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Rights: Facts, Evidence, or Beliefs?

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ABSTRACT

This paper considers whether rights hold due to the facts, the best available evidence to people, or people's actual beliefs. While there has been much discussion of this question in the context of what we *ought* to do, there is less discussion from a rights standpoint. This is a shame, since rights are often thought to be relational in a way that is not true of ought, and this relationality causes complications when prospective right-holders' and duty-bearers' epistemic perspectives differ from one another. While the paper begins with a thorny problem for the view on which rights depend on the facts, it ultimately argues we have the most reason to endorse such a view.

1 | Introduction

Most hold that rights are grounded in something. For example, Interest Theorists think that rights are grounded in the right-holder's interests. Will Theorists think that rights are grounded in the right-holder's autonomy? Even theories of rights that have a non-instrumental character tend to say that rights are grounded in something. For example, Frances Kamm holds that rights are grounded in our moral status and are reflective of our inviolability.¹ Let's call whatever it is that grounds rights the *grounds* of rights.

Here's a different question about the nature of rights: Do rights depend directly on facts about the grounds of rights, the best available evidence to people about the grounds of rights, or people's actual beliefs about the grounds of rights? While there has been much discussion of this question in the context of what we *ought* to do, there is little discussion from a rights standpoint.² This is a shame, since rights have some distinctive normative features.

Take the paradigm form of rights, the claim-right. Most assume the following relationship between claim rights and (directed) duties:

(Weak) Correlativity. If X holds a claim-right that $Y \Phi$, Y owes X a duty to Φ .³

We can see from Correlativity that rights are *relational* in a way that isn't true of ought. We don't *owe* oughts to anyone, nor are we owed oughts. But when one holds a right, one holds that right *against* someone—the correlative duty-bearer. And the right-holder's and the duty-bearer's beliefs, as well as the best available evidence to them, might be *drastically* divergent. Further, rights are often taken to be enforceable by third parties. But the beliefs and epistemic perspectives of third parties might be different, still, from the right-holder's and duty-bearer's. And as we see, this relationality creates complications when asking which perspective rights depend on. For example, suppose that we endorse a view on which rights depend on the evidence available to potential duty-bearers. Now suppose that the epistemic positions of X , our potential right-holder, and Y , our potential duty-bearer, differ. It's not merely, like with ought, that Y ought to Φ given X 's perspective, but it's not the case that Y ought to Φ given Y 's perspective. Rather, Y will not owe it to X to Φ , and X will not hold a right against her that she Φ , because rights depend on Y 's perspective, and yet Y *would* owe it to X to Φ , and X *would* hold a right that she Φ , were rights to depend on X 's perspective.

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According to what I call the

Fact-Relative View. X 's right that $Y \Phi$ depends on the facts.

The Fact-Relative View is assumed by many, and for good reason. I said above that most believe rights are grounded in something. These competing grounds of rights are usually something to do with the right-holder, for example, *their* interests, *their* having control, *their* inviolability. It's natural to think rights depend on what's *in fact* true of these grounds, thus committing one to the Fact-Relative View. For example, suppose that one is an Interest Theorist, and so holds that rights are grounded in the right-holder's interests. It's natural for this person to think rights are grounded in what's *in fact* in the right-holder's interests, and not, for example, what the duty-bearer believes about what's in the right-holder's interests.

Despite its strengths, there are some problems with the Fact-Relative View.⁴ The first problem begins with the plausible idea that there must be some sort of connection between what rights others hold against us and what we ought to do, all things considered. But now suppose one could show there is no fact-relative ought—no sense of what we ought to do relative to the facts. How, then, do rights on the Fact-Relative View relate to what we ought to do?

Second, one might think the Fact-Relative View gets the wrong verdict in some cases. (Another way to frame this problem: Even if there is a fact-relative ought, the fact-relative ought isn't particularly important. And so, if we want rights to be important, they cannot correspond to the fact-relative ought.) Consider,

Jackson's Case. All the evidence at Doctor's disposal indicates, in keeping with the facts, that giving Patient drug A would cure her partially and giving her no drug would render her permanently incurable. However, the evidence leaves it open whether it is giving her drug B or drug C that would cure her completely, and whether it is giving her drug B or drug C that would kill her.⁵

Suppose, in fact, that it's drug B that would completely cure Patient, and so drug C that would kill Patient. Given the Fact-Relative View, Patient will have a right that Doctor give her drug B. Yet, we might think this is the wrong verdict. We might think that Patient has a right, given Doctor's limited evidence, that Doctor give her Drug A. But Drug A is the only drug Doctor knows has *no* chance of being the drug Patient in fact has a right to—it's the only drug Doctor knows isn't in keeping with Patient's rights! At least if she chooses Drug B or C, she's giving a drug she knows has a 50% chance of being the drug that Patient has a Fact-Relative right to.

I think this is a tricky problem to solve. Nonetheless, I argue we've most reason to side in favor of the Fact-Relative View. I begin, in Section 2, by saying a little more about beliefs, evidence, and the facts. In Section 3, I quickly set aside what I call the Belief-Relative View. In Section 4, I raise some problems

with what I call the Evidence-Relative View. Then in Section 5, I return to these two problems with the Fact-Relative View just introduced. I argue the first problem can be answered. I then argue that we can run structurally analogous cases against the Evidence-Relative View, and so the problem *Jackson's Case* raises gives us no reason to prefer the Evidence-Relative View over the Fact-Relative View. All-things-considered, then, I suggest we should prefer the Fact-Relative View.

Before beginning, two preliminaries. First, I am going to assume Correlativity; I delay explaining why until Section 4, when I consider what follows on the Evidence-Relative View if we drop this commitment. Second, if one doesn't endorse the view that rights are grounded in one's beliefs, one will want to make use of *blameless wrongings*. Y blamelessly wrongs X iff Y infringes a directed duty owed to X , though is not blameworthy for doing so. We have good independent reason to think there are blameless wrongings. For example, when someone acts under duress, we tend to think that she is blameworthy, though not as blameworthy as she would have been without the duress—in some cases, she might be totally excused. This is sufficient to give us reason to think wrongdoing and blameworthiness come apart.

