The problem is that it is not clear that they envisage a genuine conflict of rights and, inasmuch as they do, this solution to conflicts dispenses with rights altogether.

Let me first clarify what it means for rights to conflict. In a genuine conflict of rights, both of them hold regardless of how/if the conflict is solved. Even if one right prevails, which it must ultimately do, the other does not disappear from the picture; it leaves a “remainder”, which can take the form of a requirement to provide compensation or an apology to the holder of the infringed right. Moreover, rights conflict when duties correlative or corresponding to them conflict. While it is not universally accepted that this is the *only* situation when we can speak of conflicting rights, Raz seems to concur: “conflicts of rights are possible if conflicts of duties are”.²⁸

But it is unclear that there can be conflicts of duties corresponding to rights on the Razian view. As it’s already been made clear, an interest grounds a right only inasmuch as it can defeat competing considerations that would militate against holding others under a duty; presumably such considerations include other interests that could potentially give rise to duties. Once two different interest-based rights have been established though, can they both ground conflicting duties? Again, for a right to ground duties in a given set of circumstances, the right must defeat conflicting considerations that apply. If one of the conflicting considerations is a competing right that could also potentially give rise to a duty in the circumstances, the first right can only ground duties if it defeats this consideration. I take it that this means defeating it without a remainder, that is cancelling it, in which case there is no conflict of duties.

However, Raz seems to suggest that duties can hold in certain circumstances even though they are defeated:

If considerations against requiring an action defeat the right-based reasons for requiring it on all the occasions to which they apply, then the right does not create a duty for that action. If, however, they defeat the right-based reasons on some occasions only, then the right-based reasons create a duty which is sometimes defeated.²⁹

It is unclear to me how this works for conflicting rights. Imagine that I am on my way to visit my mother in hospital and on my way to the hospital I see a child drowning. Let us accept that both my mother and the child have rights which could potentially give rise to a duty I would have towards them, to visit and save them respectively. The child’s interest in being saved is, I assume, the stronger one in these circumstances so it defeats my mother’s interest. Although it would indeed be

²⁷ Jeremy Waldron, “Rights in Conflict” (1989) 99(3) *Ethics* 503 at 503 [Waldron].

²⁸ Raz, *The Morality of Freedom*, *supra* note 3 at 184 n 1.

²⁹ *Ibid.*

plausible to think that there are two duties in this case, one of which is stronger, it is unclear that this view is supported by the Razian account. A right does not ground a duty in cases where conflicting considerations of greater weight apply. “Rights are (part of) the justification of many duties. They justify the view that people have those duties. But as has already been noted, they justify such a view only to the extent that there are no conflicting considerations of greater weight”.³⁰ So, it is unclear that Razian rights can give rise to conflicting duties. This is not a surprising result inasmuch as Raz’s view is a monist one, where well-being is the ultimate value. It is after all well-established that monist theories do not accept the existence of moral dilemmas.³¹

What are we then to make of Waldron’s point that conflicts of rights are inevitable on this view? Waldron agrees that a conflict of rights is a conflict of duties generated by rights. But a right, on this view, can generate “waves of duties”; for instance, to take Waldron’s own example, a right against torture generates not only a duty not to torture but also duties to be vigilant about torture or to rescue people from torture as well as duties of government officials to punish or pre-empt violations.³² The main point of Waldron’s argument is that, while some of these duties generated by two different rights can conflict, there will be others that are jointly satisfiable. It is unclear to me whether this means that rights do not really conflict on his view or that the conflict is (easily) solvable. I would suggest that, for the Razian, there is (pervasive) conflict between R-rights but there can be no genuine conflict between duties corresponding to rights or H-rights. In other words, since interests inevitably conflict, the abstract rights based on them give conflicting reasons for action. But conflicting reasons are not the same as conflicting rights.

Let us nevertheless accept that two rights-based duties can conflict on this account even though it is unclear how. The question is then whether such a conflict can be resolved while preserving the preemptoriness of duties. If duties are understood as protected reasons, can a conflict between them be resolved without giving up on the virtues of this account? Recall that this account was meant to explain how a duty is different from an ordinary reason for action, without being conclusive, since duties can conflict, and without appealing to strength or weight. But if, as proponents of the view suggest, the conflict is to be resolved by weighing the grounding interests against each other, it seems that the role that an exclusionary reason was meant to play disappears from view.

What we are envisaging here then is a conflict between two exclusionary reasons. Again, it is unclear how this can occur and frustratingly, Raz himself says very little on this question. He only discusses one type of conflict of second-order reasons, namely conflicts between “a reason to act for a certain reason and an exclusionary reason to refrain from acting for it”.³³ These, like first-order conflicts, “turn ... on the strength of ... reasons ... and ... the presence of any strength-affecting auxiliary reasons”.³⁴ But whether exclusionary reasons themselves conflict remains somewhat

³⁰ *Ibid* at 172.

