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RIGHTS, RESPONSIBILITIES, AND ROLES: A Comment on Waldron

Brian H. Bix*

I. INTRODUCTION

Jeremy Waldron is a central figure in modern political and legal theory. His contributions to Jurisprudence in general, and rights theory and human rights discourse in particular, are hard to overstate,¹ and he is also a major figure in constitutional theory, general political theory, and the history of ideas.² In his Edward J. Schoen Leading Scholar Lecture,³ Waldron raises important issues regarding the connections between rights and responsibilities and rights and dignity. In this brief comment, I will focus on the first set of connections—Waldron’s claim that “some rights actually are responsibilities”⁴—examining in particular, the analytical claim he offers regarding a certain subset of rights.

Part II outlines Waldron’s claim about responsibility rights. Part III presents possible questions regarding Waldron’s claim, in particular regarding whether or to what extent his view offers us new insights about the nature of (some) rights.

II. WALDRON’S CLAIMS

Waldron is careful to note that he is not claiming to have discovered a universal or conceptual truth about the connection between rights and

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1. See, e.g., JEREMY WALDRON, LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991 (1993); NONSENSE UPON STILTS: BENTHAM, BURKE AND MARX ON THE RIGHTS OF MAN (Jeremy Waldron ed., 1987); JEREMY WALDRON, THE DIGNITY OF LEGISLATION (1999); Jeremy Waldron, *The Decline of Natural Right* (N.Y. Univ. Pub. L. & Legal Theory Research Paper Ser. No. 143, 2009), available at http://lsr.nellco.org/cgi/viewcontent.cgi?article=1143&context=nyu_plltwp; Jeremy Waldron, *The Image of God: Rights, Reason, and Order* (N.Y. Univ. Pub. L. & Legal Theory Research Ser., Paper No. 246, 2010), available at http://lsr.nellco.org/cgi/viewcontent.cgi?article=1247&context=nyu_plltwp [hereinafter Waldron, *Image of God*].

2. See, e.g., JEREMY WALDRON, GOD, LOCKE, AND EQUALITY: CHRISTIAN FOUNDATIONS OF LOCKE’S POLITICAL THOUGHT (2002); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1346 (2006).

3. Jeremy Waldron, *Dignity, Rights, and Responsibilities*, 43 ARIZ. ST. L.J. 1107 (2012).

4. *Id.* at 1107.

responsibilities, only that “*some* rights actually are responsibilities.”⁵ His argument is that a significant subset of rights have certain properties that warrant his label, “responsibility rights,” and that knowing about this distinct type of right will tell us something significant—about rights, and about morality and society.⁶

Waldron distinguishes responsibility (kinds of) rights from other connections between rights and responsibilities.⁷ These other connections include not only the conventional analytical notion that one party’s right correlates with another party’s responsibility (duty), but also the constraints on rights in the name of potential duties to the public good (with many nations including such limitations expressly in their constitutional declaration of rights), and the way that the exercise of legal rights (and even moral rights) is always in principle subject to moral criticism.⁸

When Waldron writes that it is “possible to think of certain rights themselves as responsibilities,” the primary example he gives is that of parental rights.⁹ The care and upbringing of children, Waldron reports, is both a right and a duty (more precisely, a set of duties).¹⁰ He notes that parents have the right to make decisions regarding their children, including decisions regarding how and when to discipline them, and that outsiders (either the government or other individuals) generally do not have either the legal or moral right to interfere.¹¹ This “immunity” has limits, as Waldron

5. *Id.* (emphasis added); *see also id.* at 1134 (“[T]he analysis of rights as responsibilities will not apply to all rights.”).

6. *Id.* at 1114–17.

7. *Id.* at 1111–14.