2 | The Distinction

In *Case 1 (Belief-Relative)*,

Doctor believes, against the best evidence available to her, that giving treatment will kill Patient. Doctor gives the treatment to Patient, and Patient lives.

In *Case 1*, in some sense, the Doctor doesn't act wrongly. She does what the evidence tells her to do. And she saves Patient when, suppose, Patient would otherwise have died. However, there's some sense in which Doctor acts wrongly. She does what she believes will kill Patient.

In *Case 2 (Evidence-Relative)*,

Doctor believes, against the best evidence available to her, that giving treatment will save Patient's life. Doctor gives the treatment to Patient, and Patient lives.

In *Case 2*, in some sense, Doctor doesn't act wrongly. She does what she believes will save Patient. And, as it turns out, she saves Patient when Patient otherwise would have died. However, there's some sense in which Doctor acts wrongly. If we suppose that the evidence told her not to give the treatment because it was expected to be much worse for Patient, she doesn't do what the best available evidence tells her to do.

And in *Case 3 (Fact-Relative)*,

Doctor believes, on the best evidence available to her, that giving treatment will save Patient's life. Doctor gives the treatment to Patient, and Patient dies.

In *Case 3*, in some sense, Doctor doesn't act wrongly. She does what she *believes* will save Patient. And she does what, on the best available *evidence* to her, will save Patient. But as it turns out, she *in fact* kills Patient when, let's suppose, Patient would have survived were it not for the treatment. In *some other sense*, she acts wrongly.

In *Case 1*, Doctor acts wrongly in the *belief-relative* sense. In *Case 2*, Doctor acts wrongly in the *evidence-relative* sense. And in *Case 3*, Doctor acts wrongly in the *fact-relative* sense.⁶

Now, I've only presented three cases that support the idea that we can distinguish between these three senses of wrong. I've not said anything about which of these senses we ought to be concerned with.⁷ In the remainder of the paper, we consider which of these perspectives rights depend on.

3 | Beliefs

On grounds of completeness, and to help introduce the Evidence-Relative View below, let's begin by thinking about the

Belief-Relative View. *X's right that $Y \Phi$ depends on Y 's beliefs.*

The idea behind the Belief-Relative View is supposed to be that Y has certain beliefs about what will happen in the world were she to Φ and were she not to Φ . If, were those beliefs to be true, she *would* be under a duty to Φ owed to X , then according to the Belief-Relative View, she is under a duty to Φ correlating with X holding a right that $Y \Phi$. So, Interest Theorists of this flavour would say something like, for X to have a right against Y that $Y \Phi$, X 's interests must be of sufficient weight, if Y 's beliefs were to be true, to place Y under a duty to Φ . For example, I have a set of beliefs about what would happen were I to stab you—you would begin to profusely bleed, and so on. Were those beliefs to be true, whatever the correct view of rights, you would have a right that I do not stab you. So, on the Belief-Relative View, you have a right that I do not stab you. This holds irrespective of what is likely to happen were I to stab you or of what will actually happen.

The way I have formulated the Belief-Relative View has it that the beliefs that are relevant for rights are those of the potential duty-bearer. This is because the right in question requires something of the potential duty-bearer, so it should be *their* beliefs that are relevant. We could specify the view in other ways, however, such as that the beliefs that are relevant are those of the potential right-holder.

Enough exposition. Here's a much less plausible way that the Belief-Relative View could work:

Moral Belief-Relative View. *X's right that $Y \Phi$ depends on Y 's believing: " X has a right that I Φ ."*

The Moral Belief-Relative View is much less plausible than the Belief-Relative View. It's deeply implausible that one party holds

a right against another party only when the second party *believes* that the first party holds a right against her.

An initial problem with the Belief-Relative View is that, however one motivates the view, it is unclear why the Moral Belief-Relative View should not be correct in place of the Belief-Relative View. Put differently, what reason could be given in favor of the Belief-Relative View that doesn't speak, to the same or a greater extent, in favor of the Moral Belief-Relative View? For example, on the Fact-Relative Views, X can hold a right against Y even when Y has no beliefs about how her actions might affect X . Perhaps one might motivate the Belief-Relative View by saying that it is unfair that Y can owe something to X when she is unaware of the features of the world that place her under that duty. But if this's true, why isn't it also unfair that X can hold a right against Y when she is unaware that X holds a right against her?

A second problem with the Belief-Relative View is that it implausibly undergenerates rights. It undergenerates rights because Y might mistakenly believe something about the world that would mean that X doesn't have a right against Y were those mistaken beliefs to be true. But it might be highly implausible that X doesn't hold such a right against Y . Consider,

Real Gun. Non-Believer has a gun in front of her. She has good evidence that the gun is real, though she has failed to avail herself of that evidence. She fires the gun at Victim, thinking that it is a toy gun.

Non-Believer violates Victim's rights. Some might want to say that she isn't blameworthy for doing so, but she violates Victim's rights nonetheless. However, firing toy guns is not the sort of thing that others have rights against you that you do not do. Non-Believer believes she is about to fire a toy gun. So on the Belief-Relative View, Victim does not have a right that Non-Believer not fire the gun at her. Now, this case is stylized for simplicity. But for an example closer to real life, we could imagine someone believing that people of other races don't feel pain in the way that they do. Were those false beliefs true, these people would have much less stringent rights against harm than they in fact have. So they have much weaker rights given the Belief-Relative View.

The reason underlying why the Belief-Relative View implausibly undergenerates rights gives us a more general reason not to endorse the view: the Belief-Relative View makes what rights I have depend upon others' beliefs about the world. But that's implausible. What rights I have shouldn't depend on others' beliefs. That fails to pay attention to the importance that I have—an importance that should be reflected by the rights that I hold.

4 | Evidence

The natural remedy for the Belief-Relative View's tendency to undergenerate rights is to say, "Well, Non-Believer *should've* known that the gun was real—there was good evidence available to her!" We might thus hold the

Evidence-Relative View. X 's right that $Y \Phi$ depends on the best available evidence to Y .