³¹ Christopher W Gowans ed. *Moral Dilemmas* (Oxford: Oxford University Press, 1987) at 5 [Gowans].

³² Waldron, *supra* note 27 at 510.

³³ Raz, *Practical Reason and Norms*, *supra* note 15 at 47.

³⁴ *Ibid*.

unclear. Raz only addresses these in an endnote and suggests that they can; when two exclusionary reasons, p and q, conflict, they “define conflicting points of view: consisting of all the reasons not excluded by p and all those not excluded by q, respectively”.³⁵ He goes on to say that “[a] complete theory of practical reasoning will have to explore the conditions under which such conflicts can or cannot be resolved”³⁶ but offers no resolution.

My contention is that the resolution to a conflict of duties based on interests will ultimately turn on that balance of first-order reasons given by those interests, as indeed proponents of this approach and Raz himself suggest, without, I think, appreciating the implications of the suggestion. If we conceive of the two duties involved in a conflict as protected reasons, each of them will give the duty-bearer a first-order reason to protect and promote an interest as well as an exclusionary reason to exclude certain reasons for not promoting the interest; I take it that the reasons excluded by each duty will be the same (typically reasons to do with personal inclination). The duty-bearer then simply has to act on the balance of non-excluded first-order reasons and among the things in the balance are the different interests that give rise to protected reasons.³⁷ Thus, the duty-bearer will have to weigh the two interests against each other and determine which one provides a stronger reason to act. If this is the case, it seems that rights/duties have no special role to play as it is interests and their weight that determine which duties are upheld. The notion of an exclusionary reason, rather than explaining what is particularly problematic about a conflict of duties, actually serves to reduce this conflict to one of first-order reasons.

Is this necessarily a problem? After all, it may be the case that rights conflict on any account of rights, in which case they lose a degree of peremptoriness since one of the rights will have to give way to the other. It is only if rights are understood as absolute “side-constraints”, along the lines suggested by Nozick, that a set of rights will be free of conflict.³⁸ But such a view of rights is implausible, as Nozick himself seems to accept when he contemplates the possibility that rights might be permissibly violated in order to avoid “catastrophic moral horror”.³⁹ So, on any plausible view, while they may “trump” non-rights considerations, they may conflict and thus cannot be absolute constraints. Preserving some degree of peremptoriness of rights in the face of possible conflicts between them is a challenge for any plausible theory of rights. But any such theory should be able to account for the distinctiveness of conflicting rights and resolve them without cancelling one of them. The Razian account is unable to do that; it either dissolves the conflict or solves it by eliminating rights from the picture.

³⁵ *Ibid* at 204 n 13.

³⁶ *Ibid*.

³⁷ This is the solution also suggested by Heuer in order to answer the objections she is concerned with.

³⁸ The way that Nozick defines “side-constraints” suggests that he sees them as absolute, *ie*, they are exceptionless and overriding duties. A duty is overriding if it outweighs or indeed overrides every conflicting consideration. It is easy to see that a conflict of overriding duties is logically impossible. See also Gowans, *supra* note 31 at 25–26.

³⁹ Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974) at 29–30.

VI. CONCLUSION

It is time to take stock of the discussion so far. The paper considered a very popular strategy for justifying rights. It is easy to see why this strategy is popular. It's very plausible to think that other people's interests, *ie*, aspects of their well-being, give rise to duties the performance of which would make a significant difference to the promotion of those interests. Since these duties are grounded in interests, it is also plausible to think that they are owed to the interest-holders; it thus seems that we have a justification of a directed duty, that is a right. But it is also plausible to see rights as having other features as well such as a degree of peremptoriness and a necessary connection with duties; indeed, it seems to me that proponents of this view implicitly agree that rights have those features. What this paper sought to highlight is that this popular route from prudential value to rights cannot account for those other features that rights might have. More specifically, I argued that, on this view, rights are not deontic relations between two parties that hold regardless of the circumstances; they are best seen as goals to be aimed at, which may or may not give rise to specified duties on others. Moreover, rights, on this view, cannot have the degree of peremptoriness required to distinguish them from mere reasons for action; cashing them out as exclusionary reasons – which would diverge from Raz's own view – may offer a distinctive account but it should be noted first, that this is at odds with the picture of rights as goals and second, with their grounding in (prudential) value. This is because, while duties correlative to rights can perhaps be understood as providing exclusionary reasons, Razian rights do not have correlative duties and their grounding in one value, well-being, invalidates the purpose of an exclusionary reason.

In conclusion, relying on a Razian justification of rights is so costly for the notion of rights that it becomes unclear why one might want to invoke rights in the first place rather than simply argue for the protection of interests, either as a matter of public policy or a matter of (non-directed) duty.