8. *Id.* As Waldron points out, *id.* at 1113–14, the claim that an exercise of a moral right could still be subject to moral criticism is the basis for the seemingly paradoxical claim that one can have a “[moral] right to do wrong.” *See* Jeremy Waldron, *A Right to Do Wrong*, 92 ETHICS 21, 24 (1981); WILLIAM A. EDMUNDSON, AN INTRODUCTION TO RIGHTS 133–42 (2004) [hereinafter EDMUNDSON] (discussing the notion of a right to do wrong).

9. Waldron, *supra* note 3, at 1114.

10. *Id.* at 1114.

11. *Id.* at 1114–15. In American family law, the general idea that the government should stay out of disputes within a family goes by the label “family privacy,” and the standard citation is *McGuire v. McGuire*, 59 N.W.2d 336, 342 (Neb. 1953) (court will not intervene in spousal dispute about finances). That parents have constitutional rights under American law regarding the care and upbringing of their children has been repeatedly affirmed. *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (parental right to have children educated in a foreign language); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (parental right to have children educated in a private school); *Troxel v. Granville*, 530 U.S. 57, 90 (2000) (deference must be given to parental preference before granting visitation to a third party). There are, of course, limits to this protection. *See, e.g.*, *Prince v. Massachusetts*, 321 U.S. 158, 167–68 (1944) (government has right to limit child labor despite preference of parent or guardian that child work).

notes: parents who abuse or neglect their children will lose their rights over their children.¹²

Following Elizabeth Anscombe, Waldron speaks of parental rights as an assignment of authority.¹³ A parent's authority to make decisions about whether and how to discipline her child is "a right that is kind of synonymous with a responsibility."¹⁴ Waldron argues that the constraint on the right here is not just a matter of submitting to rules.¹⁵

Waldron presents parental prerogatives as an example of a "hybrid of right and responsibility,"¹⁶ and sets four criteria for such hybrids:

- 1) the designation of an important task,
- 2) the privileging of someone as the person to perform the task, making the decisions which the task requires,
- 3) doing so in view of the particular interest that that person has in the matter, and
- 4) the protection of their decision-maker pursuant to this responsibility against interference by others and even by the state (except in extreme cases).¹⁷

Waldron offers as a second example of "responsibility rights" (or the "responsibility form of rights"),¹⁸ the right to own a gun under the Second Amendment to the United States Constitution.¹⁹ Waldron focuses on the wording of the constitutional text: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."²⁰ Waldron's particular concern is the "preamble" to the declaration of right; he argues from that part of the amendment that the responsibility to be willing to be part of a "citizen militia" is a duty that "inform[s] and condition[s]" the right to own a gun.²¹

Later in the Lecture, in the course of discussing dignity of human rights, Waldron adds in passing what he considers to be other examples of

12. Waldron, *supra* note 3, at 1115–16.

13. *Id.* at 1114–15 (citing G. E. M. Anscombe, *On the Source of Authority of the State, in* AUTHORITY 142, 148 (Joseph Raz ed., 1990)).

14. Waldron, *supra* note 3, at 1115.

15. *Id.*

16. *Id.* at 1116.

17. *Id.*

18. *Id.* at 1136.

19. U.S. CONST. amend. II; see Waldron, *supra* note 3, at 1116–17.

20. U.S. CONST. amend. II.

21. Waldron, *supra* note 3, at 1117.

responsibility rights, including the right to serve in the army, political rights, and the right to serve on a jury.²²

Waldron is by no means the first scholar to consider the connection between rights and responsibilities, though usually the relationship is evaluated in a less positive way. For example, Mary Ann Glendon wrote: “In its silence concerning responsibilities, [rights talk] seems to condone acceptance of the benefits of living in a democratic social welfare state, without accepting the corresponding personal and civic obligations.”²³ Onora O’Neill reflects a standard criticism of rights-talk when she argues that lists of “universal” or “human” rights, like the 1948 *Universal Declaration of Human Rights*²⁴ “assume[] a *passive* view of human life and of citizenship”²⁵ and focus people’s attention of their entitlements, on what they should get, rather than on what they should do²⁶ (individual as “subject” rather than individual as “agent”²⁷). Rights as benefits are, in any event, O’Neill argued, dependent of other people respecting the correlative duties, and duties are the key focus for living a good life and maintaining a good society.²⁸

Waldron, in this Lecture, is trying to show that in many important instances, rights are not to be understood as the weak and grasping shadow of the duties on which we should be focusing, but rather as a mechanism for combining duty and responsibility, leading to just the sort of focus on the common good and living a good life that rights-skeptics like Glendon and O’Neill have advocated.