In its most general form, the Evidence-Relative View will say that X 's right that $Y \Phi$ depends on the evidence. We can then specify different evidence-relative sets to have different disambiguations of the view. I've specified it's the evidence available to *potential duty-bearers*. The thought behind this is again that rights place demands on the correlative duty-bearer. And so, it is the best available evidence to *them* that determines whether others hold rights against them.⁸ I have also gone with the "best available" specification as it seems most intuitive.

We can get at what is meant by evidence by thinking about *Real Gun*.⁹ Suppose that the gun looks very real, there are signs all around saying "WARNING: Live Firearms", and so on. Non-Believer has good evidence available to her that the gun is real, even though she never avails herself of this evidence by forming the belief that the gun is real. Similarly, when a doctor receives some blood test results, she has evidence available to her as to whether her patient has this-or-that condition before she opens the results.

This points to another salient feature of evidence: whether some piece of evidence is available to Y , and so whether it impacts what rights others hold, also depends on whether Y can respond to that evidence. For example, while the doctor may have good evidence available to her in the form of the test results, the patient doesn't—the patient couldn't avail herself of that evidence.

4.1 | Others' Evidence and New Evidence

So, we have a working understanding of the Evidence-Relative View. Let's assess the view. First, when objecting to the Belief-Relative View, I said

The Belief-Relative View makes what rights I have depend upon others' beliefs about the world. But that's implausible. What rights I have shouldn't depend on others' beliefs. That fails to pay attention to the importance that I have—an importance that should be reflected by the rights that I hold.

Similarly, we might be skeptical that questions about the evidence others possess and can respond to determine what rights I hold. Again, we might think this doesn't pay enough attention to the significance that rights reflect about their holder.

I am unsure of whether this objection will move those who feel the force of the Evidence-Relative View.¹⁰ Let's move on to our second objection. Because the Evidence-Relative View says that what rights we have depends on the best available evidence to the duty-bearer, this means when new evidence comes into existence, the rights we have change. This verdict is odd. Consider

Day's End. [Resident] always comes home at 9:00 pm, and the first thing he does is to flip the light switch in his hallway. He did so this evening. [Resident] flipping the switch caused a circuit to close. By virtue of an

extraordinary series of coincidences, unpredictable in advance by anybody, the circuit's closing caused a release of electricity (a small lightning flash) in [Neighbor's] house next door. Unluckily, [Neighbor] was in the path and was therefore badly burnt.

(Thomson 1990, 229)

Given the Evidence-Relative View, when Resident harms Neighbor, Resident doesn't infringe Neighbor's rights. Some find this implausible. I'm on the fence. (One wouldn't want to say that Resident is blameworthy for doing so—but this is consistent with Resident infringing Neighbor's rights, for there are blameless wrongs.) Instead of focusing on this feature of the case, let's focus on our present challenge of what happens when new evidence becomes available to potential correlative duty-bearers.

Suppose that some evidence becomes available to the electrical board about what is going to happen when Resident flips his light switch. They call Resident to warn him. While on a first-order level I am unsure of whether Neighbor has a right that Resident not flip the switch, I am more confident that it would be weird for the electrical board to say, "Look Resident, we're aware of some evidence that you're not. Were we to make this evidence available to you, it will be true to say that Neighbor has a right that you not flip that light switch; but it will not be true to say that he has the right if we don't make that evidence available to you." It seems more natural for them to say, "We've become aware of some evidence about whether Neighbor has a right that you not flip that switch." But if the Evidence-Relative View is correct, Neighbor only gets a right that Resident not flip the switch *once* the evidence becomes available to Resident. That seems implausible.¹¹

Might one object that, given the electrical board is aware of the problem, this means that there is evidence available to Resident that means he's under a duty not to flip the switch, correlating with Neighbor holding a right that he not flip the switch? On the one hand, I am not sure that the evidence is *available* to Resident. Is there evidence available to you whether your spouse has lied to you on the grounds they *could* tell you? That's odd. In any case, on the other hand, this only pushes the point back—when the evidence became available to the electrical board, new rights came into existence. And this is what I find odd.

T. M. Scanlon says, "[i]n the original example, the injury to [Neighbor] was said to be due to "an extraordinary series of coincidences, unpredictable in advance by anybody." In the modified example, [the electrical board] knows about this effect and could easily tell [Resident]. So the situation is quite different' (Scanlon 2008, 51). Similarly, Jonathan Quong says, "[t]he initial description of the example stipulates that the harm [Resident's] flipping of the switch will cause is unpredictable. But if this statement is true, then the situation is unpredictable in advance by anybody' (Quong 2015, 251). But saying something is unpredictable is ambiguous. Something can be unpredictable at t_1 but become predictable at t_2 (for example, because evidence has become available at t_2 that was not previously available at t_1). And in such cases, the Evidence-Relative View will say a right *comes into existence* between t_1 and t_2 . But it seems more natural to say that people *find out* (or *get better evidence about*) what rights hold. This speaks in favor of the Fact-Relative View.

4.2 | Undergenerating Evidence

So far, we've two reasons to be skeptical of the Evidence-Relative View: first, that it is implausible that our rights depend on the evidence available to others and others' ability to respond to evidence; second, that it implies when new evidence comes into existence, new rights come into existence rather than us gaining better evidence about what rights exist. Let's move onto a third problem with the Evidence-Relative View, one that's most worrying—the Evidence-Relative View counterintuitively undergenerates rights. Consider

Duped Soldiers. A group of young soldiers are successfully fooled by a totalitarian regime into believing that the regime is good and just, and is under repeated attacks from their evil neighbors, the Gloops. The regime's misinformation campaign is subtle and absolutely convincing: the soldiers are justified in believing what they are told by the regime. Once the misinformation campaign is complete, these Duped Soldiers are given orders to attack and destroy a Gloop village on the border, which, they are told, is really a Gloop terrorist camp plotting a major attack. In fact, everything the regime has said is a lie, and the Gloop village contains only innocent civilians. The Duped Soldiers prepare to shell the village and are about to (unknowingly) kill all the innocent civilians in it. A peacekeeping force from a neutral third country patrols the border and could avert the attack, but only by killing the Duped Soldiers.

(Quong 2015, 261)

By posing an unjustified threat to others, individuals can make themselves *liable* to be harmed. To say that an individual is liable to be harmed is to say that harming them would not wrong them nor would it violate their rights, and so they would not be justified in defending themselves. In *Duped Soldiers*, the best available evidence to the soldiers says that the Gloop villagers are liable to be attacked, so have no rights against being attacked. This suggests, given the Evidence-Relative View, that the soldiers do not violate the villagers' rights, nor do they wrong the villagers. It's also unclear, given the Evidence-Relative View, why a third-party peace keeping force would be permitted to intervene on behalf of the villagers, since the soldiers are not violating the villagers' rights. And it might even be that the soldiers do not make themselves liable to be harmed, depending on one's particular view of liability to defensive harm, since they do not violate the villagers rights.¹²

Quong agrees that these verdicts are 'unacceptable' (Quong 2015, 261).¹³ However, he doesn't think his version of the Evidence-Relative View is committed to them. He begins by separating the following two questions:

- i. Under what conditions does a person have a claim[-right] not to be harmed by a particular type of act performed by another person?

- ii. Has some particular person, *A*, waived, transferred, or forfeited this claim[-right] not to be harmed by another person, *B*? (Quong 2015, 261)

When answering the first question, Quong thinks we should appeal to evidence-relativity (for our purposes, the Evidence-Relative View). But when answering the second question, we should appeal to 'what *A* has actually done, and not on *B*'s evidence about what *A* has done' (Quong 2015, 261).¹⁴

On one reading of Quong's suggestion, there are simply two *independent* determinations we make in *Duped Soldiers*, and on different bases: On the one hand, relying on evidence-relativity, we determine whether the villagers have *claims* against being harmed by the soldiers. On the other hand, relying on fact-relativity, we determine whether the villagers have done anything to become *liable* to be harmed by the soldiers. And since the villagers have not in fact done anything to become liable, we can derive from this that they hold rights against the soldiers not to be killed. Because they still hold rights against the soldiers not to be killed, the soldiers violate those rights and wrong the villagers when they attempt to kill them. And since the soldiers violate the villagers' rights not to be killed, we have a ready explanation for why the soldiers forfeit *their* rights not to be killed defensively by the villagers and third parties on the villagers' behalf.

I am unsure of whether this distinction between (i) claims against being harmed and (ii) whether one is liable to be harmed is stable on an Evidence-Relative View.

1. Recall, if *X* has a claim that *Y* not Φ , *Y* owes *X* a duty not to Φ . If you have a claim against me that I not hit you, I owe you a duty not to hit you.
2. And recall, if *X* is liable to be harmed by *Y*, *Y* doesn't owe *X* a duty not to harm her. If you are liable to me hitting you, I do not owe you a duty not to hit you.
3. If *Y* isn't under a duty not to Φ , *X* has no claim that *Y* not Φ . If I am not under a duty not to hit you, you have no claim against me that I not hit you.
4. So, whether *X* is liable to be harmed by *Y* affects whether *X* has a claim against *Y*. Whether you are liable to my hitting you affects whether you have a claim against me that I not hit you.

Here is the problem: in (1), we began by asking whether *X* has a claim that *Y* not Φ . According to Quong, that is determined by the evidence available to *Y*. In (2), we asked what happens if *X* is liable to be harmed by *Y*. According to Quong, that is determined by what *X* has in fact done. But from (2), which was determined by what *X* has in fact done, we arrive at the verdict that (3) *X* has no claim against *Y*. But whether *X* has a claim against *Y* was supposed to be determined by the evidence available to *Y*, and not by what *X* has in fact done. So, something has gone wrong—you cannot separate claim-rights from liabilities to be harmed.

To put this in simpler terms, according to the Evidence-Relative View, whether you've a claim that I not hit you depends on the evidence available to me. But whether you've made yourself

liable to be hit by me, on Quong's suggestion, depends on what you've in fact done. But whether you've made yourself liable to be harmed by me, which depends on what you've in fact done, affects whether you've a claim that I not hit you. Yet, whether you've a claim that I did not hit you was supposed to be determined by the evidence available to me, and not by what you've in fact done.

Perhaps there's a way to avoid this instability, and here is the second reading of Quong's suggestion: What if we begin by thinking about what rights people hold, given the evidence that will likely be available to duty-bearers. At this stage, rights are evidence relative. Then, having established what rights people hold, people lose those rights in a fact-relative manner. On this reading, we have two *interdependent* determinations. Writing in this way, Quong says that 'whether a person has any *type* of claim right in the first place depends on what it is reasonable for one person to demand of another under such and such conditions, and this does partly depend on what information individuals have about the expected consequences of their various options' (Quong 2020, 162).

As I see it, there are now at least two problems with Quong's suggestion. First, what principled basis can we appeal to in determining what falls under "such and such conditions"? Quong suggests that people can 'reasonably demand that others refrain from firing mortar shells at their residence', but can such a demand be made when the conditions also include the fact that the soldiers have "absolutely convincing," albeit misleading, evidence that the villagers are terrorists? Second, and relatedly, talk of "what it is *reasonable* for one person to demand of another" is itself subject to the fact-relative/evidence-relative distinction. If the reasonableness of our demands is itself fixed by the best available evidence, then the soldiers are in a position to say that the villagers' demand that they be immune to attack is unreasonable, given the best available evidence strongly suggests the villagers are about to launch a terrorist attack.¹⁵

This suggests a more general question about how well-motivated separating Quong's two questions is. Quong suggests that this fact-relative view of forfeiture and waiver 'grants the right-holder a more effective degree of control over the right, something that is typically of central importance in the justification of the right' (Quong 2015, 262). However, it's unclear why something like this isn't true of claim-rights against being harmed in general, which are determined from the evidence-relative perspective for Quong: the Fact-Relative View gives the right-holder a more effective degree of protection over her wellbeing, something that is typically of central importance in the justification of that right. Why would it be *just* waiver and forfeiture that operates in a fact-relative way?