III. AN EVALUATION OF WALDRON’S (ANALYTICAL) CLAIMS

A. *Essence and Implication*

From an analytical perspective (that is, one more concerned with understanding concepts correctly, leaving to others issues about the best

22. *Id.* at 1124–25.

23. MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 14 (1991).

24. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/>.

25. ONORA O’NEILL, A QUESTION OF TRUST: THE BBC REITH LECTURES 2002, at 28 (2002) [hereinafter O’NEILL, TRUST].

26. *See id.*

27. *See* ONORA O’NEILL, TOWARDS JUSTICE AND VIRTUE: A CONSTRUCTIVE ACCOUNT OF PRACTICAL REASONING 127 (1996).

28. *See* O’NEILL, TRUST, *supra* note 25, at 28–39.

way to ensure the common good), the question is how to assess Waldron's analysis. Waldron is offering claims about the concept of legal and moral rights. If we are to judge his claims, a preliminary question might be asked about concepts generally: Is it the case that there are right answers about the nature of particular concepts (e.g., "law" and "rights"), or is it the case that one can talk only about whether a particular way of thinking about (or reformulating) a concept is helpful or not?²⁹

For example, in the analytical debates about the nature of law, some prominent theorists have argued that it is a mistake to speak about the one correct analytical theory; rather, one should speak either about selecting the theory about the nature of law that is morally preferable to other (otherwise adequate) theories,³⁰ or about selecting the theory of law that would have the best overall consequences.³¹ However, Waldron's analysis does not seem "skeptical" in this way; he seems to imply that there are certain facts about the nature of rights, or the nature of certain subset of rights, and not merely that he is offering a possible rethinking of right that might be better morally than alternatives or that might have better overall consequences. For example, in the comment—"This seems . . . to be a distinctive form of right and one worth studying in some detail"³²—Waldron is clearly describing what he takes to be an aspect of the nature of (some) rights, largely independent of our views and beliefs, not merely something we might, if we chose, project upon rights (or not).

There is a different conceptual puzzle, however, arising from Waldron's analysis. He emphasizes that he is skeptical of any account of rights being applicable to all rights—not only conceding that the characteristics of "responsibility rights" do not apply to all rights, but asserting also that the traditional choices of "choice" or "will" theories on one side, and "benefit" or "interest" theories on the other,³³ will each, individually, not apply (or

29. See, e.g., JOSEPH RAZ, *BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON* 27–31 (2009) (arguing that there is a truth of the matter regarding the concept of law).

30. See, e.g., Stephen R. Perry, *Interpretation and Methodology in Legal Theory*, in *LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY* 97 (Andrei Marmor ed., 1995) (moral evaluation needed to choose between competing conceptions of law).

31. See, e.g., Liam Murphy, *The Political Question of the Concept of Law*, in *HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW* 371 (Jules Coleman ed., 2001).

32. Waldron, *supra* note 3, at 1116.

33. On the debate between the two approaches to the nature of rights, see, for example, EDMUNDSON, *supra* note 8, at 119–42 ("The Nature of Rights"); MATTHEW H. KRAMER, N. E. SIMMONDS & HILLEL STEINER, *A DEBATE OVER RIGHTS: PHILOSOPHICAL ENQUIRIES* (1998). Recently, some theorists have also argued for an approach that combines the two alternatives.

not apply equally well) to all rights.³⁴ As he sees it, all these different approaches to, or understandings of, rights, each capture (only) some portion of the overall complex social or moral reality of rights.