Given the correlativity of claims against being harmed and the absence of a liability to be harmed, here's what I think a defender of the Evidence-Relative View is forced to say about *Duped Soldiers*. Suppose first the villagers know that the soldiers had been duped. (We turn to what happens if they don't know that the soldiers have been duped below.) What might justify the villager's right to defend themselves? They can't point to their right not to be killed as a justification for using defensive force; by hypothesis, they've no right against the soldiers not to be

attacked, *and they know this*. If one thinks others are liable to be harmed only if they would otherwise violate one's rights, the villagers are not permitted to defend themselves with a liability justification.¹⁶

A defender of the Evidence-Relative View might reply by positing an agent-relative prerogative to defend oneself—and so, even if the soldiers have rights against being harmed, it is permissible for the villagers to defend themselves against the soldiers' permissible conduct nonetheless (Fabre 2012; Quong 2020).

Yet, this move would still struggle to explain why a third party may intervene on the villagers' behalf, as it's unclear whether third parties may act using others' agent-relative prerogatives (especially third-parties who are not closely related to the agent). Further, agent-relative prerogatives are also less permissive than liability justifications. For example, Quong holds agent-relative prerogatives are tempered by the means principle: when harming someone using an agent-relative prerogative as one's justification, Quong holds that it's impermissible to harm people in ways that make use of things to which they have prior claims (including their bodies, property, or even the space they occupy), unless they are under a duty to suffer that harm or consent to being used in that way (Quong 2020, 80–85). This implies that the villagers may not defend themselves by using some of the soldiers as shields against threats posed by other soldiers. They may not even use the soldiers' property in defense of themselves, for example, by stealing their guns. These look like deeply implausible implications to me. And, all this is assuming one accepts agent-relative prerogatives to do harm in the first place.

Another option for a defender of the Evidence-Relative View is to deny the correlativity of claim-rights and directed duties. One could say, given the best available evidence to the soldiers, the villagers have no claim-rights against the soldiers that they not be harmed, since the villagers have (given the evidence available to the soldiers) made themselves liable to be harmed. And given the best available evidence to the villagers, the soldiers have no claim-rights against the villagers not to be harmed, since the soldiers have (both given the evidence available to the villagers and the facts) made themselves liable to be harmed. And so, what we actually have is both parties having a liberty-right to harm the other party, much like a boxing match. Yet, that's deeply implausible. One way to see this is to think of what a third-party may do if they see the events unfold. It's unclear what might explain why the third party ought to intervene on behalf of the villagers—after all, both parties have a liberty right to try and harm the other party.

(If the villagers don't have evidence that the soldiers have been duped, the Evidence-Relative View actually seems to be committed to abandoning correlativity, as explained in the previous paragraph: the soldiers will not have claim-rights not to be harmed by the villagers, since the soldiers will have [both given the evidence available to the villagers and the facts] made themselves liable to be harmed. Alternatively, we could embrace some kind of pluralism about rights dependent on different evidential perspectives: so the villagers have no rights not to be harmed given the evidence available to the soldiers, but do have rights not to be harmed given the evidence

available to the villagers. This seems to have the same implications as abandoning correlativity: whose rights do third parties prioritize?)

Perhaps one might press that the third party ought to intervene on behalf of the villagers, since their evidence is better. Yet, if we're moved to the Evidence-Relative View by the thought that it's unfair that people can be held to the standard of others' rights they're not in an epistemic position to respond to, why should it matter as regards enforceability if a third party is in possession of a better evidence set (assuming the third-party needs to act now and isn't in a position to improve the duty-bearer's evidence)?

This points to a more general worry with abandoning Correlativity: it prevents rights from having the normative upshots we tend to think characteristic and important of rights. It's commonly taken that when I infringe a directed duty, I don't merely act wrongly as when I infringe an undirected duty but wrong the person to whom I owe the duty. But if rights needn't correlate with duties, infringing someone's rights needn't imply I wrong the right-holder, because I mightn't be under a duty in the first place. (Does it even make sense to say I infringe the right, if I wasn't under the correlative duty?) Further, there are upshots specific to infringing directed duties, which we'd also lose (Thomson 1990; Skorupski 2010; Darwall 2013; Cruft 2019). For example, many believe that directed duties are demandable on behalf of the party to whom they are owed, and that their violation triggers apology owed to that party. But again, none of these upshots follow if we deny Correlativity. Finally, as suggested above during our discussion of duped soldiers, it doesn't seem rights are enforceable if that right doesn't correlate with a duty, for there will be no duty to enforce. All these costs of giving up Correlativity seem like an expensive price to pay to keep hold of the Evidence-Relative View.

5 | Facts

I have argued we have three reasons to be skeptical of the Evidence-Relative View. First, the rights people hold should not depend upon the evidence available to others; second, when new evidence becomes available, we gain evidence of what rights already exist rather than new rights coming into existence; third, the Evidence-Relative View implausibly undergenerates rights. Let's return, then, to the Fact-Relative View, and see what can be said in reply to our two problems.

5.1 | Fact-Relative Oughts

The first problem with the Fact-Relative View concerned how fact-relative rights were supposed to hook up to what we ought to do, if there's no fact-relative ought. But happily, we've good reason to think there is a fact-relative ought. Consider

Fever. Bloggs's baby has a fever. The best available evidence to Bloggs says that it would be best to starve the baby. (Feed a cold, starve a fever.) Bloggs starves the baby, and the baby dies.

Bloggs's belief- and evidence-relative "oughts" say that she ought to have starved the baby. Now suppose that, at the hospital after the case has unfolded, a doctor says to Bloggs, "I realise that you are not at fault, but you really oughtn't to have starved the baby. You ought to have kept it hydrated and given it some paracetamol." This seems perfectly natural. However, this "ought" can be made sense of only if the doctor is referring to what Bloggs ought to have done in the fact-relative sense (Thomson 1990, 172–3).¹⁷ This gives us reason to think there is a fact-relative sense of ought.

Victor Tadros doubts there's a fact-relative ought. Yet, he agrees that the doctor's comment seems natural and that, '[w]hen Bloggs is given the information, we say, [s]he finds out what [s] he ought to have done' (Tadros 2011, 223). How, then, to account for this ought without appeal to fact-relativity?

Tadros suggests that, were Bloggs to have had better evidence, it would have been the case that she ought to have kept the baby hydrated and given it some paracetamol. Given this, when we say that Bloggs ought to have kept the baby hydrated and given it some paracetamol, we are comparing, on the one hand, what Bloggs ought to have done relative to the evidence that she had available to her at the time with, on the other hand, 'what Bloggs ought to have done relative to some better set of evidence' (Tadros 2011, 223). More generally,

when we say that something is [fact-relative wrong] but not [evidence-relative wrong] what we really do is contrast the epistemic circumstances of the person with some superior epistemic circumstances that might have been available to [them]. So fact relativity is better understood as superior epistemic relativity.

(Tadros 2011, 224)

I'm not convinced. First, a dialectical worry. Consider what sorts of reasons one might have for thinking there is an evidence-, but no fact-relative ought. Perhaps one finds it implausible that agents *ought* to do things if the evidence that they ought to do those things is not available to them. What we might call the *first-person* evidence-relative ought responds to this reason: what agents ought to do is that which the best available evidence, *to them*, that they can respond to, tells them to do. However, once we move away from the first-person evidence-relative ought to superior evidence sets—as Tadros suggests—we undercut the very reason we had for preferring the evidence-relative over the fact-relative ought. It's no longer that the evidence is accessible to the person the ought requires action of.

Second, once we have abandoned relativizing ought to what the agent can respond to, and we have these superior evidence-relative oughts, why stop short of the facts? Isn't the fact-relative ought just the limiting case? At this stage, our disagreement seems merely verbal.

5.2 | Jackson's Case

Even if there's a fact-relative ought, recall the second objection I raised at the beginning: that the Fact-Relative View will get the wrong verdict in some cases. Recall

Jackson's Case. All the evidence at Doctor's disposal indicates, in keeping with the facts, that giving Patient drug A would cure her partially and giving her no drug would render her permanently incurable. However, the evidence leaves it completely open whether it is giving her drug B or drug C that would cure her completely and whether it is giving her drug B or drug C that would kill her.

We're supposing that it's drug B that would completely cure Patient, and so drug C that would kill Patient. Given the Fact-Relative View, Patient will have a right that Doctor give her drug B. Yet, we might find this counterintuitive. We might think that Patient has a right, given all the available evidence, that Doctor give her drug A (as well as rights that Doctor *not* give her either drugs B or C).

On the Evidence-Relative View, X 's right that $Y \Phi$ depends on the best available evidence to Y . So Patient will have a right that Doctor give her drug A (as well as rights that Doctor not give her drugs B and C). We can say that this holds because giving drug A is the *expectedly* or *prospectively* best option. So, it seems that cases like *Jackson's Case* speak in favor of the Evidence-Relative View, and against the Fact-Relative View.

In the remainder of this section, I'm going to argue that the Evidence-Relative View is susceptible to structurally analogous counterexamples like *Jackson's Case*. Thereby, cases like *Jackson's Case* give us no reason to prefer the Evidence-Relative View over the Fact-Relative View. Since I have suggested we have reason to prefer the Fact-Relative View over the Evidence-Relative View in the previous section, this means we have the most reason to endorse the Fact-Relative View.

Here's the problem *Jackson's Case* raises. Patient's Fact-Relative rights aren't luminous—aren't known by Doctor. But Doctor knows it's not Drug A that Patient has a right to. Yet, because things could go so much worse with the other options Doctor has available, Doctor ought to give the drug she knows Patient has no right to.

But we can turn this problem against a defender of the Evidence-Relative View. This is because the best available evidence to duty-bearers as we've been conceiving it—that which fixes what rights obtain on the Evidence-Relative View—also isn't always going to be luminous: we're not always going to know what the Evidence-Relative View says others have a right against us that we do for them. And sometimes, when things might go so badly were we to take a chance on what we think the evidence supports, we ought to perform an action that we know isn't what the evidence supports. Consider,

Smith's Case. Patient has some condition. Doctor has three available options: drugs D, E, or F. Suppose that Doctor has to give some treatment now. Doctor knows that giving each of them may cure Patient. However, Doctor also knows that giving drug D may leave Patient badly off (e.g., with a bad rash). Giving drug E may leave Patient extremely badly off (e.g., with the

loss of a foot). And, giving drug F may leave Patient incredibly badly off (e.g., with the loss of a hand). Doctor hasn't managed to arrive at any estimate of the probabilities of how likely each drug is to cure or harm. Her well-informed, if obtuse, colleague tells her that Drug D isn't the drug the evidence supports giving, though declines to tell her which of E and F the evidence does support.¹⁸

Because Doctor's colleague is a reliable testifier, Doctor knows that the evidence doesn't support giving Patient drug D. But Doctor doesn't know whether it's drug E or F that is the one her evidence supports.¹⁹ And yet, because either treatment could go so badly, intuitively Patient has a right to drug D—this is true, even though Doctor knows, relative to the best available evidence to her, *that* option has no chance of being the one Patient has a right to on the Evidence-Relative View.

Just as *Jackson's Case* presents us with an example in which the Fact-Relative View tells us that Patient has a right that Doctor give her drug B where, intuitively, Patient has a right that Doctor give her drug A, *Smith's Case* presents us with an example in which the Evidence-Relative View tells us that Patient has a right that Doctor give her drug E, where, intuitively, Patient has a right that Doctor give her drug D. If *Jackson's Case* and *Smith's Case* are analogous in all morally relevant ways, *Jackson's Case* gives us no reason to prefer the Evidence-Relative View over the Fact-Relative View.