That does, however, leave an analytical hole. If choice theories, benefit theories, and responsibility rights each applies only to some subset of rights, then some other theory or definition must be present that can delimit the category, to determine whether something is a (legal or moral) right at all. In general, theories about the nature of some practice or concept focus on either which criteria define the boundaries of the category (that which makes the object or practice “X” rather than “not X”) or on what implications follow from those essential criteria.³⁵ Waldron’s analysis would remove choice and benefit theories from this task of identification, and leave nothing in their place.

To be sure, Waldron can hardly be faulted for not putting forward in his Lecture a theory of the essence of rights when that was never his stated intention. However, the topic is fairly implicated when Waldron in effect “demotes” both the choice/will theory and the benefit/interest theory to descriptions of some subset of rights, rather than as analyses of the nature of rights, which is how they are generally presented and characterized.

There is no time here to go into this complex topic at any length. One might note, consistent with Waldron’s comments, that perhaps “right” is just a cluster concept³⁶ made up of the different types of claims—perhaps the different elements from choice theories, benefit theories and Waldron’s responsibility rights, or perhaps the four types of claims Wesley Hohfeld put forward when he analyzed judicial discussions of legal rights: claim-rights, liberties, powers, and immunities.³⁷ This question must be left here, undecided, that we might return to Waldron’s primary analytical claim.

See, e.g., Gopal Sreenivasan, *A Hybrid Theory of Claim-Rights*, 25 OXFORD J. LEGAL STUD. 257, 257 (2005); Leif Wenar, *The Nature of Rights*, 33 PHIL. & PUB. AFF. 223, 223 (2005).

34. See Waldron, *supra* note 3, at 1134–36.

35. This distinction within conceptual analysis is well stated in SCOTT J. SHAPIRO, LEGALITY 8–10 (2011).

36. On cluster concepts, see, for example, WILLIAM E. CONNOLLY, THE TERMS OF POLITICAL DISCOURSE 14 (3d ed., Blackwell 1993) (1974); David Collier, Fernando Daniel Hidalgo & Andra Olivia Maciuceanu, *Essentially Contested Concepts: Debates and Applications*, 11 J. POL. IDEOLOGIES 211, 217 (2006). On the related notion of “essentially contested concepts,” see W. B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC’Y 167, 179 (1956).

37. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 27–34 (1913); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 748–49 (1917). Hohfeld used the label “privilege” for what modern writers call “liberty”; I substitute the modern term, as “privilege” has a distinct meaning in modern legal discourse.

B. *Rights, Activities, and Roles*

Recall that Waldron's basic claim is that there is something distinctive about a subset of rights that had not been properly fully appreciated, and that subset he has labeled "responsibility rights." This Section will probe the nature of the claim being made and distinguish similar but less interesting potential claims about rights.

One possible response to Waldron's analysis is that he has not identified properties associated with a distinctive *kind of rights*, but has only noted a legal or moral aspect of *all* activities. As Waldron indicates elsewhere in his Lecture,³⁸ everything we do—whether connected with a right or not—is constrained by duties. Imagine the simplest or most mundane activities: jogging, walking a dog, driving a car, running a business, etc. In each case, and with every other activity one could imagine, one has duties to act reasonably, duties not to harm others, and so on. For example, our rights as property owners are constrained by duties not to use our property in ways that harm others (a duty protected by the tort nuisance doctrines). If we violate those duties, we are subject to civil (and, occasionally, criminal) liability. And any activity we do could, in turn, be characterized in terms of a right—at the least, a basic liberty right to do actions not prohibited by law.³⁹ There is thus a sense in which all rights are responsibility rights, to a greater or lesser extent. When I drive my car, post a comment on Facebook, or run a business, I need to do so *responsibly*, in the sense that my actions must respect the liberty, property, and reputational rights of others, or risk civil, and perhaps even criminal, liability if I do not.