Notice that the defender of the Evidence-Relative View can't appeal to just any old solution to *Smith's Case*. This is because the defender of the Fact-Relative View could then use that solution to solve *Jackson's Case*. What the defender of the Evidence-Relative View needs is a solution *only* to *Smith's Case*. They need to find a disanalogy between *Jackson's Case* and *Smith's Case* and draw on that disanalogy to solve *Smith's Case*.

Zimmerman responds by distinguishing between 'evidence available to someone and the evidence of which that person in fact avails himself of.' Whereas he used to formulate his view in terms of evidence available to agents, as we have been doing with the Evidence-Relative View, he suggests we should instead care only about evidence people have availed themselves of.²⁰ Since Doctor hasn't availed herself of the evidence that suggests giving drug D isn't prospectively best, Patient will have a right that Doctor give her drug D.

Yet, Doctor *has* availed herself of the evidence available to her in terms of Colleague's testimony—she knows drug D isn't what her evidence supports. Notwithstanding this, Zimmerman's revised view is going to get cases like *Real Gun* wrong too, for Non-Believer has *not* availed herself of the evidence as to whether the gun is real.²¹ So, Zimmerman's solution seems both not to work and also to have incredibly counterintuitive implications. This points to a general problem with how a defender of the Evidence-Relative View might respond to *Smith's Case*: the more *externalist* the view goes, the larger the gap between what rights obtain and agents' knowledge of others' rights; the more *internalist* the view goes, focusing on whether the agent has availed herself of the evidence (or perhaps focusing on her

subjective credence vis-à-vis her evidence), the more likely the view is going to have counterintuitive implications in cases in which agents don't avail themselves of evidence they ought to avail themselves. It seems the Evidence-Relative View is pulled either towards something closer to the Belief-Relative View or it's pulled towards the Fact-Relative View.²²

To conclude this subsection, *Jackson's Case* gives us no reason to prefer the Evidence-Relative View over the Fact-Relative View, as the Evidence-Relative View is susceptible to structurally analogous counterexamples. The task for the defender of the Evidence-Relative View is to find a solution to *Smith's Case* that both (i) does not lead to implausible results in other cases and (ii) is not available to a defender of the Fact-Relative View. I am not sure such an answer is available.

6 | Conclusion

This paper has questioned whether rights depend on duty-bearers' beliefs, the evidence available to them, or the facts. Against the Belief-Relative View, I argued that it is unclear why the Moral Belief-Relative View would not be true in place of the Belief-Relative View, but that we have good reason to reject the Moral Belief-Relative View. Further, the Belief Relative View implausibly undergenerates rights. Finally, more generally, I argued it is implausible that our rights depend on others' beliefs about the world.

Against the Evidence-Relative View, I argued that it is implausible that our rights depend on the evidence available to others and others' ability to respond to evidence. I also argued that the Evidence-Relative View implies that when new evidence becomes available, new rights come into existence rather than us gaining better evidence about which rights obtain; but this seems mistaken. And, finally, I argued that the Evidence-Relative View implausibly undergenerates rights.

All of this gives us good reason to endorse the Fact-Relative View. Yet, there remains the question of what to say about *Jackson's* and *Smith's Case*. What I hope to have shown above is that *Jackson's Case* gives us no reason to prefer the Evidence-Relative View over the Fact-Relative View.

During discussion of whether the fact-relative ought can reach the verdict that Doctor ought to give drug A in *Jackson's Case*, Clayton Littlejohn considers what Doctor may think to herself. He says, 'if I know I don't know whether it is drug [B] or C that is best and know that guessing could be disastrous, I ought to give drug A' (Littlejohn 2009, 238).²³ He builds on this, saying we might actually have a conditional, fact-relative ought to give drug A. On this view, we can see facts about uncertainty entering the picture. Similar to this, we might think that Patient has a conditional right to drug A, conditional on Doctor not knowing which of drugs B and C will fully cure Patient.

However, I am unsure whether we are going to reconcile deficient evidence in cases like *Jackson's Case* with the deficient evidence of the soldiers in *Duped Soldiers*. For example, might not the soldiers think to themselves, "Given that I don't know that those people over the border whom we might attack are

innocent, and given I know that not attacking could be disastrous—after all, I've great evidence they are terrorists, planning a terrible attack—we ought to attack them." I think further discussion of cases like *Real Gun*, *Duped Soldiers*, and *Jackson's Case* may point to a gap between what rights obtain and what one ought to do, where that ought has a more practical, decision-theoretic flavour.

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The author declares no conflicts of interest.

Data Availability Statement

The author has nothing to report.

Endnotes

¹ For the Interest Theory, see Raz (1986) and Kramer (2000); for the Will Theory, see Hart (1982) and Steiner (2000); and for Kamm, see Kamm (2007, 268–272).

² Cf. Zimmerman (2008, Ch. 2 2014, Ch. 5); Quong (2015, 2020, Ch. 6) and van der Vossen (2016). There is discussion of whether people are permitted to defend themselves against threateners who are, relative to the evidence, justified in defending themselves, but it is not always clear what these authors think we should conclude about *rights* in these cases (Otsuka 1994; McMahan 1994); Bolinger (2021) tackles both questions together.

³ Most see this as a biconditional, but this weaker conditional is sufficient for our purposes. Everything I say applies to the other Hohfeldian-rights, because the system is interdefined. For example, Y holds a liberty not to Φ , against X, iff Y is not under a duty to Φ , owed to X. Claims are thus the opposite of liberties. So, if claims depend on the facts, liberties depend on the facts. If claims depend on the evidence available to the prospective duty-bearer, liberties depend on the evidence available to the prospective liberty-holder.

⁴ A problem that I will not consider is whether we can have rights against risk of harm on the Fact-Relative View. I attempt to show we can hold rights against risk of harm given a Fact-Relative View elsewhere, by appeal to facts about modality (Bowen (2022a, 2022b)).

⁵ This case is taken from Zimmerman (2014, 30). It originates in Jackson (1991, 462, 463). See also the *Miners* case, discussed in Parfit (2011, 159–161) and Tadros (2011, 222).