The four criteria Waldron sets indicate that responsibility rights would not pertain to rights that are mere liberty rights: e.g., the minimal protections that come with activities not subject to government prohibition and protected from criminal or tortious interference by others. Responsibility rights would apply only where there is some additional protection given for the choices the agent makes in relation to the activity. Waldron's main example of a responsibility right, involving the care and upbringing of children,⁴⁰ does seem to involve something different, something additional to the basic duties on the actor of reasonable action and protections that go beyond the obligations not to interfere with the activity in a criminal or tortious way. As Waldron indicates,⁴¹ a parent's right to make decisions for his or her child carries both a duty imposed on

38. Waldron, *supra* note 3, at 1110–14.

39. See, e.g., H.L.A. HART, *ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL THEORY* 171–73 (1982) (discussing liberty rights).

40. Waldron, *supra* note 3, at 1114–15.

41. See *id.*

others not to interfere, but also to a sense of responsibility to make decisions that are in the best interests of the child.

One might raise the following doubt. It is not coincidental that Waldron finds support from Anscombe's discussion of authority.⁴² It could be argued that what Waldron is describing is not a kind of right (at least, that discussion in terms of a new kind of right arguably is not the most helpful or precise characterization); what is being described is a "role" or an "office."⁴³ Being a governor or a judge, to choose random examples, are offices and roles. It is the nature of such positions that they combine some number of legal powers with the responsibility to exercise those powers in good faith, within the boundaries set for the office, and for the common good.⁴⁴ And, citing Max Weber's work, Waldron himself uses the example of a political leader who has both powers and responsibilities.⁴⁵

Parenthood is, of course, in some ways quite different from political office, not least in the fact that one is not elected or selected to be a parent, and it is an "office" open to all, or nearly all. It is perhaps better described as a "role," and in this way it is in the same broad category of roles like "doctor," "clergy," and "therapist." In all those cases, the role comes with both powers and responsibilities, but that combination of powers and responsibilities does not seem well captured by saying that it is (merely) a special kind of right. It seems better characterized as a cluster of rights, duties, powers, immunities, etc.⁴⁶ When we say that the right to parent comes with special responsibilities, it seems less likely that we saying something about "the *right* to parent," and more likely that we just saying something about *the underlying activity*, parenting.

I have less to say about Waldron's other main example, the right to bear arms found in the Second Amendment. As Waldron indicates, his is an unusual interpretation of the constitutional language, one that finds support neither in those who believe the Amendment creates a strong individual right to own and use guns or in those who believe that the Amendment is

42. *See id.* at 1115.

43. One might also speak of a "status," though for some that term that has the additional connotation of a position to which one is born, rather than a position one has chosen or was selected for, as is the case with officials and parents.

44. Waldron approaches this equation of responsibility rights with offices in his discussion of dignity, Waldron, *supra* note 3, at 1120–21 but uses the equation to make different points.

45. *Id.* at 1122 (citing Max Weber, *Politics as a Vocation* (1919), reprinted in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 128 (H. H. Gerth & C. Wright Mills eds. & trans., 1958).

46. Leif Wenar has made an analogous point that legal rights often involve a cluster of "Hohfeldian incidents" rather than just one. *E.g.*, Leif Wenar, *Rights* § 2.1.6, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., July 2, 2011), <http://plato.stanford.edu/entries/rights/#2.1>.

consistent with significant government regulation of guns.⁴⁷ Even putting questions of constitutional interpretation aside, Waldron's reading of the right is at best paradoxical: he would read the *legal* right to own a gun (for the United States Constitution is, in the end, an authoritative *legal* text of our legal system, however many of its amendments may be efforts to recognize pre-existing *moral* rights) as conditioned on a citizen's willingness potentially to take up arms against the government.⁴⁸ Nor is there much reason to believe that Waldron's view reflects the general contemporary popular understanding, again either by those who favor a near-absolute right of gun ownership or by those who favor regulation of guns.⁴⁹

One can take the Amendment's preamble seriously without viewing the right to own a gun as conditioned on a legal or moral duty to be willing to serve whatever citizen militia might form. Consider the following proposed language for a new constitution in some fledgling democracy, language that parallels that of the Second Amendment: "In order to make political discussion robust and informed, the freedom of expression of the people shall not be infringed." Here the preamble, regarding robust and informed political discussion, would be clearly understood as the ultimate objective, and the hoped-for product of unfettered expression. This is a conventional justification for freedom of expression⁵⁰ (though whether it is a persuasive one can of course be questioned⁵¹). It would not be understood as imposing a duty on speakers (only) to speak on political matters (let alone to do so (only) in a robust or informed manner), though one might imagine arguments for an independent moral duty for doing so.⁵²

47. See, for example, the Opinion for the Court and the two dissenting Opinions in the recent *Heller* case on the Second Amendment: *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008); *id.* at 636 (Stevens, J., dissenting); *id.* at 681 (Breyer, J., dissenting).

48. See Waldron, *supra* note 3, at 1117 ("the citizen militia is supposed to be a potentially anti-government force").

49. One might also wonder how well the Second Amendment, even under his own reading, would fit in the rubric of "responsibility rights" he offers. As there are few restrictions on who can own a gun (and some gun advocates would prefer even those few restrictions removed), it seems strange to say that the Second Amendment is "privileging" gun owners to be potential militia members "in view of the particular interest [the gun owner] has in the matter." Waldron, *supra* note 3, at 1116. This is an even more tenuous sense of "designation" than the military conscription Waldron discusses. *Id.* at 1122.

50. Cf. JOHN STUART MILL, ON LIBERTY 115–16 (Penguin Books 1974) (1859) (arguing for the connection between freedom of expression and an informed and enlightened citizenry).

51. See generally LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? 127–46 (2005) (critiquing various proffered justifications for a right of freedom of expression).

52. Intriguingly, Waldron comments in passing that the right of freedom of expression entails just such an obligation of contributing to public deliberation. Waldron, *supra* note 3, at 1124. Even if true, the fact remains that a reference to public deliberation in the declaration of

The above analysis is not meant to claim that it never makes sense to describe some activity as both a right and a duty. Waldron gives the proper examples of jury duty, military conscription, and voting (where voting is mandatory).⁵³ The reference to “right” in these contexts is perfectly understandable, especially in the historical context where large groups (women, racial minorities, religious minorities, gays, etc.) were once excluded and in some places still are. However, one need not thereby be persuaded that these are otherwise a different *species* of rights. (At the least, it is not the mandatory nature of the activity that would make those rights distinctive, as Waldron himself argues,⁵⁴ what is distinctive about, *e.g.*, voting is present even in the many societies where it is not compulsory.) Better, one would think to conceive of voter, soldier, and jury-member as “roles” and “offices” within our political and legal system, where, as with other roles and offices, rights (powers) are combined with moral and legal obligations.

IV. CONCLUSION

Jeremy Waldron continues to do some of the most important work today on the connection between rights—especially human rights—and dignity.⁵⁵ In his Lecture, he offers an additional point on the possible connections between certain kinds of legal and moral rights and responsibility.

However, Waldron’s argument that there is a type of right that is equivalent to a responsibility remains a provocative but not (yet) fully persuasive idea. Likely examples, like those involving a parent and the care and upbringing of a child, seem more like the combination of right and duty that is found in offices and roles, rather than best understood as a distinctive form of legal or moral right.

the right is more sensibly, and more usually, understood as a reference to ultimate justification, rather than something that conditions the right on an expressed duty.

53. *Id.* at 1124–25.

54. *Id.* at 1123–24.

55. See, *e.g.*, *id.* at 1117–25; Waldron, *Image of God*, *supra* note 1, at 221–27; Jeremy Waldron, *Dignity, Rank, and Rights*, in 29 THE TANNER LECTURES ON HUMAN VALUES (Suzan Young ed., 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1461220.