⁶ For more on this tripartite distinction (see Parfit 2011, 151–153; Tadros 2011, 217–220). Others compare the *subjective* perspective with the *objective* perspective, but this distinction leaves out the evidence-relative perspective. Zimmerman uses *Prospectivism* to fill the gap, where what's *prospectively* best is that which gives the best 'prospect of achieving what is of value in the situation [...] and of avoiding what is of disvalue' (Zimmerman 2014, 32).

⁷ Some try to argue for only one perspective (Thomson 1990, 79–104). Others don't deny the existence of all kinds of perspectives, but suggest

that one is most immediately relevant to action (Jackson 1991, 472), or that one is fundamental (Parfit 2011, 161, 162), or the one with which we are *really* interested (Zimmerman 2014, 18–24). Others, still, are pluralists about which perspective is important (Smith 2018).

⁸ These sorts of considerations are most explicit in Scanlon (2008), Quong (2015, 2020) and Oberdiek (2017).

⁹ What is meant by evidence here is not what is meant by epistemologists. For example, Williamson sees one's evidence as the totality of propositions one knows (2000). Conee and Feldman see one's evidence as all of one's current mental states (2004). It's hard to square these accounts of evidence with how the moral theorist wants to use it.

¹⁰ Zimmerman 'acknowledges the force of this objection' (2014, 117, 118). It's interesting that, if we focus on directed duties rather than their correlative claims, this objection is less powerful. That's to say, it *doesn't* seem implausible that what duties I owe others depend on the evidence available to me—in fact, that sounds plausible. Perhaps this gives us some reason to doubt Correlativity. If we want to keep hold of Correlativity, which I think we should, it raises interesting questions of whether we ought to see rights or duties as prior in justificatory terms (Raz 1986, 170, 171; Waldron 1985, 14; Kramer 2000, 39). I am inclined to see rights as prior, so I am tempted to focus more on the implausibility of my rights depending on the evidence available to others, and not the plausibility of others' duties depending on the evidence available to them.

¹¹ For similar arguments, see Thomson (1990, 223) and Graham (2010, 91).

¹² Thanks to a referee for help separating these four implications. See note 16 for discussion of whether the villages may defend themselves given a liability justification. Now, *Duped Soldiers* concerns *factual* uncertainty. But we can also have cases in which people have deficient evidence about *evaluative* matters. For example, the best available evidence to someone brought up in a closed community might support that people of other races don't have rights against certain forms of conduct. This seems an even worse implication than the ones I've been examining in the text. Some try to argue for an asymmetry between factual and evaluative uncertainty (Weatherson 2014). For arguments that this asymmetry is unfounded, see Field (2019). Zimmerman thinks there's no such asymmetry (2014, 62, 63).

¹³ Zimmerman accepts these implications in individual cases of self-defense (2008, 97–117).

¹⁴ Quong has since clarified, presumably because of this factive view of forfeiture, that his view isn't actually an Evidence-Relative View. Rather, it's a view of rights on which rights depend on 'the demands we can reasonably make of one another concerning types of acts' (2020, 152). But since evidence-relativity plays a prominent role in this view, it is worth seeing how it could help out a defender of the Evidence-Relative View.

¹⁵ Thanks to [Erik Zhang] for the discussion on this. For further discussion, see Quong (2020, 163–166).

¹⁶ Though she doesn't talk in terms of liability, Thomson is committed to this view that one is liable only if they will otherwise violate someone's rights (Thomson 1991; Burri 2022). Thomson has a fairly permissive view of self-defense, on which even people who have exercised no agency whatsoever but who threaten others come to lack rights against being defensively harmed. Nonetheless, her view will not help with the Evidence-Relative View, for the soldiers do not violate the rights of the villagers (given the way we're currently understanding the Evidence-Relative View). Quong thinks that liability consists in treating someone as if they lack a right they in fact possess, so his view will not help unless we can deliver the villagers' right against the soldiers not to be harmed (see Bowen (2021) for discussion).

Other views aren't committed to liability depending on the violation of others' rights. But these views are usually committed to holding

that one is liable only if they will otherwise *unjustly* harm someone. Could a defender of the Evidence-Relative View say that the soldiers are liable despite not violating the villagers' rights? They could, but obviously they will need to ground that unjust harm in something other than the villagers' rights being violated (McMahan 2009, 163); and to the extent that one is skeptical of the Fact-Relative View, I suspect they will also be skeptical of fact-relative duties generally, the violation of which could ground this unjust harm. Yet, one *could* say rights are evidence-relative but that there are also fact-relative or superior epistemic-relative duties (see Section 5.1.), the violation of which grounds liability. It's unclear on this view how Evidence-Relative Rights would relate to these Fact-Relative Requirements, if at all, and giving up on such a connection seems an expensive price to pay to keep hold of the Evidence-Relative View.

¹⁷ In Thomson's original case, the doctor recommends giving aspirin dissolved in apple juice. However, a referee has pointed out it is recommended not to give aspirin to children under 16.

¹⁸ This case is based on Smith (2011, 5), with some details changed. For discussion, see Zimmerman (2014, 69–76).

¹⁹ What *does* Patient have a right to in *Smith's Case* given the Evidence-Relative View? With a further assumption, the Evidence-Relative View arrives at the verdict that Patient has a right that Doctor give her drug E. This is because the Evidence-Relative View needs to say something about what rights obtain when duty-bearers have no probabilities (or insufficiently robust probabilities) concerning what to do. When faced with no probabilities, Zimmerman suggests that we ought to apply a principle of indifference, on which all the options should be assigned equal probabilities (2014, 68, 69). Given that Doctor has good evidence that drug D is not best, drug D is off the table. We assign equal arbitrary probabilities to the remaining options, and so drug E comes out as best, and so the drug Patient has a right to.

²⁰ See Zimmerman (2014, 72); for his earlier view, see Zimmerman (2008).

²¹ For discussion, see Bykvist (2018, 395–398).

²² Thanks to Nicholas Makins for discussion on this.

²³ For more developed proposals, see Graham (2010) and Bykvist (2018); I worry the same problem I hint at in the text will arise with Graham's and Bykvist's proposals.

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